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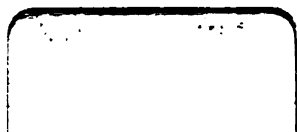
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*R. D. O'Connell*

# IRISH JURIST.

VOL. XVII. (VOL. X. NEW SERIES.)

CONTAINING

REPORTS OF CASES DECIDED IN THE SEVERAL COURTS OF EQUITY AND COMMON  
LAW, THE LANDED ESTATES COURT, COURT OF PROBATE, COURT OF  
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1865.



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## COURTS OF EQUITY AND COMMON LAW IN IRELAND AND IN THE HOUSE OF LORDS.

### Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

**BATTY v. MONKS.**—Nov. 19, 20, 21, 1863;  
Jan. 25, 1864.

#### *Meaning of the term "apothecary."*

*By indenture between the plaintiff and defendant the defendant covenanted to teach the plaintiff the art and mystery of an apothecary. At the time of the indenture being executed the defendant kept a shop, making up his own prescriptions and those of other medical men. The defendant subsequently closed his shop and confined his business to that of a general practitioner, making up his own prescriptions, but not those of other medical men. Held—that this did not disqualify the defendant from teaching the plaintiff the art and mystery of an apothecary, so as to entitle the latter to a direction in an action brought by him for breach of the covenant in the indenture.*

THE action in this case was brought upon an indenture of apprenticeship for five years, dated 5th Nov. 1859, by which the defendant covenanted to teach the plaintiff the art and mystery of an apothecary. The breach assigned was, that the defendant did not and would not instruct the plaintiff in his, the defendant's said art. There were two defences:—1. *Non est factum*. 2. A plea of performance, that the defendant did instruct the plaintiff, and was willing to instruct the plaintiff till the plaintiff left his service without his consent. The case was tried in substance upon the second plea. It appeared that the defendant, who had previously kept a shop, had closed it, and confined his business to that of a general practitioner. The plaintiff's counsel required the judge to direct the jury, that as the defendant did not keep a shop, and was not a registered apothecary, they

should find for the plaintiff. *Monahan, C.J.*, before whom the case was tried, refused to do this, but reserved leave to the plaintiff to enter a verdict for him, for a shilling damages. The Chief Justice left to the jury the issues which were in the terms of the defences, and the jury found for the defendant. A conditional order was obtained to set aside the verdict for misdirection, and as against the weight of evidence, against which

*Barry, Q.C.* (with him *Devitt*), showed cause.—The plaintiff proved that the defendant shut up the shop; that when he went to the country he could not read the prescription of some doctor; and that the defendant told him not to let the inspectors in if they came under the statute 1 Geo. III. c. 14, s. 7. He also deposed that the defendant made his prescriptions differently from the pharmacopoeia; that he prescribed a good number; that they were more numerous than before; that in 1862 he was offered a place as medical attendant in the house of a nobleman; and we say it was the refusal of Dr. Monks to allow him to accept it which led to this action. The plaintiff deposed that he made a complaint about the shop being shut in the year 1861, but there was no evidence of that but his own. A Mr. Grant was produced, who proved that the plaintiff was annoyed about the closing of the shop; but that was about the very time he was asked to go into the service of the nobleman. Dr. Leet, the secretary of the Apothecaries' Hall, proved that the defendant was a licensed apothecary since 1844; that the plaintiff had the amplest means of learning his business. The prices of medicines can be learned in three months. The question is, whether shutting up the shop makes the party cease to be an apothecary. [*Monahan, C.J.*—I left it to the jury to say whether the defendant was able and willing to teach the plaintiff everything necessary under his indenture of apprenticeship. The jury found that it was not necessary to keep the shop open.]



*Apothecaries' Hall v. Nicolls* (7 Ir. L. R. 390) was referred to. The evidence showed that the defendant was elected an apothecary to an hospital, and had compounded prescriptions since his election, and he was held not liable to the penalties of 31 Geo. III. c. 34. A man may be an apothecary and liable to the penalties of an apothecary, who could not compound the prescriptions of another person. Giving advice, attending the patient, and supplying the medicine is a dealing with the public in the way of selling—*Wogan v. Somerville* (7 Taunt. 401); *Apothecaries' Company v. Greenwood* (2 B. & Ad. 708). What constituted the party an apothecary was not that he kept a shop, but that he attended patients—*Apothecaries' Company v. Allen* (4 B. & Ad. 625). Lord Denman was of opinion that the party did act as an apothecary; and that it made no difference if he prescribed as well as prepared the medicine. In *Woodward v. Ball* (6 C. & P. 577) the question was exactly raised—*Apothecaries' Company v. Soteriga* (2 Moo. & R. 496); *Apothecaries' Company v. Burt* (5 Ex. R. 363). It is a question for the jury if every modification of the man's practice amounts to a breach of the indenture. [Christian, J.—Suppose an apprentice bound to an attorney and solicitor, and that the latter ceases to practise as a solicitor, would that be a question of law or fact, whether the indenture was broken?] It would be a question of fact. But a better illustration is this: Suppose an attorney to resolve not to issue any more writs from one particular court.

*Gamble* (with him *Whiteside*, Q.C.) *contra*.—The cases referred to were of actions for penalties under a statute. But if a man be liable to a penalty for one single act as an apothecary, it does not follow that therefore he is an apothecary within the meaning of this indenture so as to teach the business. In *Woodward v. Ball* it was proved the defendant kept a shop, with the words "surgeon and accoucheur" on the door. If a man sold sugar, he would to that extent be a grocer; but if he took an apprentice to teach the business of a grocer, and sold nothing but sugar, could he teach him the business?—*Thompson v. Lewis* (3 C. & P. 483). In *Apothecaries' Company v. Warburton* (3 B. & Akl. 40, 44) the question for the Court was, what was practising as an apothecary. Lord Tenterden defines the duty of an apothecary, and refers to the 5th section of 55 Geo. III. c. 194, where the duty is defined. [Keogh, J.—Suppose the party kept an apothecary's shop and got no prescriptions to make up?] It would not be the defendant's fault if the public did not come to him; but it is different if he wiffully shut up his shop. We complain that the plaintiff had not an opportunity of seeing the prescriptions of other eminent men; that we paid the twenty guineas upon the faith of Dr. Monks following all the branches of his business. It is a question of law for the Court and not a question for the jury. The plaintiff could not have known, if he went into another shop, the value of the medicines or how to charge for them—*Ellen v. Topp* (6 Excheq. 424). [Monahan, C.J.—Suppose a grocer sells mustard and pepper, and sugar, and other things, can he not give up any one of these?] Suppose a tailor with an apprentice to begin to make clothes for his own family

[Ball, J.—Is an attorney who gives up practising in the Court of Common Pleas disqualified from teaching the business of an attorney?] [Keogh, J.—Suppose an attorney who had practised in an inferior court to confine himself to a superior court.] A solicitor and attorney who should cease to practise in equity, not from the want of business, for that would not test the case, but who should choose to cease to practise, would be disqualified from teaching the business of a solicitor. The plaintiff asked to go to this nobleman, and offered to come back afterwards and serve out the remainder of his apprenticeship, and a friend offered to pay for an assistant in his place; but Dr. Monks would not let him go, and he then asked himself was he bound to continue when Dr. Monks had closed his shop. But he could not leave the service, as Dr. Monks would have brought an action against him if he did. The plaintiff proved that no sooner had the inspectors been excluded than Dr. Monks commenced to make up the prescriptions in a different way; and the plaintiff had afterwards to be examined in this very business—1 Geo. III. c. 14, s. 11. [Christian, J.—Suppose a doctor is not satisfied with the component parts of a medicine in the Pharmacopoeia, would he be bound to blend them as they were there?] [Monahan, C.J.—Is every apothecary's apprentice to have the Pharmacopoeia off by heart?] Section 12 imposes a penalty of £10 for departing from it. [Counsel produces a copy of the Pharmacopoeia; reads from the order in council by the Lord Lieutenant.] All the medicines are compound medicines. The evidence given on the other side was, that a physician was not bound to follow the Pharmacopoeia. When the plaintiff came to be examined, he would not be able to explain the Pharmacopoeia, but to explain what Dr. Monks had been teaching him for four or five years; viz., from the old London Dispensator or some such other source. [Monahan, C.J.—"For his own private use solely" shows that a doctor would not be obliged to follow the Pharmacopoeia in a case of fever if he disapproved of it.] [Ball, J.—The other doctors might depart from the Pharmacopoeia; and in such a case as that the plaintiff would learn nothing from the Pharmacopoeia.] [Monahan, C.J.—Is not the Pharmacopoeia merely a direction regarding the elements of compounds? Suppose Dr. Monks departed from the Pharmacopoeia, and that other doctors attended to it, and that the plaintiff sets up a shop afterwards, he would have to get the Pharmacopoeia, and would he not have the knowledge of making the medicines by the Pharmacopoeia, which only describes the proportions?] But the question is not what did the plaintiff obtain the knowledge of, but what steps did Dr. Monks take to enable him to learn. [Monahan, C.J.—And is not that plainly a question of fact for the jury? Would it be difficult for him to prepare according to the Pharmacopoeia because he had been preparing previously by some other cause?] The next part of his evidence was as to the charge for the medicines. When the shop was shut Dr. Monks attended to patients themselves and charged five shillings, and the drugs were not charged for separately. It was proved that it was easy to learn the prices, but that is no answer. The plaintiff himself proved that he would have been unable to tell. Is he

bound even now to go back and serve the other two years after the evidence he has given? [Ball, J.—We have not that question.] It is involved in the question, because if the Court decide with the jury that Dr. Monks did teach the plaintiff his business, he may have an action against him; and besides he may have to go back. Not one of the defendant's witnesses would swear that keeping a shop and making up prescriptions was not part of the business of an apothecary. Dr. Power deposes that the plaintiff could learn his business in such an establishment as Dr. Monks kept, with the exception of vending retail medicines. He could not say if knowing the prices was an essential part of the business. [Christian, J.—The question of the importance of departments was for the jury.] Yes, with a proper direction. The verdict that the defendant was able and willing to teach the plaintiff his business was against the weight of evidence. [Monahan, C.J.—No objection was taken to my charge, except that I was asked to direct for the defendant.] In the case in 6 Exchequer, the Chief Justice lays it down that the party is bound to teach the very trade he had undertaken to teach. [Christian, J.—There were three distinct trades.] In *Elliot v. South Devon Railway Company* (2 Exch. R. 725), the question was as to the meaning of the word "town." Parkes, B., says "The judge ought to have given a definition sufficient to enable the jury to decide the present question." [Christian, J.—The Chief Justice so put it to the jury that you complained because you did not learn the Pharmacopœia; was not that leaving to them the materiality of that branch? In that case in 6 Exchequer, there were three distinct trades admitted to be three by the demurrer being taken.] When parties have contracted, they are entitled in law and equity to have what they have contracted for. If the plaintiff went to a shop to get employment, would not the first question be if he could hand a thing over the counter, if asked for it, and fix the price of it? Are the Court or the jury to interfere in the contract, and say what is and what is not essential? [Keogh, J.—The Chief Justice left the question of its being essential to the jury, and the jury said it was not.] [Christian, J.—How far will you push it?] Suppose one medicine excluded from what the defendant made up; would you say that the question was not one of fact for the jury how far that prevented the plaintiff getting what he contracted for? —*Ford v. Lacey* (30 L. J. Excheq. 351). In law the defendant had ceased to be an apothecary.—The Apothecaries' Act, 31 Geo. III. c. 34, implies that it is the duty of an apothecary to prepare and vend medicines. The preamble is for preserving the health of his Majesty's subjects:—"Inasmuch as many dangerous and fatal consequences have heretofore arisen from the practice of taking as apprentices persons disqualified to prepare or vend medicines," &c. "No person shall open shop" till he has been examined, &c. Open shop and practise the art and mystery of an apothecary are put together. The Apothecaries' Hall have no power to grant permission except under this statute. Therefore practising as an apothecary includes the opening of a shop. Sec. 23 is intended to give an appeal to every person mentioned in the 22nd section, and bears out the view that the Legis-

lature intended to include the whole business of an apothecary. Sec. 24 follows up the same in the English Act; 21 & 22 Vic. c. 90 enables apothecaries to register, and by sec. 32 they shall not recover unless registered under the Act. So that if Dr. Monks brought an action for medicine and attendance as an apothecary, he could not recover. The plea would be that he was not registered. Then in law he is not an apothecary. [Monahan, C.J.—Is there anything in the Act rendering it penal to act without being registered?] There is. The exception relied on is,—that chemists, druggists, and dentists shall not be affected or licensed apothecaries so far as relates to the selling of medicines. That is the very thing the defendant never did, and says it is not necessary to do. There are two branches: one is the attending and prescribing, the other is compounding and vending medicines. Dr. Monks is on the horns of a dilemma; if he be an apothecary why is he not registered; if not, how could he teach the plaintiff the duty of an apothecary? Sec. 40 imposed a penalty of £20. The defendant was registered as a licentiate, and on what terms does he get his certificate? Why, on the terms that he does not keep a druggist's or apothecary's shop. [Ball, J.—Does that apply to a shop in Ireland?] Yes; he would cease to be a fellow of the college. [Per curiam—That document is not in evidence.]

*Devitt* in reply.—According to the *Encyclopædia Britannica*, vol. iii., the term "apothecary" in England means a general practitioner in medicine, who also dispenses and sells drugs to his patients or the public.—Haden's Dictionary of Dates, 35; Rymer's *Fœdera*. 3d. per diem was settled on the medical attendant of Edmond, A.D. 1344. Horace, Book II. Sat. 5. The defendant was not precluded from making any alteration which would not injure the plaintiff, and that was for the jury. The indenture has no such terms as "to learn his business as an apothecary." The art of the defendant at the time of the indenture being executed, was that of a general practitioner. The smallest part of his practice was selling drugs. The art the defendant "used" was the material thing. [Monahan, C. J.—The summons and plaint mentions the art and mystery of an apothecary, and the plea says the art in the summons and plaint mentioned. The issue, if left to the jury, was in accordance with that.] According to the true construction the defendant was not precluded from making immaterial alterations. Keeping an open shop is not an essential part of the business of an apothecary. According to *Woodward v. Ball*, the practising of an apothecary is said to be the preparing or the mixing up of medicines prescribed by a physician or by himself." That is the definition given by Williams, J., in *Allison v. Haydon* (4 Bingham, 614). Best, C. J., says, "But he was lowering a typhus fever, which is the province of the physician or apothecary."—*Handy v. Hewson* (4 C. & P. 110). In the 31 Geo. 3, c. 34, the disjunctive conjunction used. The true meaning of the 23rd section is, that a party wishing to qualify to open a shop might, in case he were dissatisfied, appeal. As to the case of *Apothecaries' Company v. Nicolls*, the principal grounds relied on were, that Mr. Nicolls was not a trader. That is answered in *Ex parte Pratt*, in the

case in England. The defendant sells medicines. Nicolls did not. There is no evidence in this case as to how the defendant charged at all. Dr. Nicolls was not a trader. The defendant is. The one did not buy; the other buys and sells. [*Monahan, C. J.*—I think it was assumed there was no separate charge for medicines.] *Ellen v. Topp* is an authority in our favour. It was an action by the master against the father of the apprentice. There was a covenant to instruct the apprentice in all the three trades. To bring this case within that, the summons and plaint should have said the defendant ceased to carry on the trade of an apothecary, or that he was bound under the indenture to keep an open shop, and that he did not do so. All that that case decides is this, that if the defendant were to bring an action, it would be an answer to say he had ceased to transact part of the business of an apothecary. This case is an authority that the covenant to serve is independent of the covenant to teach. The apprenticeship is put an end to by the apprentice withdrawing from the service. On the authority of that case a condition precedent has been broken. [*Monahan, C. J.*—The apprentice was justified in going away if you could not teach him; on the other hand, you could not teach him if he went away. The strength of your case is, that I left the question to the jury in the very words of the plea. They must have found that the defendant was willing to teach everything pertaining to the art.] Section 34 of the Medical Charities Act gives the definition of a legally qualified practitioner. The term shall mean "a person registered under this Act." Section 40 makes the terms convertible, general practitioner and apothecary. If the punctuation be allowed, then it must be so, but if the punctuation be the act of the printer, and not of the Legislature, still that is the fair meaning of it. The exception gives no protection to English apothecaries. Section 33 has no reference to the apothecaries, but to a general practitioners. According to the true construction of the 1 Geo. 3, c. 14, the defendant is bound to admit the inspectors even now. As to the licence or diploma, which it was said we did not produce, it is now produced. [Licence or diploma produced.]

\* *Cur. adv. vult.*

*Jan. 25.*—*MONAHAN, C. J.*—This case comes on upon cause shown against conditional order for a new trial. The plaint avers that the defendant did not teach the plaintiff the art or mystery of an apothecary, and that the plaintiff is entitled to damages. I shall not read the evidence. The substance of what appeared was this, that the defendant was originally, in the ordinary sense, an apothecary; that he kept a shop, and also made up his own prescriptions; that he afterwards shut up shop, i.e., that he confined his business to what is called that of a regular practitioner; that in his laboratory and shop, with the assistance of his apprentice, he made the prescriptions he ordered himself, but not those of other doctors. The plea being that the defendant was at all times willing to teach the plaintiff till he chose to go away, the question was to be tried was the defendant ready and willing to continue to teach him. There was a great body of evidence. Several medical men deposed that the defendant had

ample practice; that the plaintiff could have had more opportunities than in many other establishments, where other prescriptions were made up; that, so far as instruction was concerned, he had had sufficient. The objection made by Mr. Whiteside was, that the mere fact of shutting up shop was ceasing to be an apothecary, and that I was bound to direct a verdict for the plaintiff, because when the defendant undertook to teach, there was an implied promise that he would continue to keep the shop, and cases were cited to shew that if there be two trades, and one be discontinued, there was a violation of the contract. It was contended that such was the legal effect here of ceasing to keep the shop open. Several sections of Acts of Parliament were referred to, and I thought it right to reserve liberty to enter a verdict for nominal damages. The jury, upon the evidence, found that the defendant was ready and willing, and thought he had taught the plaintiff everything, and that the circumstance of shutting up the shop, and not taking the prescriptions of others, some of which might be good and some bad, did not interfere with teaching the art and mystery of an apothecary. The only point, and that rather a childish one, was that the plaintiff might not be able to read the prescriptions of others. But it appeared that the reason for his leaving was not the want of instruction; he was allowed to attend all lectures, &c. He appeared perfectly well up in his business; and the fault he found with Doctor Monks was, that when well instructed he asked Dr. Monks to let him go and attend a nobleman, or man of fortune, who wanted an attendant. Therefore, the jury could not have done otherwise than they did, and there is no ground for changing the verdict on account of its being against the weight of evidence. The reason why the plaintiff would be only entitled to one shilling is, because on the facts he would have had no damages, and if on a point of law they could be only nominal. But the question is, if the man ceased to be an apothecary when he shut up his shop. We were referred to the 18th and 22nd sections of the 31 Geo. 5, c. 34. The 18th recites—"Many dangerous and fatal consequences have heretofore arisen from the practice of taking as apprentices to the art and mystery of an apothecary, boys or persons disqualified, from the want of proper education, to prepare or vend medicine," &c.; and the 22nd section, which was principally relied on, was this, "that no person shall open shop, or act in the art or mystery of an apothecary until such person shall have been examined." There is no doubt if he he did he would be liable to a penalty. There is no doubt, if not being an apothecary, he acted as one, he would be liable. But there is nothing in this Act to show that the man ceases to be an apothecary because he makes up his own prescriptions only. What is an apothecary? He is a man who attends others, and makes up prescriptions of himself or others. That is the definition in *Woodward v. Ball* (6 C. & P. 578): *Apothecaries' Hall v. Nicolls* (7 Ir. L. R. 390). The facts there were, that the party was appointed as the apothecary or the medical practitioner to the fever hospital. He made up medicines for the patients of that particular hospital. He had not a shop. *Apothecaries' Co. v. Allen* (4 B. & Ad. 625) was an action for penalties. It appears the defendant made up the prescriptions of

himself, and it was decided he was acting and was liable to the penalty. *Apothecaries' Co. v. Warburton* (3 B. & Ald. 40) was referred to as contrary to that. It is not. In the case in 4 Bingham the man was a surgeon—was non-suited on the ground he was not doing the business of a surgeon, but the business of an apothecary. Therefore, there is no doubt the business of an apothecary is to attend and make up prescriptions. I never held that this man would be qualified to act as an apothecary, if he could not attend others, and make up the prescriptions. The only other point is, that it is said Monks was not registered. He was registered under the Medical Act in some capacity. The 32nd section says, "No person shall recover," &c.; but that is not an apothecary, because there is a saving in the 55th section that nothing shall affect the trade of chemist or druggist. On the whole of the case we are of opinion that there is no ground for entering the verdict or for altering the verdict. The order will be discharged with costs.

*Rule discharged.*

## Court of Exchequer.

Reported by Oliver J. Burke, Esq., Esq., Barrister-at-Law.

COLTSMAN v. COLTSMAN.—Nov. 5, 1863; Jan. 30, 1864; Dec. 5, 1864.

*Will made before the Wills Act—Construction of—Executory devise—Dying without heirs of the body—word "property"—Meaning of.*

*Testator by his will, dated 9th August, 1833, devised as follows:—"I give, devise, and bequeath to my son J. C. all those, my property, lands, tenements, and premises, at and about Fleak Castle, together with the live stock on said lands; also my plate, library, pictures, and furniture. I also devise and bequeath to my son, J. C., my lands, tenements, and premises, with the appurtenances thereof, situate lying and being at Dick's Grove, near Castle Island, county of K." The testator then made several bequests; amongst others, he bequeathed a life annuity of £700 sterling to his wife, "said annuity to be paid and payable into her own lands, out of the rents, issues, dividends, interest, and profits of my said estates;" and he further gave and bequeathed to his wife the sum of "£1000 sterling to be paid to her out of my said estates at the end of the year next after my decease, for her own use and benefit." By codicil dated 6th December, 1833, the testator gave a further sum of £100 in addition to the annuity bequeathed in his said will, also to be paid "out of the rents, issues, dividends, interest, and profits of all my said estates by half-yearly payments, in the manner and at the times specified and declared in my said will." "And if it should happen that my son, J. C. die without heirs of his body lawfully begotten, or to be begotten, in that case, and in default of such heirs, I do hereby de-*

*vise and direct that my lands, castles, tenements, and premises at or about Fleak Castle, and mentioned in my said will, together with the plate, furniture, and library in my said will specified, also my lands, farms, tenements, and premises situate, lying, and being at Dick's Grove, near Castle Island (all subject to and charged with the payment of the aforesaid annuity to my dear wife of £800 a year, and also with the payment of any reasonable provision made with my consent by my son for his wife, to be paid and payable to her during her natural life,) shall, at my son's death, descend to be transferred to my grandson, D. C., his heirs, executors, and assigns, for ever. The heir for the time being to add the name C. to the name C. Also if it should happen that my son, John Coltsman, die without heirs of his body lawfully begotten, or to be begotten, in that case, and in default of such heirs, I do hereby give and assign out of the monies I have at interest, and specified in my said will, the £6,000 to my daughter, Mary Godfrey, for her own use and benefit." Held, that J. C. took an estate in quasi fee simple in Fleak Castle, and an estate in fee simple absolute in Dick's Grove, subject to be defeated by an executory devise over to D. C.*

DANIEL CRONIN COLTSMAN, the defendant, appeared in this case to shew cause why the conditional order obtained by the plaintiff, Catherine Coltsman, on the 5th of November, 1863, should not be made absolute, whereby it was ordered by the Court "That the verdict had for the defendant at the last assizes for the county of Kerry be set aside, and instead thereof that a verdict be entered for the plaintiff, pursuant to the leave reserved by the learned judge at the trial, unless," &c. The action was one of ejectment on the title; and the following was the abstract for Nisi Prius:—"Whereas Catherine Coltsman, the plaintiff, on Friday, the 12th day of June, 1863, sued Daniel Cronin Coltsman, Edmund Keane, Bartholomew Daly, James Walsh, Michael Russell, Denis Sullivan, Patrick Brosnahan, Maurice Brosnahan, Michael Russell, Ellen Sullivan, Thomas Walsh, and Ellen Clifford, the defendants; and complained that the plaintiff, on the 1st day of January, 1857, became, and was, and still is entitled to the quiet and peaceable possession of the lands of Tiernagoose, Labarn, Inchymacmanus, Parksmethane, Inchybuoy, Knockane, Dysart, Middle Curraghmore, South Curraghmore, East Curraghmore, West Curraghmore, and the two Byres, all situate in the barony of Trughanacmy, and county of Kerry, and all that and those the town and lands of Dromhumpur, Sheheroe, Coolboga, situate in the barony of Magunnihy, and county of Kerry; and that the said defendant, Daniel Cronin Coltsman, wrongfully assumed the possession thereof and still withheld the same from the plaintiff; and the plaintiff prayed judgment against the said defendant to recover possession of said lands and premises, and compensation in damages, for the loss of the mesne rates and profits of the said premises while the possession thereof was withheld from the said plaintiff, to the amount of £6000 sterling.

"And the said defendant, Daniel Cronin Coltsman, on Monday, the 6th day of July, 1863, has taken defence for the lands in the summons and plaint mentioned,



including the lands of Dromore, alleged by said defence to be erroneously styled in said writ the lands of West Dromore, and the two Lyres, also alleged by said defence to be erroneously styled in said writ the two Byres; and alleged that the plaintiff was not entitled to the possession of them, and that the said possession belonged to the said Daniel Cronin Coltsman as of right. Therefore let the jury try, first, whether the plaintiff was, on the 1st day of July, 1857, or at any time subsequent to said day and before the commencement of the action, entitled to the premises in the summons and plaint mentioned, or any part thereof. Second, whether the plaintiff is entitled to any and what sum for damages for the loss of the mesne rates and profits, as in the summons and plaint mentioned." The several defendants, in plaint named, likewise took defence to the action separately for the portions of the lands in their possession respectively. The above-mentioned several townlands as set forth in the summons and plaint form portions of two separate estates, one known by the name of Dick's-grove, in the barony of Trughanacmy, and the other by the name of Fleak Castle, in the barony of Magnihy. Fleak Castle was held in *quasi* fee, and Dick's-grove in fee. Sir William Duncan Godfrey was examined at the trial as a witness for the plaintiff, and deposed that John Coltsman the elder was in possession of the two estates, Dick's-grove being fee-simple, and Fleak Castle held for lives renewable for ever; and that the several townlands mentioned in the declaration were subdivisions of Fleak Castle and Dick's-grove: Witness had been for several years agent on the estates. —John Coltsman, the elder, made his will on the 9th of August, 1833, and the codicil on the 6th December in the same year: he died in 1836 leaving his widow him surviving; also his son John Coltsman, hereinafter called John Coltsman the younger, one daughter married to Sir William D. Godfrey: his only other child, Christina, was married to Daniel Cronin, whose son was Daniel Cronin Coltsman, the defendant. The following is the WILL of John Coltsman, the elder:—"In the name of God, amen. —I, John Coltsman, of Fleak Castle, near Killarney, in the County of Kerry, gentleman, being of sound and disposing mind and understanding, do make and publish this my last will and testament, in manner following:—1st. I give, devise, and bequeath to my son, John Coltsman, all those, *my property*, lands, tenements, and premises, at and about Fleak Castle, together with the live stock on said lands; also, my plate, library, pictures, and furniture. I also devise and bequeath to my son, John Coltsman, my lands, tenements, and premises, with the appurtenances thereof, situate, lying, and being at Dick's Grove, near Castle Island, county of Kerry. I give and bequeath to my son, John Coltsman, the money I have at interest in the Bank of England, also the money I have at interest in the lands and estates of Daniel Cronin, my son-in-law; also the money I have at interest in the lands and estates of the late Daniel Cronin, his father—the bonds, I think, are signed by father and son aforesaid. I also make over and assign to my son, John Coltsman, the bond I have of Lord Keomare for the sum or bond of £500 sterling; I also

give and bequeath to him the sum of £500 sterling, lent by me at interest to my son-in-law, William D. Godfrey. I give and bequeath to my son, John Coltsman my lands and premises at Caleza de Montacheque, a few miles from Lisbon. I also bequeath and assign to him my title and claim to some houses and lands situate and lying in New-lane, near the South Catholic Chapel, in the city of Cork, the property of the late Dr. Walsh, but which houses and lands aforesaid the son of the said Dr. Walsh promised to transfer and assign to me in payment of a debt which his father owed me at his death. I give and bequeath to my dear wife, Christina Coltsman, the yearly sum or annuity of £700 sterling, during her natural life, and for her own use and benefit, in lieu for, and instead of all other provisions made for her upon or previous to our intermarriage, said annuity to be paid and payable into her own hands, out of the rents, issues, dividends, interest, and profits of my *said estates*, by half-yearly payments on the 25th day of March and the 29th day of September in every year, by even and equal proportions, the first payment of the same to begin and be made on such of the said days as shall first happen after my decease; the said annuity to be also paid or payable clear of all taxes and deductions whatsoever. I also give and bequeath to my dear wife, Christina Coltsman, the further sum of £1,000 sterling to be paid to her out of *my said estates* at the end of the year next after my decease, for her own use and benefit. I also bequeath to my dear wife, Christina Coltsman, during her natural life, such part or portion of the said plate as she may think proper, for her own use, and to be returned at her decease to my son, John Coltsman, his heirs, executors, and assigns. I also give and bequeath to her our best carriage, and the carriage horses, and desire that she shall have sufficient good and suitable furniture for the rooms she may prefer in Fleak Castle for her own use. I bequeath to my daughter, Mary Godfrey, the sum of £300, to be placed in the funds for her own use and benefit, and so as that the said sum of £300, or any part of it, shall not be liable to the debts, engagements, management, or control of her husband. I give to my son-in-law, Daniel Cronin, the sum of £100 sterling; also to my son-in-law, William D. Godfrey, the like sum of £100 sterling. I moreover give and bequeath to my dear wife, Christina Coltsman, whatever part or portion of the household linen she may think proper for her own use, and also desire that she may have the disposal of, by will, of the £1,000 before mentioned (and bequeathed in this will to her), at any time she may think proper after my decease. I also hereby constitute and appoint my beloved wife, Christina Coltsman, executrix, and my son, John Coltsman, executor of this my last will and testament, hereby revoking and annulling all former and other wills and testaments by me at any time heretofore made. In witness whereof I have to this my last will and testament set and subscribed my hand (and seal, 9th day of August, 1833. JOHN COLTSMAN (Seal). Signed, sealed, published, and declared by the said testator, John Coltsman, as and for his last will and testament, in the presence of us who at his request in his presence, and in the presence of each other have hereunto subscribed our

names as witnesses thereto. Thomas Dunn, R.C.C. (Seal). James Leyne (Seal). Timothy Talvery (Seal)."

**CODICIL.**—"Whereas I, John Coltsman, of Fleak Castle, near Killarney, County of Kerry, gentleman, have made and executed my last will and testament in writing bearing date the 9th day of August, 1833. Now I do hereby declare this present writing to be a codicil to my said will, and I do direct the same to be taken as a part thereof, and I do hereby give and bequeath to my dear wife, Christina Coltsman, in my said will named, the further yearly sum of £100, and in addition to the annuity I have bequeathed to her in my said will, to be paid and payable into her proper hands, out of the rents, issues, dividends, interest, and profits of all my *said estates* by half-yearly payments, in the manner and at the times specified and declared in my said will. I also do hereby give and bequeath to my brother-in-law, John Lassener, the sum of £100. And if it should happen that my son, John Coltsman, *die without heirs of his body* lawfully begotten, or to be begotten, in that case, and in default of such heirs. I do hereby devise and direct that my lands, castles, tenements, and premises at and about Fleak Castle, and mentioned in my said will, together with the plate, furniture, and library in said will specified, also my lands, farms, tenements, and premises situate, lying, and being at Dicks Grove, near Castle Island (all subject to and charged with the payment of the aforesaid annuity to my dear wife of £800 a year, and also with the payment of any reasonable provision made *with my consent by my son for his wife*, to be paid and payable to her during her natural life), shall, at my son's death, descend and be transferred to my grandson, Daniel Cronin, his heirs, executors, and assigns, for ever. The heir for the time being to add the name "Coltsman" to the name "Cronin." Also if it should happen that my son, John Coltsman, *die without heirs of his body* lawfully begotten, or to be begotten, in that case and in default of such heirs, I do hereby give and assign out of the monies I have at interest, and specified in my said will, the sum of £6,000 to my daughter, Mary Godfrey, for her own use and benefit, and so as that the said sum of £6,000 shall not, nor shall any part of it, be subject or liable to the debts, engagements, management, or control of her husband. But at the same time said sum of £6,000 shall be subject to and charged with the payment of the said annuity to my dear wife, Christina Coltsman. I do hereby give and bequeath to the Reverend Thomas Dunne, Catholic curate of Killarney, the sum of £50, as a testimony of my esteem. I do hereby constitute my daughter, Mary Godfrey, and my son-in-law, Daniel Cronin, joint executors with those already constituted by me in my said will, and I do hereby ratify and confirm my said will in all other particulars thereof. In witness whereof, I the said John Coltsman have to this codicil set my hand and seal, this 6th day of December, 1833.—John Coltsman (Seal)."

This codicil was duly attested. It appeared on the trial that upon the death of John Coltsman the elder, in 1835, his son, John Coltsman the younger, took possession of both the estates of Fleak Castle and Dick's Grove, and continued in the enjoyment thereof

until his death, upon the 15th January, 1849, without issue. Daniel Cronin, who had married John Coltsman the elder's daughter, Christina, had died in the lifetime of the testator, and had left, amongst other children, Daniel Cronin, now called Daniel Cronin Coltsman, the principal defendant. The defendant gave in evidence three several deeds purporting to be deeds disentailing all the lands of Fleak Castle and Dick's Grove; the first of which was an indenture of the 7th July, 1835, between said John Coltsman the younger, and David Mahony, whereby, after reciting the will and codicil of John Coltsman the elder, it was witnessed that in order to enlarge the estate in tail into a fee simple, the said John Coltsman granted the lands therein mentioned (being the said estate of Dick's Grove), to said David Mahony and his heirs, to the use of said John Coltsman, his heirs and assigns for ever: said deed was duly enrolled in Chancery pursuant to the statute. By another indenture of the same date, between the same parties, the lands of Fleak Castle, held for lease of lives renewable for ever, were conveyed to said David Mahony and his heirs to hold same upon trust to reconvey. By indenture of reconveyance, 8th, July, 1835, said lands of Fleak Castle, were reconveyed by said David Mahony to said John Coltsman the younger, his heirs and assigns. By WILL dated 7th August, 1848, the said John Coltsman the younger, after several bequests, made the following residuary devise:—"I devise and bequeath all the rest, residue, and remainder of my property of every kind and description, whether real freehold or personal, to my dear wife, Catherine Coltsman, her heirs, executors, administrators, and assigns for ever."—Said Catherine Coltsman is the plaintiff. Said several wills and deeds were read at the trial on behalf of the plaintiff, and plaintiff's counsel submitted that under the will and codicil of John Coltsman the elder, John Coltsman the younger took an estate tail in the lands of Dick's Grove, and an estate *quasi* in tail in the lands of Fleak Castle; that said estates were barred by the disentailing deeds of 1835, and that the said lands passed, by the will of John Coltsman the younger, to his widow, under the residuary devise in said will contained. Counsel for the principal defendant, Daniel Cronin Coltsman, submitted that under the first will, John Coltsman the younger, did not take an estate in tail, or *quasi* in tail in said lands, and that under the limitations in said will, the lands had passed to Daniel Cronin Coltsman. His Lordship directed a verdict for the defendants, stating his opinion, that under the will of John Coltsman the elder, and deeds executed by John Coltsman the younger, the latter had no estate which he could devise to the plaintiff, his widow; and that on his death, he never having had issue, the defendant, Daniel Cronin Coltsman, the grandson of the testator, John Coltsman the elder, became entitled to both estates, Fleak Castle, and Dick's Grove. The jury found for the defendant, and they were discharged, by consent, from finding on the second issue, as to the mesne rates. The above conditional order was obtained by the plaintiff on the 8th November, 1863, in pursuance of leave reserved.

The *Solicitor-General* (with whom were *Serjeant Sullivan, Barry, Q.C., Leahy, Q.C., and Jellat*), now

to which the word *estate* refers. The estate given to John Coltsman, the younger, cannot be held to be an estate in fee, if the will and the codicil be read as one instrument, which in fact the testator has desired to be done in these terms—"I do hereby declare this present writing to be a codicil to my said will, and I do direct the same to be taken as a part thereof." Now, the very words used in the codicil are such words as import an estate tail, "and if it should happen that my son, John Coltsman, should die without heirs of his body." Those are words of art; words bearing a well-known legal meaning. *Lees v. Mosley*, mentioned by the Lord Chief Baron, shews that it requires a demonstrative context to shew that the testator meant that these words were not to import an estate tail. In discussing, in the 36th chapter of Jarman on Wills, p. 312, the rule in *Shelley's case* (1 Rep. 93), it is said "that the limitation to the heirs of the body may arise by implication; as (if the will is subject to the old law) in the case of a devise to A. for life, and in case he shall die without heirs of his body, or without issue, then to B. Such a case (in which the first taker, beyond all doubt, has an estate tail), is an exemplification of the rule in *Shelley's case*. A gift to heirs of the body is implied; and the effect is, that the devise is read as a gift to A. for life, and after his death, to his issue or heirs of the body." Was there any expression in the instrument that imported the devise of a fee in Dick's Grove? But even if the word "property" did import a *quasi* fee in Fleak Castle, the words "heirs of the body" in effect cut same down to an estate in tail. In the operative part of the will, "I also devise and bequeath to my son, John Coltsman, my lands, tenements, and premises, with the appurtenances thereof, situate, lying, and being at Dick's Grove," &c., the words "lands, tenements, and hereditaments," were not contended by the other side to pass a fee, as it was urged that the expression "property" might. And before the Wills Act, words of limitation must have been used to carry a fee; if omitted, only a life estate could have passed. If, then an estate for life only in the lands of Dick's Grove were devised to John Coltsman the younger, it was enlarged into an estate tail by the expression "dying without issue" in the codicil.—*Matchell v. Weeding* (8 Sim. 4). There the testator gave real and personal estate to his wife for life, and after her decease, to his son J., *for his life*, but if "his son should die without issue" and not having any children, then his estates to be sold, and the money divided among his other children, and it was held by Sir L. Shadwell "to be a settled point, that when an estate was given in fee or for life, followed by a devise over in the case of the devisee dying without issue, the devisee will take an estate tail."—1 Jar. 519. But then, it is contended by the defendant at all events that the words "said estates," upon which the testator had charged the annuity of £800, and the bequest of £1,000 has reference to Fleak Castle and to Dick's Grove, and that the word "estates" imports a fee-simple. The cases, however, are directly opposed to this construction. The expression "said estates" cannot give a larger interest than the expression to which same refers, and shall be held to be mere words of description of locality if the words to which they

refer are so.—*Doe v. Clayton* (8 East., 141). There it was held that, when in the operative part of the will the word "estate" was not used, and that when in the subsequent portions of the instrument it was used, in reference to the antecedent words, which were merely words of description of locality, that the force of the word "estate" was by reference restricted to the antecedent words.—"My property" are mere words of local description, and, unless aided by the context, are not strong enough to carry the fee. In *Doe d. Clarke v. Clarke* (1 Cr. & Mees. 39), the Court said that the word "property" was not used to describe the quantum of estate to be taken, but was a word of local description. The argument, then, that the word "estate" as it is used in the will, shall carry a fee to the devisee, fails. On the other side it was also contended that the words "estates" or "property" were large enough without any words of limitation to carry a fee. We submit that if even the word "estate" and not "property" in the operative part of the devise of Fleak Castle, was the word used, yet that word, large though it be, would be cut down by the surrounding expressions, as, in the case under consideration, by such words as "if he die without heirs of his body," the adoption of which expression, while it cuts down the estate in fee in Fleak Castle to an estate tail, enlarges the life estate in Dick's Grove to an estate tail. *Doe d. Norris v. Tucker* (3 B. & Ad. 473) shews that the word "property" is ambiguous. In that case a testator, being seised in fee of the premises, devised as follows: "I give, devise, and bequeath to my wife my freehold estates, called Pouncetts, during her natural life. I give to my son Richard, my heir after the death of my wife, £10. Item, all the above bequeathed goods and chattels, after the death of my wife, I give to my son Richard, to my son Thomas, and to every other of my children then in being, share and share alike, equally to be parted between them," and it was held that, under this devise, the children only took life estates in their respective shares after the death of the wife. In this case the words "estate to the wife" were cut down to a life estate, and the children's interests in their share were also cut down by contiguous expressions to life interests. [*Serjeant Sullivan* called the attention of the Court to a case which had not been cited as yet. *Uthwaite v. Bryant* (6 Taunt., 319), with a view to shew that a devise of freehold "estates" passed the fee.] The word "estate" has been frequently restrained from passing the inheritance; regard is paid to the whole instrument—it was so in *Broadhurst v. Morris* (2 B. & Ald. 1). In that case a testator devised all his shares of his two estates in W. to his daughter, E. B., for life, and at her death to J. B., her husband, during his life, and at the decease of his said son-in-law, J. B., he directed that the whole legacy to him should go to his grandson, W. B., and to his children lawfully begotten for ever, but in default of such issue at his decease, to the testator's grandson, A. B., his heirs and assigns, for ever; and it was there held that W. B. took an estate tail in the share of the estates in W." In that case if the position sought to be maintained by the other side were correct, E. B. would have taken an estate in fee. Such a construction, however, would have been absurd, and accordingly the word "estate" must be read and con-

strued by having regard to the whole tenor of the instrument. The words which irresistibly control the meaning of "property" as regards Fleak Castle, and also which enlarge the life estate in Dick's Grove, are the words in the codicil, "if he die without heirs of his body." No other words known to the law from the time of *Shelly's case* (1 Co. Rep. 93) to the present have so sure a meaning as the words "heirs of the body." John Coltsman, the younger, then took an estate tail under the will and codicil—*Wild v. Lewis*, (1 Atk. 432); *Lee's case*, (1 Leon, 285); *Walter v. Drew*, (Comyn, 372); *Forth v. Chapman*, (Tudor's L. C. on R. P., 552); *Daintry v. Daintry* (6 T. R., 307).

If, then, the Court should be of opinion that an estate tail vested in the first taker, John Coltsman the younger, it was then open to him to cut off the executory devise by barring the entail, as it is said in *Fearne on Cont. Remainders*, p. 429, "When in lands of inheritance an estate tail is first limited, and then an executory or conditional limitation is made upon that estate, a recovery suffered by the tenant in tail, before the event or condition happens on which the ulterior limitation was to arise, will bar the estate depending upon that event or condition." Had the estate been, as it is contended for by the defendant, an estate in fee, and not an estate tail in John Coltsman the younger, "the tenant in fee could not bar the executory estate."—*Fearne*, 7th ed. 424, note (e), by Butler. In *Jones v. Ryan*, (9 Ir. Eq. 251), "A testator devises lands to his son A. and his heirs for ever;" those are words of limitation much stronger than any used by John Coltsman, the testator, "and in case A. shall die without lawful issue, testator desired that after his death all the property should go to his daughter and her heirs, and in case both A. and the daughter should die without lawful issue, the property to go to his brother;" and it was held to be an estate tail in A., and not a fee-simple, with remainder over.—In 1 Jarman on Wills, 3rd ed., 519, the rule is thus laid down—"A devise in a will which is governed by the old law, to a person and his heirs, followed by a limitation over, in case of his dying without issue, confers an estate tail, on the ground that the testator has, by the words giving the limitation over, explained himself to have used the words in the qualified and restricted form of "the heirs of the body." *Nicholls v. Hooper*, relied on by the Solicitor-General, was entirely conversant with personalty, and not applicable, therefore. In *Doe d. Goldsmith* (7 Taunt. 209), where testator devised lands to his son F., to hold to him and his assigns for his natural life, and immediately after his decease, the testator devised the same unto the heirs of his body lawfully to be begotten, in such parts, shares, and proportions, manner and form, as F. should by will or deed devise or appoint, and in default of such heirs of his body lawfully to be begotten, then immediately after his decease, the testator devised the premises to another son, J., in fee, and it was held by the Court of Common Pleas that F. took an estate tail. *Moriarty v. Gray* (12 L. C. L. 129) was where a testator, seised of lands under a lease renewable for ever, devised the same, by will dated 1826, to his son T., and he also devised other property by the same will to his son P., and directed that

"in case any or either of my sons shall die without issue, that their shares and proportions shall be left to the survivor; and if it should happen that both should die without issue, that their shares or proportions shall be left to my grandson, J.G., or his heirs." Held, that, under this devise, the sons of the testator took an estate in *quasi* tail.

There is yet another point which is to be considered, and that is, that the executory devise over must fail for remoteness. John Coltsman the younger was heir-at-law of the testator, and the interests of the heir-at-law are much favoured by the Court, and therefore, in construing the expression of "dying without issue," the period to which same is referred, and the limitations made thereupon in wills made before the Wills Act, is not supposed to be dying without issue at the death. The rule is thus given in *Fearne on Contingent Remainders*, 476, "The Courts, in cases of personal estate, generally incline to pay attention to any expression in the will that seems to afford a ground for construing a limitation after dying without issue, to be a dying without issue living at the death of the party, in order to support the devise over; yet in the case of a real estate, it seems the construction is generally otherwise, for then we are to consider the interests of the heir-at-law," which are always much favoured by our laws; and therefore, in *Forth v. Chapman* (1 P. Wms. 663), in one and the same sentence, "dying without issue," was held to have two different meanings, viz., that the testator, when he limited over his personal and real estate on the "death without issue" of his nephews, would be construed to mean as to his personalty dying without issue at the nephew's death, while as to the realty, it was a dying without issue generally, and if generally, the limitation over was void.—*University of Oxford v. Clifton*, (1 Eden, 473, Ambler, 358); *Wright v. Pearson*, (1 Eden, 119, Ambler, 358); *Byfield's case* (1 Ventris, 231); *Pitman v. Robinson* (1 Barrow 38); Prior on Issue, s. 34.

*Serjeant Sullivan* replied—It is repugnant to the manifest intention of the testator to give John Coltsman, the younger, an estate tail. The testator clearly meant that his estates should go only to such as would bear the name of Coltsman, and therefore he directed his grandson, the defendant, to add Coltsman to the name Cronin, should his son, John Coltsman, die without heirs of his body: construe this devise to be an estate tail, and you give into another family, who are not bound to bear the name of Coltsman, the family estates, thereby directly conflicting with testator's intention; mark now the absurdity that will follow from such a construction. *Forth v. Chapman* decides that, as to personalty, dying without heirs of the body, must mean dying without heirs of the body living at the death of John Coltsman, the younger, and, therefore, that there was no remoteness to defeat the executory bequest of the plate, the library, and the furniture; and that that must go to Daniel Cronin Coltsman accordingly. You then have the family plate and library, &c. going to one family, while the estate goes to another:—We insist that the words charging the legacies and annuities on his "said estates" are sufficient to carry the fee both in Fleak Castle and in Dick's Grove. The use of the word

"estates" is explanatory of the testator's meaning in the antecedent gift.—*Roe v. Bacon* (4 Manle & Sel. 366). That was a devise by the testator of all and singular "his freehold lands, messuages, and tenements, at &c., or elsewhere, together with all my household goods, &c., for life, and after her decease then all the said estates, goods, &c., to be divided among my sons (naming five) share and share alike. Held, that the sons took a fee-simple in the lands after the death of the wife." So also, in the case of *Uthwatt v. Bryant* (6 Taunt. 317), where a testator devised all his freehold lands, tenements, tithes, hereditaments, and premises in the parish of B. to certain persons for life, with remainder over, and on a given event devised his said freehold estate in the parish of B. to his daughters, as tenants in common; and in case such his said children should die in the lifetime of his wife, then he devised all his said freehold estate in the parish of B. to his wife and her heirs for ever, it was contended that inasmuch as the testator had twice described the subject of the devise by words not capable of carrying the fee, when he afterwards devised it by the term 'the said freehold estate in the parish of B.,' he thereby only gave the same thing as he had before given, and therefore the daughters took estates for life only; but the Court certified that they took in fee. In like manner, *Doe d. Bates v. Clayton* (8 East. 141). On these authorities, then, the estates of Fleak Castle and Dick's Grove were given absolutely in fee to John Coltsman the younger, and, being given in fee, could not be cut down by any subsequent words, such as, "If he die without heirs of the body" in the codicil.—*Doe d. Barnfield v. Welton* (2 Bos. & P. 324). That was a devise "unto my daughter Susannah, her heirs and assigns, for ever, but if my daughter shall happen to die leaving no child or children lawful issue of her body living at the time of her death, then I give, devise, and bequeath all the said premises to Francis Barnfield, his heirs and assigns," and it was there held that the devise in fee to S. S., was not restrained by the subsequent words to an estate tail; and that the subsequent devise over to Francis Barnfield was a good executory devise. So also *Johnson v. Johnson* (8 Ex. 81); *Wilkinson v. South*, above cited. An estate tail will not, then, cut down a preceding devise in fee, neither will the Court be inclined to imply an estate tail has been created. In *Lethulier v. Tracy* (3 Atk., 798), Lord Hardwicke says, "That where the intention of creating an estate tail is not plain, but very doubtful and uncertain, judges will lay hold of any circumstances, rather than put it in the power of a person on a remote contingency to bar all subsequent remainders." The Court here is asked to put it in the power of John Coltsman the younger to bar all remainders, and thus, upon doubtful and uncertain grounds to render ineffectual the intentions of the testator. The expression "property" which the testator has adopted in the devise of Fleak Castle, gave, without any words of limitation, a fee simple to John Coltsman, the younger.—*Doe d. Booley v. Roberts* (11 A. & E. 1000). In that case Robt. Ittill on the 5th March, 1812, being seised in fee of a dwelling-house with the appurtenances, published his last will, which is as follows: "I give and bequeath to Mary, my wife, all my lauds,

messuages, and tenements, by her freely to be possessed and enjoyed, with all my property whatsoever;" and Lord Denman there decided that the testator's widow had an estate in fee, the word "property" being sufficiently ample to carry same. The other cases deciding the same point have already been relied upon by the Solicitor-General, *Bentley v. Oldfield*, &c. Had the testator made use of the word "estate," no words of inheritance need have been used. *Burton v. White*, (7 Ex. Rep. O. S. 720). That the word "property" is synonymous with "estate," is laid down in a multitude of cases.—*Roe v. Pattison* (16 East. 221); *Nicholls v. Butcher* (18 Ves. 193); *Patton v. Randall* (1 J. & W. 189); *Booley v. Roberts* (11 Ad. & E. 1000); *Footner v. Cooper* (2 Drew. 7); *Barnfield v. Welton* (2 Bos. & Pul. 329).

*Dec. 5.*—*PIGOT, C.B.*—This was an ejectment on the title brought by the widow and devisee of John Coltsman the younger for the lands of Fleak Castle and Dick's Grove. It appeared on the trial that those lands were in the seisin of John Coltsman the elder, Dick's Grove being in fee-simple, and Fleak Castle in quasi fee. Said John Coltsman the elder made his will, dated the 9th of August, 1833, and codicil, 6th December, 1833. In the said will occurs the following passage:—"I give, devise, and bequeath to my son, John Coltsman, all those my property, lands, tenements, and premises at and about Fleak Castle, together with the live stock on said lands, also my plate, library, pictures, and furniture. I also devise and bequeath to my son, John Coltsman, my lands, tenements, and premises, with the appurtenances thereof, situate lying and being at Dick's Grove, near Castle Island, county of Kerry.—I give and bequeath to my dear wife, Christina Coltsman, the yearly sum or annuity of £700 sterling during her natural life, and for her own use and benefit; in lieu for and instead of all other provisions made upon or previous to our intermarriage, said annuity to be paid and payable into her own hands out of the rents, issues, and profits of my said estates, by half-yearly payments, on the 25th day of March and 29th day of September in every year, by even and equal proportions, the first payment of the same to begin and to be made on such of the said days as shall first happen after my decease, the said annuity to be also paid and payable clear of all taxes and deductions whatsoever. I also give and bequeath to my dear wife Christina Coltsman, the further sum of £1000 sterling, to be paid to her out of my said estates at the end of the year next after my decease, for her own use and benefit. I also bequeath to my dear wife, Christina Coltsman, during her natural life, such part or portion of the said plate as she may think proper for her own use, and to be returned at her decease to my son, John Coltsman, his heirs, executors, and assigns." The other portions of the will are not material. [His lordship read the codicil through as given above.] It appeared at the time that these lands belonged to John Coltsman the elder, who died in the year 1835, leaving his widow and John Coltsman the younger, his son, and two daughters, one of whom was the mother of the defendant. John Coltsman the younger executed two disentailing deeds; under the above will and codicil,

and under those several deeds, the plaintiff's counsel insisted that John Coltsman, the younger, took an estate tail in the lands of Dick's Grove, and an estate *quasi* in tail in the lands of Fleak Castle; that said estates were barred by the disentailing deeds of 1836, and that the said lands passed by the will of John Coltsman, the younger, to his widow, by whom the ejectment has been brought at the trial, which was had before the Lord Chief Justice of the Court of Common Pleas at the Spring Assizes of 1863 for the County of Kerry. His lordship directed a verdict for the defendant, reserving leave to have same turned into a verdict for the plaintiff in case this Court should be of opinion that the verdict ought to be so entered. As to the several other defendants, a general verdict was directed for them; and the jury were by consent discharged from finding as to the mesne rates. A conditional order was accordingly obtained to enter the verdict for the plaintiff, and cause was shown against making said conditional order absolute, and upon that conditional order we are now called upon to deliver judgment. Two members of the Court, Baron Fitzgerald and Baron Deasy, have taken no part in the arguments addressed to us, as they were both, when at the Bar, advising counsel in the case.

The solution of the question depends upon the will and codicil. The defendants claim those lands under an executory devise contained in the above-mentioned codicil. Henceforward, for perspicuity sake, I shall speak of both of those denominations of Fleak Castle and Dick's Grove as if they were both held in fee by John Coltsman the elder, and neither of them in *quasi* fee. The disposition made by the will and codicil must be considered separately and in connexion with each other. First, Fleak Castle. "I give and bequeath to my son, John Coltsman," adding no words of limitation, "all those *my property*, lands, tenements, and premises at and about Fleak Castle, together with the live stock upon said lands; also my plate, library, pictures, and furniture." In my opinion the word "property" had the effect of passing all the estates in Fleak Castle in fee to John Coltsman. Had the testator made use of the word *estate*, no words of limitation need have been added, but the word he used was *property*. The word "estate" is the most general word that can be used; and Buller, J., thus expresses himself in *Holdfast v. Martin* (1 T. R. 411):—"The word estate is the most general word that can be used. For so far from its being necessary to add words of inheritance to make it pass in fee, words of restraint must be added in order to carry a less estate, for it is a *genus generalissimum*." Now, as to the expression "property," *Bentley v. Oldfield* (19 Beav. 225) is an authority to shew that a devise of "my property" in houses, &c. is sufficient to pass the fee. It is quite clear (per Sir J. Romilly, M.R.) according to the various reported cases, that where the testator uses these words, "share of property," he speaks of it as a whole; and the words in the first instance are quite sufficient to give a fee. Now, applying this case to the will under consideration, the word "property" is quite sufficient to give the fee in the lands of Fleak Castle.

With respect to Dick's Grove, the testator, in his will, apart from the codicil, uses the following expres-

sion:—"I also devise and bequeath to my son, John Coltsman, my lands, tenements, and premises, with the appurtenances thereof, situate, lying, and being at Dick's Grove, near Castle Island, in the county of Kerry." The expression "property" not being used at all; neither are there any words of limitation used; but it has been argued that the subsequent clauses have the force and effect of supplying or of referring the word "estate" thereafter mentioned to the preceding portion of the will; for by one of those clauses he gives an annuity of £700 to his wife, to be payable out of the rents, issues, dividends, interest, and profits of my *said estates*." And in another part of the will he bequeaths a "sum of £1000 sterling to be paid to her out of my *said estates*." Defendant insists that the use of the words "said estates" shews that the testator intended to transfer the whole interest; "said estate" having reference to what had gone before, namely, both Fleak Castle and Dick's Grove. That argument is thus answered: whenever the words "said estates" are used in one of the portions of the will, there the word *estate* is by its reference restricted to the antecedent words of devise, and that said estates did not pass any larger estate than what the antecedent words of devise passed, and that those could not pass a fee, as the antecedents did not do so, and there are no words of limitation used in the operative part of the antecedent devise of either Fleak Castle or Dick's Grove. In *Doe d. Burton v. White* (1 Ex. 526), the question depended upon the construction of the words "estates and properties" in the part of the will in which they are used. In that case a testator devised to "my wife Nannie all that house, shop, and garden now in the tenure of B., for her own sole use and purpose; and I also give to my wife Nannie all that messuage, farm, and premises now in the holding of C., to hold to her my said wife during the term of her natural life; and from and after her decease I give and devise the said messuage or tenement, and also the said farm and premises given to my said wife for her life as aforesaid to my son John. I bequeath to my son John the lease of the farm I rented of Lord L. for his own use and benefit. And I also give to my son George that one acre of copyhold land I bought of G., and also a half acre of freehold land adjoining that one acre of copyhold land." The will contained other devises, and at the end was this passage:—"And I give and bequeath and order the rents or interests that is behind, due, and unpaid shall go and be paid to that person I have left the *estates and properties* respectively to. As to all the rest, residue, and remainder of my property whatsoever, and of what nature and kind soever, I give, devise, and bequeath the same to be equally divided between and amongst my wife Nannie and her children who have issues, share and share alike." It was held, first, that a fee in the lands devised did not pass to George; for, though the word "estate" in the operative part of a will passes not only the corpus of the property, but all the interest of the testator in it unless controlled by the context, yet when that word is not used in the operative part of the will itself, but is introduced into another part of the will referring to it, such word cannot be construed as having the effect

of extending the meaning of the operative clause, whether prior or subsequent." On the authority, then, of this case it would appear that, although a fee passed under the word "property" in Fleak Castle, yet the fee in Dick's Grove was not passed, the word *property* not having been used in the operative part of the devise. I am of opinion, then, that under the will, apart from the codicil, the whole interest of the testator in Fleak Castle passed to John Coltsman the younger, and that the devise of Dick's Grove gave a life estate to John Coltsman, the first devisee.

We have next to consider the codicil: it confirms the will; and the testator thereby directed that the codicil should be taken as a part of the will, and he therein gave to his wife, the further sum of a £100 a year, in addition to the sum he had bequeathed her in his will; and he again refers to Dick's Grove and Fleak Castle as his *said* estate, which he thereby charged with the last-mentioned annuity; these estates not being previously named in the codicil, though named in the will; the codicil then proceeds—"And if it should happen that my son, John Coltsman, *die without heirs of his body*, lawfully begotten or to be begotten, in that case and in default of such heirs, I do hereby devise and direct that my lands, castles, tenements and premises, at and about Fleak Castle, and mentioned in my said will, together with the plate, furniture, and library in said will, specified; also my lands, farms, tenements and premises, situate, lying and being at Dick's Grove, near Castle Island, all subject to, and charged with the payment of the aforesaid annuity, to my dear wife, of £800 a year; and also with the payment of any reasonable provision made with my consent by my son for his wife, to be paid and payable to her during her natural life, shall, at my own death, descend and be transferred to my grandson, Daniel Cronin, his heirs, executors, and assigns, for ever; the heir for the time being to add the name 'Coltsman,' to the name 'Cronin;' also if it should happen that my son, John Coltsman, die without heirs of his body, lawfully begotten, or to be begotten, in that case, and in default of such heirs, I do hereby give and assign out of the moneys I have at interest, and specified in my said will, the sum of £6,000 to my daughter, Mary Godfrey, for her own use and benefit, and so as that the said sum of £6000 shall not, nor shall any part of it be subject or liable to the debts, engagements, managements, or control of her husband; but at the same time said sum of £6,000 shall be subject to, and charged with the payment of the said annuity to my dear wife, Christina Coltsman." I shall first consider this disposition in connexion with the devise in fee of Fleak Castle. There can be no doubt but that if "issue" had been the term used instead of "heirs of the body," a fee simple would have been given to John Coltsman, the younger, with an executory devise over—then it would read thus—"If it shall happen that my son John shall die without issue;" which words must be coupled with the words "at his death;" it must be, then, that the dying without issue, *at the death*, constituted the event upon which the lands are to go over to the next devisee; if the word "issue" then had been used, the case must have been much

easier of solution; for the general rule of construction of dying without issue, in wills made before 1838, is thus laid down in 2 Jarman on Wills, 472, 3rd ed. "It has been long settled (though the rule, it will be remembered, now applies only to wills made before 1838), that words referring to the death of a person without issue, whether the terms be '*if he die without issue*,' '*if he has no issue*,' or '*if he die without having issue*,' or "*if he die before he has any issue*,' or '*for want*,' or '*in default of issue*,' unexplained by the context, and whether applied to use or personal estate (notwithstanding the distinction taken between these two species of property in some of the early cases) are construed to import a general indefinite failure of issue, *id est*, a failure or extinction of issue at any period," which period the testator fixes here to be at his son's death, whereupon the lands were to descend to Cronin. In *Doe v. Frost* (3 B. & AL. 546) the testator having a son and daughter, and the daughter having several children, devised to his son W. F. in fee; and if he should have no children, child, or issue, the said estate was, on the decease of his son, W. F., to become the property of the heir-at-law, *subject to such legacies* as W. F. might leave to the younger branches of the family; and it was there held, that W. F., under this will, took an estate in fee, with an executory devise over to the person, who on the happening of the event contemplated by the will, should become the heir-at-law of the testator; and Bailey, J., at p. 555 says—"it does not seem to me that this will contemplates a devise over on an indefinite failure of issue, but only on failure of issue at William Frost's death. And the subsequent part of the clause confirms me in this opinion, for if the will had given an estate tail, with the reversion in fee, to William Frost, it would have been wholly unnecessary to have given him the specific power of charging the estate with legacies." In like manner, here it would have been unnecessary to have given John Coltsman the power of charging the estate with a provision for his wife, if the testator meant to give him an estate tail; for had he given him an estate tail, it was open to John Coltsman, junior, to bar the entail and cut off the executory devise, when, of course, he might make any disposition in favour of his wife without any other power from the testator.—Fearn on Contingent Remainders, p. 424. If the testator gave a fee-simple to his son, with an executory devise over, no act of John Coltsman the younger could have barred such executory devise if he died without issue living at his death—*Ex parte Davies* (2 Sim. N.S. 114), & *Jones v. Ryan* (9 I. E. 249). In the former an estate in fee was held to be given to the first taker, while in the latter an estate tail; but in both cases an executory devise over was given. The case of *Ex parte Davies* was where a testator who died in 1833 devised his estates, real and personal, to his eldest son and his heirs, provided that if his son died without leaving any lawful issue of his body, such part of his residuary estate as was freehold and situate at certain places, should, at his death, be divided into two equal parts, one of which parts he gave to his second son and his heirs, and the other to his daughter and her heirs, and the Vice-Chancellor held, as to such part of the testator's residuary estate as was freehold and situated in



the place named, that his eldest son took an estate in fee, and not an estate tail therein with an executory devise over to take effect at his death, in case he should have no issue then living. In the case of *Jones v. Ryan* the testator devised lands to his son A. and his heirs for ever, and in case A. should die without issue after his death, all the property should go to his daughter and her heirs; and in case that both A. and her daughter should die without lawful issue, then the testator desired the property to go to his brother; and the Lord Chancellor there decreed it to be an estate tail in A., and not a fee-simple with remainder over. In the case before the Court the defendant has contended that John Coltsman, junior, took an estate in fee, and relied on *Ex parte Davies*. It is, however, contended by the plaintiff that the words "*die without heirs of the body*" must be construed, by implication, into a devise in tail, and the plaintiff's counsel has contended that the devise over must be treated as an executory devise, or as a contingent remainder, after an estate tail. In *Parker v. Berke* (1 Kay & J. 156), John Wilkinson, being seised in fee-simple of real estate in Yorkshire, by his will dated the 27th April, 1816, after bequeathing various legacies, gave and devised his lands to his brother, Henry Wilkinson, his heirs and assigns, for ever; but in case his nephew, William Shaw, should die without child or children of his body lawfully begotten, he ordered and he gave and devised to the children of his niece, Hannah Grey, their heirs and assigns, for ever on the decease of the aforesaid William Shaw, that part of his said real estate devised to his nephew, William Shaw; and this was held to confer an estate in fee-simple on A., subject to be defeated by an executory devise, if at his decease there should be no issue of A. living. Now, in each of these three cases, namely, *Doe v. Frost*, *Ex parte Davies*, and *Parker v. Berke*, it was held to be a devise in fee with an executory devise over. It is true, upon principle, that if the devise was expressly to John Coltsman and the heirs of the body, followed by "and in default of such heir I do hereby devise and direct that my lands, castles, tenements, and premises" following the words of the codicil, the defendant would have been devised an executory devise or a remainder contingent upon and after the estate first given. If those were the expressions used, the case would be similar to *Jesson v. Wright* (2 Bligh, 2.). That was a "devise to William (a natural son of the testator's sister) for life, and after his decease to the heirs of his body, in such shares and proportions as William by deed shall appoint; and for the want of such appointment to the heirs of the body of William, share and share alike, as tenants in common, and if but one child, the whole to such only child, and for want of such issue, to the heirs of devisor." Held, that an estate tail vested in William by this devise. And there also it was held that the rule is, "that technical words shall have the legal effect, unless from subsequent inconsistent words it is clear that the testator meant otherwise." So in *Doe v. Goldsmith* (7 Taunt. 208) that was a devise to F. G. and his assigns for life, and immediately after his decease, until the heirs of his body lawfully to be begotten, in such parts and shares as F. G. should by deed or will appoint; and in default of such heirs of his body, then

immediately after his decease, over to J. G. And it was held that F. G. took an estate tail by implication — *Wright v. Pearson* (1 Ed. 119), noticed and commented upon in 2 Jarman on Wills, 3rd ed. 335 & 336. This will and codicil before us contain no words that could directly be construed to give an estate tail. The devise of "the property" of Fleek Castle is synonymous with a devise of same to John Coltsman and his heirs.

It is urged that the limitation to Daniel Cronin is void for remoteness on the grounds that the executory devise is limited to take effect, after a dying without heirs of the body, and subject to no other restriction, doubtless, had the limitation so been worded the executory devise over would have been void. But the failure of heirs of his body spoken of by the testator, coupled with the direction, "at my son's death to be transferred to Daniel Cronin," point to the death of the son as the period to which dying without heirs of his body has reference to; and on the death without issue of John Coltsman the younger, he bequeaths £6000 to his daughter, Lady Godfrey. The 29th section of the Wills Act, 1 Vict. c. 26, whereby the words "die without issue" shall be construed to mean "die without issue at the death" does not apply to the present case. Even supposing this will to have been made since the Wills Act, that section of the statute does not deal with the expressions "dying without heirs of the body" (2 Jarman, 3rd ed. 507.) The popular notion of the words "heirs of the body" does not differ from the legal sense in the same way as the word "issue;" such at least appears to be the result of the case of *Harris v. Davies* (1 Coll. 416). Upon the question of the testator's intention and of the inherent force of the words "die without heirs of the body," whether this would imply an estate in fee or in tail, it is manifest that by construing those words to imply an estate tail, the apparent intention of the testator shall have been frustrated, for his grandson Cronin at the death of his son John "without heirs of his body" was to have taken the additional name of Coltsman; and therefore if the first had taken an estate tail, the apparent intention of testator would have been frustrated by barring the entail. The codicil shews a plain intention that Fleek Castle should not pass out of the family name.

I must add, that in the will the absolute gift of the personality is not to be omitted from our consideration. By his will the testator bequeathed his property at and about Fleek Castle, together with the live stock on said lands; also, he absolutely bequeathed his plate, library, pictures and furniture to his son John Coltsman. This last-mentioned bequest he afterwards altered, for by the codicil he plainly shews that the plate, furniture, and library, were not to be the absolute property of John Coltsman, his son, but were to follow the same course as Fleek Castle; and that his grandson, Cronin, should have the lands, plate, &c., if no heir of the body of his son, should be living at his son's death. Fleek Castle was a family mansion, and he gave the absolute property in his will of the plate, library and pictures to his son, John Coltsman; in the codicil he alters that bequest, and instead of giving them absolutely, he gives them to his grandson, with the lands, adding that he requires his grandson,



Cronin, should take the name of Coltsman, in addition to his own. Does not all this shew that he was revising what he did by his will? I feel, then, that we are bound to give that construction to the will and codicil, which must best effectuate the testator's intention, namely—by giving John Coltsman (jun.) an estate in fee, with an executory devise over. As to the use of the words "heirs of the body;" there is no doubt that he can control the meaning of the words of the "heirs of the body." *Lees v. Morley* (1 Young & Col. 539) *Roddy v. Fitzgerald* (6 H. L. C. 823). So far for Fleak Castle.

Now, as to Dick's Grove. No words of limitation are used in the will, neither is the word "property" used as in the devise of Fleak Castle. I have now to deal with Dick's Grove; the limitations of Dick's Grove differ from those of Fleak Castle in as much as the word "property" is not used by the testator in the devise of these lands; the words are, "I also devise and bequeath to my son, John Coltsman, my lands, tenements, and premises, with the appurtenances thereof, lying and being at Dick's Grove, near Castle Island, county Kerry;" this devise was before the Wills Act; and it is said in 2 Jarman on Wills, 3rd edition, 247, that "nothing is better settled than that a devise of messuages, lands, tenements, or hereditaments (not estates) without words of limitation, occurring in a will which is not subject to the newly enacted rules of testamentary construction, confers on the devisee an estate of life only." Under this devise then of Dick's Grove, John Coltsman, junior, could have only taken an estate for life, or an estate in fee simple, with an executory devise over to Daniel Cronin. The disposition of Fleak Castle and Dick's Grove is made in one and the same clause in the will; and also in the same clause in the codicil; and as it has been already observed, the provision in the codicil shews that the testator looked to the death of John Coltsman, without issue, as the period upon which the devise over was to take effect. I think, then, that the testator's intention would be more fully carried out, if an estate in fee be given to John Coltsman, the younger, with an executory devise over; an estate tail would be quite repugnant to the meaning of the testator, which John Coltsman, junior, could have at any moment barred. The Court then is of opinion that John Coltsman, the younger, took an estate in fee in Dick's Grove, and quasi fee in Fleak Castle, subject to an executory devise to testator's grandson, Daniel Cronin Coltsman, the defendant; we are both then of opinion that the two denominations became on the death, without issue, of John Coltsman, the younger, the absolute property of Daniel Cronin as directed by the codicil, and therefore that the direction of the learned judge at the trial was right, and that the cause shewn must be allowed.

*Cause shewn allowed.*

## Court of Probate.

Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.

KELLY v. DUNBAR.—12th December, 1864.

*Intervient—Appearing but not pleading.*

*An intervenient who has appeared to a citation served on him to see proceedings, but who has not pleaded, is not entitled at the hearing of the cause to cross-examine the witnesses or to address the jury. An application on behalf of said intervenient at the hearing for liberty to plead want of capacity, and undue influence, was refused.*

THE plaintiff alleged a will of Mrs. Jane Catherine Seale, bearing date the 4th Nov., 1863, which gave legacies of various amounts to the next of kin (three in number), and to various other persons, and named the plaintiff sole residuary legatee and executor, and in case of his death before the deceased, then his wife was substituted for him. The defendant, a next of kin, and a legatee in that, and also residuary legatee in a former will, pleaded that the residuary and executorial clauses in the will alleged, formed no part of the last will and testament of the deceased, and that the same should be excluded from the probate of such will, that is to say, the portion of said will contained from the words, "I give all the rest, residue, and remainder of my property" to the end thereof, on the ground of undue influence exercised by the plaintiff on the deceased. The case came on for trial before the Court and a special jury. The question to be tried was whether the paper writing in the declaration mentioned, or any and what part thereof, is the last will and testament of Mrs. Jane Catherine Seale. George Marsh Clibborn, a minor, had intervened by his curator, having been cited to see proceedings. He was a legatee in a former will of 1860, for £1,000, but was not named in the last will. No plea had been filed on his part. At the close of the cross-examination of the first witness called for the plaintiff,

*Serjeant-Sullivan*, Q.C., for the intervenient, asked permission to cross-examine the witness.

*Serjeant Armatrong*, Q.C., contra.

KEATINGE, J.—The intervenient, not having filed any plea, is not entitled to interfere. If he desires to take part in the trial, he might have made an application to be allowed to plead; but no such application was made.

At the close of the plaintiff's case *Serjeant Sullivan* for the intervenient claimed to be heard for him, on the ground that the question to be sent to the jury involved the whole case on the will; or if that could not be done in the present state of the record, then that he (*Serjeant Sullivan*) should be allowed to amend the record by inserting—1st. A plea alleging the will of 1860; 2nd. The incapacity of the testatrix at the time of the execution of the will of 4th November, 1863; 3rd. Undue influence exercised by the plaintiff. He argued, that as the plaintiff had adduced evidence going to the whole case, he should be allowed to do so without being put under any terms.

*Dr. J. E. Walsh*, Q.C., and *Dr. Townshend*, for the plaintiff opposed the application.—The record contains

the case of the parties and the issue sent to the jury is merely the question of fact on which the judge desired its verdict. If the motion were to be allowed, it might prejudice the case of the other legatees. The motion cannot be granted; but if it were, it should be only on the terms of postponing the case, to allow the plaintiff to prepare to meet these pleas, and on payment of costs—*Todd v. Sampson* (1 G. and T., 269).

KEATINGE, J.—This application cannot be entertained at this stage of the case.

*Motion refused.*

[By consent of the parties, plaintiff and defendant, a verdict was taken, establishing the will of 4th Nov., 1863, except as to the residuary and executorial clauses, as the last will and testament of the deceased, and a decree made accordingly. *Serjeant Sullivan*, for the intervenient, protesting.]

## Court of Bankruptcy & Insolvency.

[Reported by John Levy, Esq., Barrister-at-Law.]

[BEFORE LYNCH, J.]

IN RE CLIFFORD WEBSTER.

*Execution of search warrant to seize goods of an absconding bankrupt—Rights of shipowners—Assignment of bills of lading—Payment of freight.*

*Where goods have been shipped to be conveyed to a certain port, for a freight agreed upon, bills of lading having been signed, in case of the subsequent bankruptcy of the shippers, his assignees cannot, before the sailing of the ship, insist upon having the goods re-delivered without paying the freight that would become due at the port of destination, and indemnifying the master against any claim in respect of the bills of lading. And the possession of such goods acquired by the messenger in consequence of a search-warrant granted by the Court, in no way changes the onus of proof, or entitles the assignees, where the goods have been re-delivered to the Master by the Court, to cast upon him the duty of impeaching the title of the holders of the bills of lading at the port of destination. Quare, has the Court of Bankruptcy jurisdiction to issue a search warrant with respect to goods on the premises of a third party in England?*

Kernan, Q.C., with him P. Martin) were for the shipowners.

Heron, Q.C., was for the assignees.

The facts appear in the judgment of Judge Lynch.

LYNCH, J. said—This is a case of considerable importance, involving very serious questions respecting the action of this Court by its summary warrant, and deeply important to a large and important interest in a mer-

cantile community, viz., the ship-owners and carriers of merchandize. The facts of the case are:—Clifford Webster, who was a trader in this city, was adjudicated a bankrupt by this Court on the 23rd of September, 1862. He was an absconding trader, and his bankruptcy was marked by the commission of very outrageous frauds against his creditors. Of course it would be the wish of this Court to aid the creditors by the exercise of every power possessed by it, in recovering any of the assets of this trader so fraudulently dealt with by him, and accordingly on the application by counsel a warrant was, on the twenty-sixth day of September, 1862, granted by this Court to search for and seize certain goods alleged to be concealed in the ship "Pantaleone," lying in the dock at Liverpool. It is argued here that this warrant was unauthorized by law, upon the true construction of the statute, on the grounds that this warrant can only be issued in respect of goods in Ireland, and is not authorized in respect of goods being in England. It is next argued that this warrant, even if legal, was executed illegally in the state of facts disclosed in this case. First, it is said, that the hatches of the ship were broken, which was in excess of any authority given by the warrant; and secondly, it is said that these goods were on board a general ship consigned to San Francisco, in respect of which bills of lading had been in due course of trade delivered, and that it was not lawful for the assignees thus forcibly to remove them without at all events paying the freight, and producing the bill of lading, or giving an indemnity for the goods. For the assignees it is argued that these goods were Clifford Webster's when shipped, and remained his, unless before bankruptcy he had *bona fide* indorsed over the bill of lading; that it lies on the shipowner to show that there was such an indorsement, or that there is no case made out against the ownership so shewn in the bankrupt, and by force of the law transferred to the assignees; and it is further said that even if the action on the warrant was in excess of the power thereby given, yet the goods being so acquired in possession should now be held to belong to the assignees, unless a superior title be shown by the shipowners. Before disposing of these several propositions, it is right that I should shortly state the facts of this case, as found by me, to authorize my judgment in law. It appears that in September the goods in question were shipped on board the Pantaleone in four several shipments, the first being on the 2nd, and the last on the 16th September. Three of these shipments were made by Frankleton, and the other by Clifford Webster; but I treat them all as made by Clifford Webster, Frankleton acting for him in the shipments. Bills of lading were in due course signed, and I find that Clifford Webster held these bills of lading before this bankruptcy. There is no doubt of the fraudulent intent of Webster in making this shipment. But the question I have to decide is not as to him, but as to the rights of the parties before me. The assignees are on the one side, and Messrs. Schillirri and Flood on the other, and here I must say in passing, that there is no case at all made out to bring Messrs. Schillirri and Flood into the position of parties cognisant of the frauds of Webster, or as engaged with him in unlawfully carrying off the

goods from his creditors. I think these gentlemen acted fairly and honorably in at once submitting to the jurisdiction of this Court, and leaving all questions in the matter thus to be decided there. It appears that the ship *Pantaleone* was a general ship, and on the day of the seizure of the goods had a general cargo on board, and was ready prepared for sailing. It being discovered that this property was on board the *Pantaleone*, the assignee, or rather the petitioning creditor who acted by his solicitor, procured from this Court, on the evidence then laid before it, the search-warrant granted on the 26th September. This was done on the application of counsel, and it is right here to state the order of this Court on the 30th September, 1862, permitting a case to be sent to counsel to advise as to the steps to be taken respecting the seizure of the goods in the vessel at Liverpool—that is, that the action on the warrant should be taken under legal advice. I now come to state the action taken under this warrant. On the 4th October, 1862, William Boyd, to whom this warrant was delivered, entered on board the *Pantaleone*, broke the hatches of the vessel, and forcibly took therefrom the goods so shipped by Frankleton and Clifford Webster. Freight was demanded, and the production of the bills of lading, but, not answering in any way this claim, he seized the goods, and took them from the vessel, as absolutely entitled to do so by virtue of the warrant issued by this Court. The goods thus seized were then brought to this country, and the order of the 7th October, 1862, was then made, whereby Mr. Fitzgerald giving his guarantee for the value of the goods, the goods were returned to the owners of the vessels, and all parties covenanted to abide by the order of this Court in respect of these transactions. The only further matter I think it necessary to state is, that on the 16th January, 1863, an order was made by this Court that the assignees should appoint an agent in San Francisco to look after their interest in the cargo, and armed with documents to show their title, without prejudice to any liability of the shipper; (this meant evidently shipowner). No step pursuant to this order was taken. The ship duly arrived at San Francisco, and delivery of the cargo was there made to the holders and indorsees of the bills of lading, certain indemnities being required again by them. Upon these facts, the assignees claim now from this Court the value of these goods now lost to the estate, while on the contrary the Messrs Schillirri and Flood claim to be compensated for the loss sustained by them, by reason of the seizure of the goods on the 4th October, 1862. Now, the claim of the assignees is founded, as I understand, solely on the ground that these goods were Clifford Webster's; that therefore the title to them passed to them as assignees, and that they have a right to recover their value now from the shipowners as for goods converted by them. In my judgment this reasoning is entirely unsound, for the shipowners were never wrong-doers in respect of their possession of these goods. They hold them under a contract made by Webster before his bankruptcy, and a contract which bound them to deliver them pursuant to the contract expressed in the bill of lading at San Francisco. By that contract they were bound to deliver these goods at San Francisco to *shipper's order or to his assignee,*

and they did deliver them to persons who were holders by indorsement of the bills of lading. What title should the assignees show in an action of trover under these circumstances? Would it suffice to shew that Webster shipped the goods, though the contract for the delivery of them may have passed to a third party? Is it possible they could make this a *prima facie* case, and throw on the shipowners the onus of proving that the assignees, by indorsement of the bill of lading, had not a fraudulent title? In my judgment this would be a monstrous doctrine, making strangers to the transaction the parties to prove it. It is an affirmative in the assignees to prove their title, and if they had a title against the holders of the bill of lading, it was their duty to shew to me that title before I could be called upon to give them now an award of the value of these goods from the shipowners, who appear literally to have carried out the contract shewn by the bill of lading. What evidence have I of the title of the holders of the bills of lading? Am I to presume fraud in them? Can I affirmatively find on any evidence before me that they were assigned by an impeachable title, or must I hold that the shipowner is bound to dispute the title of the holder of the bill of lading until he establishes his title by proofs of the absence of fraud in the assignment? Had the assignees conformed to the order of this Court, and sent their agent armed with proof of their title, and then demanded the goods at their port of destination, the case could then have been tried by those who had the means of bringing forward the evidence, and it is quite clear that the matter could have been reasonably tried. But the assignees have chosen deliberately to forego all action on their part, and cast on the carriers the duty of impeaching the title of the person who at all events *prima facie* filled the character of the person to whom they had contracted to deliver the goods. In my judgment the assignees must recover on a title made through the bill of lading, or show me that, notwithstanding that contract they were entitled to have the goods delivered to them. This must be their affirmative case, and in my judgment they have failed in establishing it. The claim of the Messrs. Schillirri and Flood is for the damage sustained by them, by the seizure of the goods on the 14th of October, and the consequent loss in the transshipment of the goods, and the expenses they were put to on the occasion. The first material enquiry on this claim is—were the assignees justified in entering this vessel, and forcibly seizing the goods. The ship *Pantaleone* was a general ship, and these goods were part of her cargo, and on the 4th October she was loaded and ready for sailing on her voyage. The assignees, through their messenger armed with the warrant of this Court, entered into the vessel, and claimed from the captain these goods then stored in his vessel, as being the goods of the bankrupt fraudulently concealed there. No evidence existed of any conspiracy on the part of the captain, or the owners of the vessel to carry off these goods. But on the naked claim that the shipper became bankrupt several days after the shipment, the captain was required to unload these goods, and deliver them up to the assignees. What color exists for such a claim as this? The goods

were then lawfully in possession of the shipowners, under a contract to deliver them in San Francisco, they to be paid the freight therefor, and the captain had signed bills of lading, binding him to have these goods at San Francisco in due course, for order of Webster or his assigns. Did subsequent bankruptcy annul this contract? Without payment of freight, or any security that the shipowners should not be liable on the contract, could the assignees take these goods? What colour of right is there for such a claim? Common sense goes fully on the rule of law laid down in *Abbott*, and fully recognised in *Taylor v. Tindall* (4 El. & B., 219), that the shipper of goods cannot insist on relanding them and taking them back, without paying the freight, and delivering up the bill of lading, or giving indemnity to the captain, and this should be done at a reasonable time, and indeed even this privilege seems only to have arisen through a usage of trade, as otherwise this privilege is like the rescinding a contract at the will of one party to it. Therefore, in my judgment, the act done under this warrant in breaking the hatches, and forcibly taking these goods, was wholly improvident and unjustifiable. It was felt, at the time this warrant was granted, that it required much caution to use it properly, and accordingly, by the order of the 30th September, the assignees were empowered, or rather the petitioning creditor then having the carriage of the proceedings, by his solicitor was authorised to take counsel's opinion in acting under it. I am not aware if any such advice was taken, but I unhesitatingly say that it was acted on in a manner totally unjustifiable, and with a total disregard of the plain rights of the owners and captain of this vessel. It was argued, that however unjustifiable the act of seizure was, still that it revealed the property in the assignee, and now changes the onus of proof as to the title to the goods. Such an argument I cannot hear advanced without expressing my very strongest dissent from it, and in my judgment it is almost an insult to this Court to argue that, by abusing the process of this Court in execution, rights can be acquired by the parties so acting. If the abuse of the process of this Court is brought before me, or if improvidently a warrant issues under which anything unlawful is done, my first action will ever be to repair the wrong done, and put anyone injured into the very position he stood before the wrong was inflicted. When first advanced, I thus met the proposition by a denial, and I now repeat my total dissent from it. Mr. Martin has argued very ably that this warrant cannot at all issue with respect to goods concealed in the house, or on premises of a third party in England. It is unnecessary for me to decide this point in this case, and it would certainly be a great omission in the statute if such an argument is well-founded; but it is not necessary now to decide it. In my opinion, for the reasons I have stated, the act of removing these goods was an unlawful act, and the Messrs. Schilliri and Flood are entitled to be indemnified for all the losses sustained by them in consequence of such seizure. I have now to estimate the damages, and in my opinion I must award the following, viz.:—The expenses of the Master to Dublin, and a reasonable sum for his loss of time; return freight; re-

loading; damage to crates as proved, and damage to hatches. I think I give a full measure of damages in awarding £30, with the whole costs they have been put to in the matter.

Attorneys for the shipowners, Messrs. D. & T. Fitzgerald.  
Attorneys for the assignees, Messrs. Bloomfield & Leahy.

#### RE EDWARD ELLIS.

*Election by assignees—Their liability to rent—Vesting of lease under the 268th section Protection of Landlord under the 271st section—Landlord and Tenant Act, 23 and 24 Vic., cap. 154, ss. 14 and 15.*

*The 268th section of the Irish Bankruptcy and Insolvency Act does not vest the lease of a bankrupt in the assignees, so as to make them liable to its covenants and conditions previous to election, even though in possession, and the Irish Landlord and Tenant Act, 23 and 24, Vic., cap. 154, secs. 14 and 15, does not apply. Section 271, whilst it regulates the liability of the bankrupt, also recognises the obligation of the assignees, and is the protecting section for the landlord.*

LYNCH, J., in giving judgment said—In this case a motion has been brought forward on behalf of Mr. Henry Beere claiming, as landlord of certain leasehold premises held by the bankrupt, one quarter's rent due the 24th of September, 1864; the notice of motion then requires that the assignees may be directed to elect whether they will continue in possession. When this case was first opened to me I was ready to order the amount claimed to be paid as an occupation rent for premises over which the assignee had control, and which it was beneficial to the estate that they should have used; but counsel, with a view to further the claim, insisted that the landlord had a right to the rent, as rent due to him under the lease, and accordingly I allowed the case to be argued before me on this ground. The proposition contended for is that the 268th section of the statute absolutely vests in the assignee, immediately upon adjudication, the interest in the lease, and all its responsibilities; and that section 271 is merely intended for the protection of the bankrupt against the liabilities resting upon him in respect of his contract under the lease. Upon this view it is insisted that the assignees are liable under the lease by the 268th section, and that if they, under the 271st section disclaim, they have still the liability under the Landlord and Tenant Act, 23 and 24 Vic., c. 154, s. 14 and 15, to pay the whole gale, portion of which was commenced at the time of their disclaimer; and it was mainly to arrive at this last liability that the question was argued before me. In my opinion this argument is not sustained by the statute or by any of the cases cited, or by the conclusion of common sense applied to the enactments. Section 268 certainly gives all the bankrupt's rights in the lease to the assignees, but section 271 expressly regulates the liability arising out of the transference given by section 268. By

its first words it states—"If the assignee shall elect to take such lands," &c.; then for the benefit of the landlord," gives the means of enforcing such election, and provides the full means of protecting the landlord in case the assignees refuse to take the lands. It appears to me utterly impossible to read this section and yet to hold that without election, and irrespective of such election, the assignees are bound by, and onerated with, all the covenants and conditions of any lease vested in the bankrupt. Some cases have been cited, namely, *Cartwright v. Glover* (2 Giffard 620), and *Jones v. Binns* (10 Jur. N.S. 119), as ruling the point that by and upon an adjudication in bankruptcy the estate and interest in leasehold property immediately vests in the assignees, and the entire liability to the conditions and covenants, irrespective of any election, devolves on them. I do not here stop to go with any minuteness into those cases, but I merely pass them with the observation that no such point was raised in them, and no such point could be decided in them. The cases more in point on the question raised before me are the cases of *Macklyn v. Patterson* (1 Best & Smith, 178), and *Bishop v. Bedford Charities* (1 Ell. & Ell., 697). The latter cases seem to me clearly to rule that without election the assignees are not bound; and that section 271, which regulates the liability of the bankrupt, also recognises the obligation of the assignees. In my judgment, unless the assignees elect to take the benefit of the lease, they are not bound at all by its provisions. They are bound to elect in a reasonable time, and the landlord can compel them to declare their election; and this provision does away with any hardship from such a construction. In this case before me the notice calls on the assignees to declare their election, thereby treating it as still open to them whether or not they will elect to take the lease. Yet at the same time it is argued that the landlord has them bound by that lease, notwithstanding such election made. In this Court it has been the practice where premises are used by the assignees previous to election and there has been a beneficial occupation by them, to allow a fair return to the landlord, generally the amount secured by the reserved rent; and accordingly in this case I offered to grant the motion, not as rent, but as compensation for occupation before election. However, this was refused and the case was argued on the strict right of the landlord with great ability, but without convincing me that the practice of the Court was wrong, and therefore while I order that this sum be paid to the landlord, and that the assignees do declare the election within one week, I direct the landlord to pay the costs of one argument in this case, such costs to be set off against his claim, and the balance paid over to him. I remember some acts being mentioned as having been done by the assignees, which seemed to go a long way to establish an election on their part to take the land, but no matter of this sort has been brought forward in the argument of the question raised, which was confined to the point as to the construction of the sections 268 and 271.

Counsel for the landlord—Mr. Phillips.  
Counsel for the assignees—Mr. Purcell.

## Court of Admiralty.

[Reported by William Chamney, Esq. Barrister-at-Law.]

### THE LIONESSE.

#### *Collision—Pleading and Proof—Costs.*

*In a collision suit where the promovent pleads one state of facts, and proves another, his petition will be dismissed; and under ordinary circumstances dismissed with costs; but if the impugnant vessel has pleaded a defence, which is at variance with the proofs at the hearing, the case will be dismissed, and each party will be left to bear their own costs.*

THIS was a suit of collision instituted by David Rennick and the other owners of the steam-tug "Brothers," of Dublin, 12 tons burthen, and 25 horse power, against the steam tug, "The Lioness," of South Shields, Charles Flanagan, Master, to recover compensation for injuries alleged to have been sustained by the promovent tug in a collision, which took place between those two vessels, on the 21st of October, in the bay of Dublin, a little to the south of Dalkey Island. The Court was assisted by Capt. Somerville, R.N., as a nautical assessor, and the case was, by consent, heard *viva voce*. The facts appear fully in the judgment of the Court.

*Doctors Townsend and Chatterton, Q.C.*, for petitioners, and *Doctors Todd and Elrington* for the impugnant vessel.

JUDGE KELLY.—Both vessels, it appears by the evidence in this cause, belong to owners who employ them exclusively for the purposes of towage; and on the 21st of October last a Sardinian barque, 300 tons, under full sail, free, and with the wind at south, having been seen coming up to Dublin, from between Bray Head and Killiney, they steamed down towards her, the Brothers having first reached her, and in about one quarter of an hour after, the Lioness. That was about three o'clock, p.m. On her arrival, the Lioness, finding that the Brothers had taken up her position on the starboard side of the barque, alongside, and ranging from her forechains towards her head, proceeded to range herself to starboard also, but from the mizen towards the main chains, and astern of the Brothers. As at that very juncture the circumstances out of which the alleged collision arose began to occur, the Court will read the petitioner's own statement of them, as set out in the ninth and tenth articles of their petition, it having been before alleged that the Lioness had, when taking up the position referred to, struck the Brothers on her starboard quarter. The ninth article states "that the Lioness, having then dropped astern, came up and struck the Brothers a second blow, running into the Brothers port quarter with her stem and bulwarks;" and then the tenth article states "that by the force of that blow the Lioness ran the Brothers, which then was a short distance from the barque, right ahead of the starboard bow of the barque, which consequently struck the Brothers a severe blow, making her heel over to starboard, so that the water came in at the ashport on the starboard side," and hence all her damage and injury. Such being the petitioners' own statement of their

own case, it was to be expected that they would have established, or have tried to establish it by their proofs. On the contrary, those proofs set out quite a distinct class of facts, and in the main, one at variance with that case. These are, that the second blow was no more severe than the first, and "brushed off a little paint only;" that by it "their larboard quarter was thrown out, and they were laid athwart the barque's bows, that their larboard paddle-box caught in the bowsprit shrouds of the barque and listed them over, and that the barque's anchor-stock caught them abaft the paddle-box." In a Court bound to proceed to judgment according to plea and proof, such an incongruity existing between them, as in the present instance, renders that obligation impossible. The defendants also, in the opinion of the Court, stand in a like difficulty. They took special defence to that petition, and in the tenth article of their plea aver that the alleged collision occurred as follows:—"That from the negligence of the crew of the Brothers, or their anxiety to be employed, her way was stopped while under the bow of the barque, and the Brothers having struck the bobstay of the barque, fell athwart her bows, and in endeavouring to back clear, the port rail of the Brothers caught the starboard anchor of the barque, and the barque being under way canted the Brothers over." Now the proofs, instead of being in support of that plea, set forth another state of things, some of them being at direct variance with it. They are—that Tyrrel, who was at the helm of the Brothers, partly starboarded, and let the Brothers sheer in towards the barque's starboard bow, the Brothers immediately before having been laying with the after-part of her paddle-box on the luff of the barque's starboard bow, that neglect and carelessness caused the Brothers to sheer; that the starboard helm turned the vessel's head in, and they then went ahead and parted, that they got the damage by going ahead, and that if they had remained stationary there would have been no damage. Such being the incongruities between pleas and proof, on the part of the defendant, the Court found a like obstacle as in the case of the petitioner, and should dismiss the defendant on that plea, as prayed for. To this anomaly in the practice and proceedings of that Court its attention and opinion were specially challenged by counsel for the defendant, at the close of the petitioner's case, and by counsel for the petitioner on the close of the defendant's. The proofs relied upon them being extra articulate should be considered as inadmissible in the cause; and as the objection applied to both the parties equally, the Court had no alternative but to dismiss the petition as not proven, and to let the defendants' pay their own costs, which otherwise they were entitled to from the petitioner.

Proctor for the petitioner—Mr. Hamerton, Q.P.  
Proctor for the defendant—Mr. Lee.

## Court of Appeal in Chancery.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

IN THE MATTER OF THE BAGNALSTOWN AND WEXFORD RAILWAY COMPANY.—Nov. 22, 23; Dec. 5, 1864.

*Railway—Bankruptcy.*

*A railway company, incorporated by Act of Parliament, is a joint-stock company within the provisions of the Irish Bankruptcy and Insolvency Act, 1857, 20 & 21 Vict., c. 60, and are therefore liable to be made bankrupt.*

THIS case came before the Court on appeal from the decision of Judge Berwick, one of the judges of the Court of Bankruptcy and Insolvency, whereby his Lordship decided that a railway company incorporated by Act of Parliament is a joint stock company within the provisions of the Irish Bankruptcy and Insolvency Act, 1857, 20 & 21 Vict., c. 60, and therefore liable to be made bankrupt. The following is the petition of appeal:—

"That your petitioners have been incorporated as a railway company by the statutes of the 17th and 18th Vic., c. 136, called 'The Bagnalstown and Wexford Railway Act, 1854,' to construct and maintain a railway between the town of Bagnalstown and Wexford. That by the said Act the following statutes were declared to be incorporated therewith, that is to say—'The Companies' Clauses Consolidation Act, 1845;' 'The Lands' Clauses Consolidation Act, 1845,' so far as is consistent with 'The Railways' Act (Ireland), 1851;' 'The Railway Clauses' Consolidation Act, 1845;' and 'The Railways' Act (Ireland), 1851.'" That the said Act of 1854 was amended and extended to the following statutes, that is to say—the 19 & 20 Vic., c. 88, called 'the Bagnalstown and Wexford Railway Act, 1856;' the 22 & 23 Vic., c. 36, called 'The Bagnalstown and Wexford Railway Act, 1859;' the 23 & 24 Vic., c. 24, called 'The Bagnalstown and Wexford Railway Act, 1860.' That although petitioners constructed said railway from Bagnalstown to Ballywilliam, in the County of Wexford, they have never possessed any rolling stock wherewith to work the same, except four or five mineral waggons, and, in fact, they never worked the said railway; but petitioners entered into an arrangement with the Great Southern Railway Company, under which they carried goods and passengers on the said Bagnalstown and Wexford Railway, from March, 1862, and up to the 31st December, 1863; and the said Great Southern and Western Railway Company issued, in the name of petitioners' company, tickets for goods and passengers on the said Bagnalstown and Wexford Railway, and received tolls therefor, to be accounted for with your petitioners. That if there were any profits on the working of the said railway, after deducting expenses, your petitioners should have been entitled thereto; but, in fact, there were no such profits. That since 1st January, 1864, the said Bagnalstown and Wexford Railway has not been worked, inasmuch as the Great Southern and Western Company withdrew their rolling stock, and petitioners are

unable, by reason of want of funds, to work the same. That pursuant to the powers given to your petitioners in their said several Acts, petitioners have borrowed large sums of money from various companies and persons upon the security of mortgages of the said undertaking, known as the Bagnalstown and Wexford Railway, and of all future calls on shareholders, tolls, and sums of money arising by virtue of the said Acts, and the sums so borrowed are made payable with interest, at five pounds per cent., at the periods mentioned in the said mortgages. That amongst other persons who advanced monies to your petitioners on the security of such mortgages is William Gibton, Esq., of No. 6 Gresham-terrace, Kingstown. That the said William Gibton advanced sums amounting to one thousand and five hundred pounds, on three several mortgage deeds, dated respectively the eleventh day of November, one thousand eight hundred and fifty-nine, sealed with the common seal of petitioners' company, whereby after reciting respectively the advance of £500, your petitioners granted and assigned to the said William Gibton the said undertaking, known as the Bagnalstown and Wexford Railway, and all future calls on shareholders, and all bills and sums of money arising by virtue of the said Acts, and all the estate and interest of the company in the same, to hold to the said William Gibton, until the said respective sums of £500, with interest at 5 per cent. per annum, should be paid; and by the said deed it was provided that the principal sum mentioned in said deed should be repaid on the day of November, 1864, and in the meantime the said company should in respect of the said principal sums, pay to the bearer of the coupons or interest warrants thereto annexed, at the times specified, the several sums mentioned in the said warrants. That interest on the said three mortgages amounting in the whole to the sum of £150, became due to the said William Gibton up to and ending on the 31st December, 1863, which sum your petitioners not having funds to discharge, the said William Gibton, on the 24th of March, 1864, filed an affidavit of such debt in the Bankrupt Court, and stated therein on belief that your petitioners are traders within the meaning of the bankrupt law in Ireland. That notice of the filing of that affidavit was served on John Edward Redmond, Esq., on the 26th March, 1864, and on Sir James Dombrain, two of the directors of the said company, with a demand of immediate payment, and notice that if the demand was not paid, secured, or compounded for within twenty-one days, that your petitioners should be declared to have committed an act of bankruptcy. That the said demand of £150, or any part thereof was not paid, secured, or compounded for by petitioners, as petitioners have no funds for the purpose. That on the 6th day of May, 1864, the said William Gibton presented a petition for adjudication in Bankruptcy against petitioners, and such proceedings were had thereon, that on the 27th day of May, 1864, an order of adjudication in Bankruptcy by petitioners was pronounced, finding that they had become bankrupts before the filing of the said petition, and a copy of said order of adjudication was served on two of the directors of petitioners' company, and on the secretary of petitioners, with a notice pursuant to the Bankrupt

and Insolvent Act, Ireland, 1857, allowing petitioners three days to shew cause against the said adjudication. That pursuant to the provisions of the Bankrupt and Insolvent Act, Ireland, 1857, and according to the practice of the Court, petitioners, on the 2nd day of June, 1864, served notice to shew cause for the 3rd day of June, 1864, or the first opportunity after; and by the said notice petitioners disputed the trading and the act of Bankruptcy. That the said notice, to shew cause against the said adjudication, came on to be heard on the 9th day of June, 1864, before the Honorable Judge Berwick, and the said William Gibton then proved his said demand for £150, as to which demand no question now arises. That the evidence of the trading of your petitioners was then read consisting of a deposition made by Gerald Martin, who deposed to the agreement above stated under which the said Great Southern and Western Company worked the said railway, and to which deposition petitioners refer. That the said William Gibton also proved the filing of the said affidavit by him on the 24th of March, 1864, and if petitioners are subject to be made bankrupts under the provisions of the Irish Bankruptcy and Insolvency Act, 1857, they admit that all the statutory requisites to force and establish an act of Bankruptcy by them under the last mentioned Act, were proved by the said William Gibton, and petitioners refer to the proofs and depositions on the file of proceedings. That your petitioners contended upon the said motion to shew cause, that the said company, being a railway company, incorporated by Act of Parliament, were not subject to the provisions of the Bankrupt and Insolvent Act, 1857, and that no sufficient proof had been given of trading by the said company. That on the 21st day of June, 1864, the Honorable Judge Berwick gave judgment upon the said motion to shew cause, and ordered that the cause shewn against the said adjudication, should be disallowed, and affirmed the said order of the 27th day of May, 1864. Your petitioners submit to the Court, that the order of the 21st day of June, 1864, should be reversed, and the cause shewn against the said adjudication should be allowed, for the following reasons:

"First—Because the Bagnalstown and Wexford Railway Company, being a railway company incorporated by Act of Parliament, having regard to the statutory enactments affecting railway companies, is not subject to be made bankrupt under the provisions of the Irish Bankrupt and Insolvent Act, 1857.

"Second—Because assuming the said company to be subject to be made bankrupt under the said Irish Bankrupt and Insolvent Act, 1857, no trading by the said company has been proved."

The following is the answer of Michael Murphy and Charles Henry James, official assignees of the Court of Bankruptcy and Insolvency in Ireland, the assignees of the Bagnalstown and Wexford Railway Company, to the petition of said company, dated 19th July, 1864:—

"That said Bagnalstown and Wexford Railway Company was incorporated, as in petition mentioned, to construct and maintain a railway between the towns of Bagnalstown and Wexford, and said company were by their Act of Incorporation, in said peti-



tion mentioned, (the 17th and 18th Victoria, cap. 136,) empowered to take and receive tolls and fares for the use of said railway, and for the carriage thereon of goods, cattle, and passengers. That said company constructed a portion only of the railway they were by their Act of Incorporation empowered to make, that is to say, from Bagnalstown to Ballywilliam, in the County of Wexford, and although these respondents are unable to state, whether said company did ever possess any rolling stock of their own (save that in petition mentioned), wherewith to work said line, these respondents say, that said company were carriers upon said line, and did carry goods and passengers for hire upon said line, and did issue in their own name, passengers' tickets, and bills for goods for passengers, and goods carried by them on said line; and respondents submit that said company were traders up to the 31st day of December, 1863, as carriers within the provisions of the Irish Bankrupt and Insolvent Act, 1857, and that although it may be true that said line was worked by the Great Southern and Western Railway Company, for said Bagnalstown and Wexford Railway Company, yet such working of said line was in fact, and in law, a working of same by said last-mentioned company in their name, and for their profit, if any profit had accrued from such working. That the trading of said bankrupt company as carriers up to the 31st day of December, 1863, was proved at the time of the original adjudication in this matter by the *visa voce* examination in open Court of Gerald Martin; and which Gerald Martin on that occasion made a deposition in this matter, to which these respondents refer, and by which they submit the trading of said bankrupt company as such carriers as aforesaid was satisfactorily proved. These respondents submit to the Court that said Bankrupt Company having been incorporated for the purpose of making and maintaining a line of railway for the purpose of profit, to be derived by them from the receipt of tolls and fares as hire for the use of said line in the carriage thereon of goods and passengers; and said Bankrupt Company having in pursuance of said Act of Incorporation made a portion of the said line they were so authorised to make by said Act, they the said company thereby became and were traders within the provisions of said Irish Bankrupt and Insolvent Act, 1857, and so continued up to the time of the original adjudication in this matter. That the provisions of the Irish Bankrupt and Insolvent Act, 1857, in relation to making Bankrupt Joint Stock Companies include Joint Stock Companies incorporated by Act of Parliament; and respondents submit that said Bankrupt Company although incorporated by Act of Parliament are within the words and provisions of that Act, and that at the time of the original adjudication in this matter, said Bankrupt Company was a joint stock company within the meaning of said Act. That no creditors' assignee has as yet been appointed in this matter. That the respondents submit to the Court that the order in this matter of the 21st day of June, 1864, should be affirmed, and the cause shewn against the original adjudication disallowed, with costs, for the following amongst other reasons:

"First—Because the Bagnalstown and Wexford

Railway Company, although incorporated by Act of Parliament, was at the time of the original adjudication in this matter, a joint stock company within the meaning of the Irish Bankrupt and Insolvent Act, 1857.

"Second—That said Bankrupt Company having been by their said Act of 1854, incorporated as a company for the making a railway for the purpose of conveying goods and passengers for hire, and having acted under said Act of Incorporation, were thereby constituted and became and were traders within the provisions of said Irish Bankrupt and Insolvent Act, 1857, and so continued up to the said 31st day of December, 1863."

*Kernan*, with *May*, appeared for the appellants.—Railway companies cannot be made bankrupt, neither can they be wound up. Under the 8 & 9 Vict. c. 98, passed in 1845, they might have been wound up until they were expressly excluded by the Joint Stock Companies Act of 1849: that was an Act amending an Act passed in 1849. By the Act of 1849, 12 & 13 Vict. c. 108, s. 1, it was enacted "That whereas it is expedient to amend as after mentioned the Joint Stock Companies Winding up Act of 1848, Be it enacted by, &c. that notwithstanding anything in the said Act contained importing a more limited application thereof, the same shall apply to all partnership associations and companies whereof the partners and associates are not less than seven in number, whether incorporated or unincorporated, or whether formed or subsisting before or after the passing of the said Act other than and *except railway* companies incorporated by Act of Parliament, to which company such Act shall not apply." The Act of 1845 above mentioned then ceased to comprehend railway companies in 1849; and it was entirely repealed by schedule A. of the 20 & 21 Vic. c. 60. And again, as it would appear the Legislature being ignorant of its repeal, it was repealed by the Companies Act in 1862. No Act of Parliament has ever included railways by name since their exclusion in 1849; and it is now sought to include them within the terms of the Bankrupt and Insolvent Act: although not named therein, the grounds upon which the railway companies differ from other companies are those of public utility and convenience; they cannot be considered like other associations and companies established for the mere private advantages of the shareholders and proprietors. They are for the public. The preamble of the Bagnalstown and Wexford Railway Company Act, 17 & 18 Vict. c. 136, expressly declares that the formation of the company was for "the public advantage." The State treats railway companies as companies whose property is compulsorily to be taken advantage of by the public. By the 1 & 2 Vict. c. 98, railway companies are bound to carry the mails. The 7 & 8 Vict. c. 85, s. 12, requires railway companies incorporated to carry the militia and police, together with the wives, children, and baggage of the soldiers, as also all public stores, baggage, arms, ammunition, and other necessities and things, at charges regulated by said last mentioned Act. Railway companies must further provide for the public convenience third class (Parliamentary) trains at hours to be fixed on by the directors, but subject to the approval of the Board of



Trade. Many other public burdens have been cast upon railway companies. By the 7 & 8 Vict. c. 85 the Lords of the Treasury may purchase the railways. Lastly, railway companies are under severe restrictions as to leasing their lines. The 8 & 9 Vict. c. 96, passed in 1845, makes it unlawful for such companies as obtained their Act in that year to sell or lease their lines except "under the authority of a distinct provision in some Act of Parliament to that effect, specifying the name of the railway to be so leased, sold, or transferred, and the company or party by whom such lease, sale, or transfer may respectively be made, granted, or accepted." By the 21 & 22 Vict. c. 75, s. 3, made perpetual by the 23 & 24 Vict. c. 41, railway companies are prevented taking leases of the lines of other companies "except under the powers of some Act or Acts in which the parties to such lease shall be specifically named and authorized to enter into the same." It will be thus seen that railway companies cannot lease or sell their lines without the aid of an Act of Parliament, thereby differing from all other joint stock companies. Parliament alone can give power to railway companies to do acts which all other companies could do, while other joint stock companies could have recourse to the Court of Chancery to enforce a specific performance of a sale or lease. A railway company must go to Parliament for an Act to carry out a lease or sale. *The Great Northern & Western Railway Co. v. The Eastern Counties Railway Co.* (9 Hare, 306) was an application for an injunction to restrain a company from obstructing the engines of another company from passing on the line of the defendant's railway upon the ground that the defendants agreed to give the plaintiffs the right to run their trains on the defendant's railway, and to use their stations, &c. It being necessary in support of the plaintiff's case to refer to an agreement between the plaintiff and a third company which gave the plaintiffs certain rights over a line of railway adjacent to the defendants' railway, the Vice-Chancellor (Sir G. Turner) refused the injunction, on the ground the latter agreement was illegal: "There lies," said that learned judge, "at the root of this case a question of public policy which precludes the interference of the Court. It is an attempt to carry into effect, without the intervention of Parliament, what cannot lawfully be done except by Parliament in the exercise of its discretion with reference to the interests of the public." The railway company cannot sell the soil of their line after it is opened for public traffic—*R. v. South Wales Railway Company* (6 Rail. Cas. 489, 14 Q.B. 902). If then the company cannot sell their line or soil thereof neither can their assignees. In England railways cannot be made bankrupt, neither can it be attempted in Ireland—not from the 4th, 90th, or 156th sections of the Insolvent and Bankrupt Act, which Act never mentions railway companies at all. By those three sections it is now sought to overturn the whole policy of the Legislature, which, it has been shewn, was to prevent railway shares from being dealt with by any authority in the country save that of Parliament. The 4th section defines joint stock company to "mean and include every company and body of persons associated for any banking or other commercial or trading purposes

in Ireland, and incorporated by statutes or charter, or which derives any immunity, privilege, or power under any Act of Parliament, or has been registered either provisionally or completely under any Act of Parliament save as hereinafter expressed; and all commercial or trading companies, associations, and partnerships in Ireland, the capital or profits of which is or are divided into shares, and transferable without the express consent of all the partners." Within this section it was held by Judge Berwick that a railway company was included. The 90th section gives an enumeration of such traders as are liable to become bankrupt, among whom are "carriers." It is submitted that "carriers" here cannot be held to include railway companies; but should you do so, you at once give the assignees power to sell the line, a conclusion conflicting with the above-cited decisions. Railway companies are expressly excluded from the Companies' Act of 1862, the Act for the winding-up of trading companies. This Act related to England and Ireland; and while it empowers every other company to be brought into court, it expressly excludes railways. Supposing then that the Irish Insolvency and Bankruptcy Act included railways in its purview, the effect of the Companies' Act of 1862 would be to repeal that portion of the Bankrupt Act which impliedly included railways—*O'Flaherty v. M'Donnel* (6 H. L. Cas. 142). In that case it was held that the Irish statute, 33 Geo. 2, c. 14, is repealed, so far as joint stock banks in Ireland are concerned, by the imperial statute, 6 Geo. 4, c. 42, though the former is not mentioned in the latter statute, the provisions being entirely incompatible with each other. As to railway companies being companies for trading purposes, Baron Parke, in *Bright v. Hutton* (6 H. L. C. 366), expresses a doubt that railways were companies for commercial or trading purposes. [The Lord Chancellor asked whether railway companies were established for the purpose of trading as common carriers.] Even supposing they are, the Court of Parliament alone cannot deal with them. *Vide also Furnes v. Chatham R. Co.* (25 Beav. 614). The Bankrupt Act cannot get its full scope, for it would be antagonistic to the code of railway laws. All those Railway Acts must be read as one Act, just as the Ejectment Acts have always been received as one Act.

*Brewster, Q.C., with Warren and T. White, Q.C.,* were heard in support of Judge Berwick's adjudication.—Railway companies are included in the Bankrupt Act, inasmuch as they are companies established for trading purposes—*Ex parte Barber* (1 De Gex, 391); *Ex parte Barber* (1 M.N. & G., 176); *M'Kay v. Rutherford* (6 Moore, Priv. Coun. Cas. 413); *Ex parte Morrison* (1 De Gex, 539).

THE LORD CHANCELLOR.—This case comes before us, on a petition of appeal, from the Baginbown and Wexford Railway Company, complaining of the adjudication made by Judge Berwick, by which they were adjudged bankrupts, under the 20 & 21 Vict. c. 60, which was an Act to consolidate and amend the laws relating to bankruptcy and insolvency in Ireland. The 4th section of the Act defines a joint stock company to be "Every company or body of persons associated for any banking or other commercial or trading pur-

poses in *Ireland*, and incorporated by statute or charter, or which derives any immunity privilege, or power under any Act of Parliament, or has been registered, either provisionally or completely, under any Act of Parliament, save as hereinafter expressed; and all commercial or trading companies, associations, and partnerships in Ireland, the capital or profits of which is or are divided into shares, and transferable without the express consent of all the partners." Now, undoubtedly, this company is a company associated and incorporated by statute; and it is a company, the capital of which is divided into shares, and transferable without the express consent of all the partners; *prima facie*, it is so far within the meaning of the Act; and the question is only whether it falls within the other part of the description—whether it is for commercial or trading purposes in Ireland? Now, all commercial or trading companies partake of one common object; they refer to anything that has the employment of money for profits. Profits in a railway are expected to be made quite as well for the conveyance of passengers and of goods for hire as by any common carriers on a canal, or on the ordinary roads of the country; they, therefore, become common carriers. And if we look to the subsequent section, the 90th section of the same Act, we shall see what persons are liable to become bankrupt. That section enumerates "All alum makers, apothecaries, auctioneers, bankers, bleachers, brokers, carpenters, *carriers*," and a number of other trades alphabetically arranged "shall be deemed to be traders liable to become bankrupt: Provided that no farmer, grazier, common labourer, or workman for hire, receiver-general of the taxes, or member or subscriber to any incorporated commercial or trading company established by or under charter or Act of Parliament shall be deemed as such a trader liable to become bankrupt." Common carriers then are enumerated in this section as liable to be made bankrupt; and, in fact and in law, railway companies are common carriers, and are recognized as such with all the liabilities attached to other carriers for hire; it appears to me, therefore, that railway companies may be looked on as companies for a trading purpose within the meaning of the 4th section of the Irish Bankrupt and Insolvency Act, 1857. No authorities have been cited to shew that railway companies have not come within this statute, and that they are not companies associated for commercial or trading purposes, but, on the contrary, *M'Kay v. Rutherford* (6 Moore's Priv. Coun. Cas. 414) is in point the other way. That was a contract entered into by persons in Canada with the government commissioners to supply stone for making a canal; and it was held that that was a commercial matter. There is no difference between that case and the present, both speculations are for like purposes; one for constructing a waterway, and the other a railway—one a way by land, the other a way by water; and Lord Campbell there says, p. 425, that "Whenever capital is to be laid out on any work, and a risk run of profit or loss, it is a commercial venture." Lord Campbell there delivered the unanimous opinion of the judges—*Ex parte Barber* (1 M.N. & Gord. 176) was a case upon the Winding-Up Act of 1848—the 11 & 12 Vict. c. 45—where a railway company provisionally

registered in 1845, and which had become abortive, held to be within the provisions of the Joint Stock Companies Winding-up Act of 1848. The question in that case was merely whether a company provisionally registered was within the meaning of the Act, and Lord Cottenham held it was; there, just as in the case now under consideration, the company did not carry passengers or goods for hire, the contract was to make a railway: and his Lordship says, "That even if the railway was made the company might not have used it themselves for carrying goods, but merely for enabling other persons to carry goods. This, however, would make no difference. The petitioner sets out by stating that the railway was to be for the carriage of passengers and goods; and I do not see that it makes any difference whether this was to be carried out in one way or another; whether by the company acting as carriers themselves, or allowing others to use their railway for that purpose. The object of the company was to make a railway, to be used either by themselves or others, for the carriage of persons or of goods, to be used for profit, either by letting it or by the company acting as carriers themselves." At page 182 Lord Cottenham observes in delivering judgment in the same case (the question there, being as here, whether the company was for commercial or trading purposes) as follows—"The question, therefore, really is, whether this company, being within the Registration Act, is or is not within the meaning of the Act (the 7 & 8 Vict. c. 111, s. 1, 'Be it enacted, &c., that if any commercial or trading company, now or at any time hereafter incorporated by charter or Act of Parliament, or any company or body of persons now or at any time hereafter associated together for any commercial or trading purposes, &c., shall commit any act which by this Act is to be deemed an act of bankruptcy on the part of any such company or body, a fiat in bankruptcy may issue against such company or body by the name or style of the said company or body, upon the petition of any creditor or creditors, &c.), and is not a body of persons associated for commercial or trading purposes? Now, under the bankrupt laws the word 'trading' has a fixed meaning; but the word 'commercial' has a larger sense; and whether I adopt the meaning given to the word given by two members of the committee of the privy council in *M'Kay v. Rutherford*, or any other meaning, is not material, for it is clear it is something by which profit is to be obtained. If, instead of manufacturing a railway, this company had been formed for establishing steam-packets, it would clearly have been a commercial purpose, a purpose out of which profit was to be made. The speculation would have been one having profit for its object; and no question can be raised as to the particular machinery out of which profit is to be worked as connected with the establishment of a company. The word 'commercial' has received an interpretation in the case before the privy council; but without the aid of that authority I have no doubt that making a railway for the carriage of persons and goods is a commercial purpose."—*Bright v. Hutton* (3 H. L. O. 364) was the case of a projected railway company provisionally registered; and it was held to be within the meaning of the Winding-Up Act which may be applied to it if a court of equity shall

think fit; that was an unincorporated association. The only question there was, whether an unincorporated company was within the meaning of the Joint Stock Companies' Winding-Up Act, 11 & 12 Vict. c. 45. In England it was held they were. But it was said very boldly that no case was in the books where incorporated companies were included; but that is explainable, for railways were expressly excluded from the Winding-Up Acts of 1849, and therefore from that time out railways were excluded from the purview of the Acts. It is said that the bankrupt laws do not apply in England. Here, however they do. I can have no doubt on my mind that the company is a joint stock company for trading purposes, and trading too as common carriers; and that the petition of bankruptcy was rightly presented against this company under the 151st section of the Irish Bankrupt and Insolvent Act. It has been pressed, and with considerable force, that incorporated railway companies are excepted from the Bankruptcy and Insolvency Act (though not named in such exception) on the grounds of public convenience; and further, that there is not a single case in the country that can be cited as a precedent for making a railway company bankrupt. That remark is very true, but the answer thereto is very simple, that there has not been a single bankrupt railway company in Ireland up to the moment of the Bagnalstown Railway Company becoming bankrupt. The 8 & 9 Vict. c. 98 is repealed by schedule A. of the Irish Bankrupt and Insolvent Act, 20 & 21 Vict. c. 60, passed in 1857. This last-mentioned Act, however, while repealing the 8 & 9 Vict. c. 98 is rather, as far as regards joint stock companies, a re-casting or codification of the laws relating to joint stock companies; and under the 7 & 8 Vict. c. 111, which is precisely the same in England as the 8 & 9 Vict. is in Ireland, railway companies have been made bankrupt—*Ex parte Barber, in the matter of the Tring Reading and Bassintoke Railway Company* (1 De Gex, 381), decided in 1847. Railway companies, it is true, were excluded from the operation of the Winding-Up Act of 1849. Under 20 & 21 Vict. cap. 60, the Bankrupt and Insolvent Act, however, railway companies are included. Now, great inconveniences are suggested. It is said that the Bankrupt Court is paralysed because the assignees cannot sell the railway; but they can do many other things. They can make calls, and pay creditors, and lease the railway to the company if they can work it or get others to work it; they can go to Parliament to make valid that particular sale. But it is said then that there is an absolute law against selling railways; and counsel for the appellants have relied upon the 9 & 10 Vict. c. 96. That Act contains no prohibition against selling railways at all, except such railways as were made that session of Parliament. But I cannot see how the power of selling or not selling the line affects this case. I see nothing in that point; there are many things that cannot be sold—*Ex parte Butler* (1 Atk. 210) is a case to show that a public office held by the bankrupt, such as marshal of the city of London, cannot be sold. But it is said that the bankrupt code makes the shareholders unlimitedly liable. We are not called upon to decide that point. The question may arise hereafter whether the share-

holders may be called upon to pay more than their actual shares. I am of opinion that Judge Berwick was correct in holding that railway companies are included within the 20 & 21 Vict. c. 60.

THE LORD JUSTICE OF APPEAL.—I am clearly of opinion that the judgment of the Court below ought to be affirmed. I have not a doubt on my mind that railway companies were included within the 4th section of the Irish Bankrupt Act. I entirely agree with the judgment of Judge Berwick in this case, as reported in the 9 *Irish Jurist*, N.S. 239. No doubt, it is a subject of regret that there is a difference between the state of the law in England and in Ireland. However, I concur in the judgment of my Lord Chancellor as to the state of the bankrupt law in this country. It is said that the Companies' Act of 1862 has repealed the Bankrupt Act. It is strange that if the Legislature repealed that Act they did not do so by name; for in 1862 I find no less than 50 Acts repealed by name. I see no code of laws conflicting with the bankrupt code. Well, it is said that the bankrupt laws don't apply in England to railways; here, however, they do apply. I think then that the Bankrupt Court has acted perfectly right in acting as it did. I am of opinion that this order is right. Let the assignees have their costs out of the estate.

### Court of Queen's Bench.

[Reported by William Woodcock, Esq., Barrister-at-law.]

DEVINE AND PENTONY v. THE LONDON AND NORTH WESTERN RAILWAY COMPANY.—Nov. 2, 4; Dec. 4, 13, 1864.

*Practice—Costs—Common Law Procedure Act, 1853, s. 243.*

*A summons and plaint contained two counts framed in contract, for non-delivery of certain cattle. It also contained a count for trover, and a count for detinue of cattle. Defendants traversed the contracts alleged in the first and second counts, and paid £14 2s. 6d. into Court upon the other two. Issues were taken on the contracts and on the sufficiency of the money paid into Court. The jury found for the plaintiff upon one of the counts in contract, with £14 5s. damages, but found for the defendant upon the issue as to the sufficiency of the lodgment in Court. Held, by Lefroy, C. J., and Fitzgerald, J., that the plaintiff was entitled to half costs only, he having recovered less than £20 in an action of contract, and that he could not call the money lodged in Court upon the counts in tort in aid of the sums recovered by verdict on the counts in contract.*

*Held, by O'Brien and Hayes, J., that the whole summons and plaint should be considered as one action; that that action was not for a wrong disconnected with contract, and, therefore, that the plaintiff hav-*

*ing recovered in all over £20 was entitled to his full costs.*

THIS was a motion on behalf of the plaintiffs that the taxing master might be directed to review the taxation of the plaintiff's costs, and that he might be directed upon such review to allow to the plaintiffs full costs in place of half costs, upon the ground that this action was not within the class of cases in which, by the 243rd section of the Common Law Procedure Act, 1853, half costs are only to be allowed, and on the ground that the sum recovered by this action was not less than £20. The circumstances under which the case came before the Court were as follows:—The action was brought by the plaintiffs against the defendants to recover damages for the loss of certain cattle. The summons and plaint contained four counts. The first count averred a delivery of twenty-four head of cattle to the defendants, a contract by them for certain hire to deliver the said cattle at Huntingdon within a reasonable time before a market, which was to be held at St. Ives, near Huntingdon, and a non-delivery of the cattle within such time before the market. The second count, which was also in contract, was for not delivering the cattle at Huntingdon within a reasonable time. The third count was for the defendants converting to their own use certain goods of the plaintiffs, to wit, one bullock; and the fourth for the defendants detaining certain goods of the plaintiffs, to wit, one bullock. The defendants pleaded to the first two counts traversing the contracts alleged in them respectively. To the last two counts they paid a sum of £14 2s. 6d. into Court, alleging that the plaintiffs had not suffered any greater damage. The case went to trial upon issues as to the existence of the contracts, and the sufficiency of the money paid into Court. The trial was had upon the 22nd June, 1864, before the Lord Chief Justice of the Queen's Bench. The findings of the jury appear from the *postea*, which, upon that matter was as follows:—"The jurors, &c., upon their oaths, say and find as to the first issue, that the bullocks in first count mentioned were not delivered or received by the defendants upon the terms and additions in said first count mentioned, and that the bullock in second count mentioned were delivered and received by the defendants upon the terms and conditions in said second count mentioned. Secondly, that the bullocks were delivered at Huntingdon a reasonable time before the market in first count mentioned; thirdly, that the said bullocks were not delivered by defendants at Huntingdon within a reasonable time; and fourthly, that the sum of £14 2s. 6d. brought into Court by defendants is sufficient to satisfy the plaintiffs' claim in respect of the causes of action in third and fourth counts contained, and they assess the damages of the said plaintiffs to the sum of £14 5s., in addition to the sum lodged in Court, and for their expenses and costs the sum of sixpence sterling, wherefore," &c. Judgment was accordingly marked by the plaintiffs for the sum of £14 5s., in addition to the sum of £14 2s. 6d. brought into Court, and costs. The taxing master, in taxing the plaintiff's costs, refused to allow them more than half costs, upon the ground that the sum recovered by them by their ver-

dict, and which was in respect of the counts in contract, was under £20, while the finding as to the sufficiency of the sum brought into Court upon the two last counts was against them. From this ruling the present appeal was brought.

*O'Donnell, Q.C., and Palles*, in support of the motion.—We are entitled to full costs. We have recovered more than £20 in this action, which is not one disconnected with contract within the meaning of sect. 243 of the Common Law Procedure Act, 1853.—*O'Rorke v. M'Donnell* (13 Ir. C. L. Rep., App. viii.) Money paid into Court is to be treated as money recovered in the action.—*Hughes v. Guinness* (4 Ir. C. L. Rep. 314); *Parr v. Lilliecrap* (1 H. & Colts. 615).

*Serjeant Armstrong and Boyd*, contra.—The first count is in contract, and the jury have found for us upon that. The second is also in contract, and upon that the jury have found for the plaintiff, with £14 5s. damages. The jury have also found that the sum paid into Court upon the remaining counts was sufficient. Under those circumstances the plaintiff has recovered, in an action of contract a sum under £20, and is therefore entitled only to half costs. *O'Rorke v. M'Donnell* was the case of a tender before action, and the sum found by the jury was upon the same cause of action as the money which had been tendered. *Hughes v. Guinness* was a case of lodgment in Court merely. Can it be said that the plaintiff has recovered more than £20 in an action of contract, where the two sums which make up the £20 were recovered on different counts, one set being in contract, and the other in tort? [*Hayes, J.*—Whatever the form of action was, still it was a matter connected with contract. The animal was delivered to you; how can it be said that the whole sum was not recovered in an action founded on contract?] *Blackmore v. Higgs* (10 Jur. N. S., 708; a. c., 15 C. B., N. S., 790). We have here counts in contract and counts in tort quite disconnected with each other, and they must be looked upon as totally distinct causes of action. It is only upon the second count in contract that the plaintiff has recovered, and all that he has recovered upon that is £14 5s. The counts must be treated for the purpose of costs as different actions, and the action of tort is found against the plaintiff. [*O'Brien, J.*—Suppose there was no money paid into Court, and that £17 were recovered on the counts in contract, and £4 on the counts in tort; what do you say would be the result? Would the plaintiff be entitled to full costs, or only half costs?] If we are able to shew that the two sets of counts apply to two different causes of action, we are entitled to have the ruling of the taxing-master upheld. The prayer for judgment shows that the causes of action are different. There are distinct prayers for judgment, and that must be so, as one of the counts is in detinue, in which case the prayer is for a return of the goods. The observations of Erle, C. J., in *Blackmore v. Higgs* are most important. He says, "I take the true rule to be this—that, where there are two causes of action disclosed by the declaration, and a distinct line of pleading applicable to each, the two are, for the purposes of costs, to be treated as being as distinct as if there had been two separate actions." Even though the counts here were different counts in contract, and there was no

count in tort, the plaintiff would only be entitled to half costs. In *O'Rourke v. M'Donnell*, Fitzgerald, J., lays down the same proposition as Erle, C. J. The count in detinue is not an action for a wrong.—*Danby v. Lamb* (11 C. B., N. S., 423).

*Palles* in reply.—Some sections of the Common Law Procedure Act are important upon this question. Section 60 regulates the mode in which the costs are to be borne by either party as to distinct issues. Sec. 78 is as to where the plaintiff disputes the sufficiency of the lodgment in Court. The rate of costs is the only matter which is dealt with by s. 243. *Prima facie* all costs are to be taxed according to the rate given in the schedule to the Act. There are two exceptions to this—first, an action of contract where £20 has not been recovered; and, secondly, an action independent of contract in which upwards of £5 has not been recovered. My general right to costs is given by the earlier part of the section, and it lies upon the other side to shew that the case comes within either of the exceptions. I am willing to concede that this is neither an action of contract, nor an action disconnected with contract, and therefore that it does not come within the section at all. But, taking it otherwise, if it is an action of contract, we have recovered in all upwards of £20; if it is an action of tort disconnected with contract, we have recovered more than £5. The argument on the other side is, that this is an action partly in contract, and partly in tort, and that we are obliged to shew that we recovered both £20 in contract and £5 in tort. To support that argument it is necessary to introduce two words into the 243rd section, and read "cause of action" instead of "action." The provisions of the earlier sections of the statute allow different causes of action to be joined. [*Fitzgerald, J.*—Yes, but not in one "action," but in one "summons and plaint."] Sections 5, 6, 8, and 54 of the Act must be attended to. In section 243 the word "action" must be taken to mean all the causes of action together that are included in the same summons and plaint. The result of holding otherwise may be thus shewn. Suppose a man brings an action to recover several gales of rent, each gale being under £20. Each gale constitutes a separate cause of action; yet, could it be said that the plaintiff would be entitled to half costs only, because on each gale he had recovered less than £20? [*O'Brien, J.*—A better illustration would be an action brought upon several promissory notes, for, in the case which you put, it might be said that all the gales of rent constitute but one debt.] The observations of Erle, C. J. must be taken *secundum subjectum materiam*. He never intended to lay down the rule which has been contended for.

*December 13.*—*FITZGERALD, J.*—This case came before us in the month of November on a motion on the part of the plaintiffs for a review of the taxation of the costs in the case. The officer on the taxation had allowed the plaintiff costs only on the reduced scale, and the plaintiff contended that he was entitled to the costs on the full scale. The plaint contained four counts: the first two were in contract, alleging the delivery of twenty-four head of cattle to the defendant to be delivered at Huntingdon and a non-delivery. In addition it contained two counts in tort.

The third count was in trover; the fourth was in detinue. From the judge's notes at the trial it appeared that there was no evidence given in respect of the third and fourth counts. So we can only take the character of the action from the plaint itself. It appears, therefore, that the action embraces two sets of causes of action—contract and tort. It remains to consider whether the third and fourth are disconnected with contract; but in the absence of evidence to shew that the wrong complained of was connected with contract, we must take it to be disconnected with it. The defendants pleaded to the first and second counts denying their liability, and to the third and fourth counts, treating them as one cause of action which they were, they paid into Court the sum of £14. The plaintiff took issue on the first and second counts, and the trial proceeded on that issue. In reference to the third and fourth counts, the plaintiff took issue as to the sufficiency of the sum paid into Court, but at the trial no evidence was given as to those counts, the plaintiff thus admitting that the sum was sufficient. On the first and second counts the defendant had a verdict, which entitles him to the costs of the cause on those counts. The question raised for us arises under the 243rd section of the Common Law Procedure Act; and that section after giving the plaintiff a right to the costs mentioned in the schedule to the Act, provides thus:—"Provided always, that in case the plaintiff in any action of contract (except for breach of promise of marriage) shall recover, exclusive of costs, less than £20, or in any action for any wrong or injury disconnected with contract (except replevin, or for slander, libel, malicious prosecution, seduction or criminal conversation), a sum not exceeding £5; the plaintiff in any such action shall be entitled to no more than one-half of the ordinary costs." The officer in taxing the costs of the plaintiff, having a judgment on the first two counts, and the defendant having a judgment on the last two counts, allowed the plaintiff but half the costs of the first and second counts, because the verdict on those counts was about £14 2s. In the course of the discussion on the motion, which motion, I may observe, is not of much importance, as it is not likely that we shall have again such a complication of costs—the plaintiff's argument was, that his title to the costs was independent of the Common Law Procedure Act altogether, and that it lay on the defendant to bring the case within the 243rd section. It seems to me that the argument on that was fallacious and unfounded, because on referring to the schedule to the Act, it will be found that the statutes on which the right to costs rested formerly have been repealed; and it will be seen that it is in fact under the Common Law Procedure Act, and the rules which the Court makes under it, that the plaintiff has any right to his costs. It is not necessary to refer to any authorities, save very shortly, because it appears that the words "shall recover" in the 243rd section have received a large interpretation, and in *Hughes v. Guinness* so large an interpretation as that they mean not "recover by verdict," but "recover in the action." In *Hughes v. Guinness* issue was taken as to the sufficiency of the sum brought into Court, and the sum recovered by the verdict,

when added to the sum brought into Court, brought the sum obtained by means of the action beyond £20. The Court of Common Pleas held that the plaintiff was entitled to add the two sums together, and from that decision I am not disposed to dissent. Another case referred to was *Parr v. Lilliecrap*. There a defendant paid money into Court, which the plaintiff took out in satisfaction of his demand. And it was contended that the plaintiff was entitled to no costs as having recovered nothing by the action, but the Court there put a similar interpretation on the statute before them, to that put on the Common Law Procedure Act by the Court of Common Pleas in this country, and said that he had obtained the sum by means of the action, by compelling the defendant to pay the money into Court, and that he was, therefore, entitled to his full costs. I am not aware that a case similar to the present has been the subject of decision, and it will be observed that on the facts which I have stated there is considerable peculiarity in the present case. It will be necessary to refer to some other sections in order that the ground of my judgment may be understood. By the 54th section it is provided, that "causes of action, of whatever kind (except in ejectment) may be joined together in the same summons and plaint." The language is peculiar: the words are, "causes of action may be joined." In other words, the summons and plaint may embrace dissimilar actions. That could not be done before; and the plaintiff avails himself of that privilege in the present case to include two different actions in his summons and plaint. The 76th section enables a party to pay money into Court in a larger way than was allowed previously, and he is allowed to pay in money in actions of tort. Other sections make provision for his drawing the money out. The 78th section provides that "in case the plaintiff declines to accept the sum paid into Court to satisfy the claim of the plaintiff in respect of the matter to which the plea is pleaded, the sufficiency of the payment shall be tried upon the issue raised for that purpose by the said defence; and in case of such issue being found for the defendant, the defendant shall be entitled to judgment and his costs of suit." And that section exactly applies to the present case as the issue joined is as to the sufficiency of the payment into Court. No evidence being given as to its insufficiency, and the plaintiff admitting its sufficiency, the defendant had his verdict on that issue, and is so far entitled to his costs of suit; so we have the third and fourth counts out of consideration, except so far as I shall point out. The defendant being thus entitled to judgment and full costs, the plaintiff contends that, though in this action he has recovered less than £20 in an action of contract, he can call in aid the other sum, and by adding the two sums together, so as to reach the sum of £20, he becomes entitled to the full costs of the action; that is, he contends that he has recovered £14 5s. under one set of counts, and £14 2s. 6d. under the other, and that adding the two together he is entitled to full costs. It seems to me that he cannot be permitted to do this. There are two actions—one of contract, and the other of tort disconnected with contract; and they are not to be considered the less two actions because they are comprised in the same summons and

plaint. In the action of contract the plaintiff has recovered less than £20. In the other there is judgment against him, and he is liable to the defendant's costs; and it would be strange if, being so liable in one action to costs, he would be entitled to add the sum recovered in that action to the other. I am of opinion that he has no such right. Cases were put in the course of the argument of several causes of action being joined together; and this was put among others—supposing in an action of contract several causes of action were joined, as five promissory notes, and the plaintiff got a verdict on four of them, would he be entitled to costs? I think he would, because there he had recovered on an action of contract. But the distinction here is that the plaintiff is bound to shew us that he has recovered in an action of contract a sum exceeding £20. He has failed to do so; and he cannot be permitted to add a sum recovered in a totally different action though included in the same summons and plaint. I think therefore that the judgment of the officer was right.

HAYES, J.—The defendants here entered into a contract for the carriage and delivery of certain cattle belonging to the plaintiffs. The cattle were shipped and not duly delivered. It appeared also that another beast was injured on the premises of the defendant, and in this state of things the plaintiff issued his summons and plaint which contained four counts. In the first two he claimed £50 as compensation for the non delivery of his cattle according to the contract of the defendants, and by the last two he claimed £20. These last two counts were framed, one in trover and the other in detinue, and disclosed a cause of action totally distinct from the first two. The defendants paid £14 2s. 6d. into Court on the second two counts; and that not having been taken out, the cause went down with issues as to the contract and as to the sufficiency of payment. The jury found that the payment was sufficient, but that the plaintiffs were entitled to £14 5s. as compensation for the non-delivery. The taxing master has held that under the 243rd section the plaintiffs are only entitled to half costs, whereas the plaintiffs insist that they are entitled to full costs. In this latter view I concur. The plaintiff, as it now appears, had two well-founded causes of action, and he joined them in one form of suit, making his demand amount to £28 7s. 6d. That action not being one disconnected with contract in the language of the statute must be referred to the other alternative and be treated as an action of contract. The plaintiff has then recovered more than £20 in this action, made up of the two causes, as he has recovered £14 5s. by verdict, and £14 2s. 6d. by the defendant's own admission. No doubt, the plaintiffs have unwisely pushed the case to trial, but that trial was not had for the purpose of ascertaining whether the plaintiff was entitled to compensation for the loss of the animal, but whether the compensation was sufficient. The verdict on that does not prevent the soundness of the cause of action, but impliedly says that the plaintiffs are entitled to the sum paid in but not to more. It appears to me, therefore, that the plaintiffs are entitled to the ordinary costs, subject to deduction of the costs of the issue as to the sufficiency of the sum paid in. My brother Fitzgerald

said there was no evidence as to any injury being done to the animal. There is some confusion as to that, but it is of little importance, and I have taken it as it seemed best to me.

O'BRIEN, J.—In this case I agree with my brother Hayes in opinion that the plaintiff is entitled to full costs. Independently of the provisions in this 243rd section,—by the provisions I mean the concluding part of the section which says that in certain cases he shall only recover half costs,—independently of that the plaintiff is entitled to full costs, because though the former Acts are repealed by the 243rd section, it gives full costs in the first part of it, and then contains a proviso for half costs. Therefore, whether the right of the plaintiff be considered as existing independently of the Act, and this provision introduced for the first time, or be considered as derived by this section, in either case the plaintiff is entitled to full costs unless the defendant can shew it is within the proviso at the end of the section. I think it further immaterial to consider how far the old sections are repealed or not. Well, does the present case come within this latter proviso? Now, there are two or three points established by authority, and as to which there is no dispute. One is, that money lodged in Court is to be considered as part of the money recovered in the action in estimating the amount that the plaintiff ultimately recovered in regard to the question of costs. So that we are to consider the £14 lodged in Court on the third and fourth counts as part of the money recovered in the action, and, as my brother Hayes has said, that £14 added to the sum given by the verdict would amount to a sum exceeding the utmost limit prescribed by the Act. Well, if that be the case, what is there in the present instance to authorize us, because that sum was made up of two causes of action, to say that the plaintiff should not therefore get his full costs. Now, I omit for the present any consideration of the question whether one of these counts being in detinue, it may be considered as an action for a wrong unconnected with contract altogether. In *Danley v. Lamb* (11 C.B., N.S.) it was held that the 34th section of the English Act, which empowers the judge to certify to deprive the plaintiff of costs where he recovers less than £5 does not apply to actions of detinue. It is true that the schedules to the Common Law Procedure Acts, in giving forms of pleadings, deals with the case of detinue as if it was an action for a wrong; but if it were necessary to decide that question I should require to be further satisfied that the action was one of wrong, altogether disconnected with contract. If it was we would have this case, that in an action really grounded on contract the plaintiff has recovered £28. It is said that the plaintiff has gone down to trial and has failed; and if so, that bears its penalty with it as the costs of those issues would be against him; but if detinue is an action of wrong not disconnected with contract, then he would not come within the provision. Suppose the two causes of action altogether distinct, and supposing the first cause of action on which he has recovered £14 by verdict to be an action of contract, and the other altogether a cause of action in tort, I ask again, what is there to authorize us to insert in this proviso words that are not in the Act of

Parliament; and I can well understand why that should not have been done by the Legislature. The first time the Common Law Procedure Act gives the right to incorporate several causes of action in one summons and plaint. It appears to me to be a strong thing to say that because the words "cause of action" are used in the 54th section, therefore in considering the words of the 243rd section we should consider the action as wholly distinct. Mr. Pallett referred us to words in the Act which bear, I think, a contrary construction. Section 5 speaks of special forms of personal actions not being necessary, and then section 6 says that "the right to recover any debt or damages or personal chattel, in respect of any matter of contract or of tort, or taking or detention, which might have been heretofore the subject of any action of debt, covenant, assumpsit, account, trespass, trespass on the case, trover, replevin, or detinue, shall and may be enforced in an action to be called a "personal action." The 8th section also was referred to. I look upon this as being one action partly founded on contract and partly upon tort. Well, the reading that would be put on the 243rd section would be, that in case in any action in contract founded solely on contract, the plaintiff recovers less than £20 he is to be deprived of his costs. But this is an action for both together, and if it does not come within that provision there is nothing to deprive the plaintiff of his costs; and it is for the defendant to satisfy us that the plaintiff has been so deprived. There is this fallacy also—I will not put the case of notes; but suppose the case of a party having a cause of action in contract under £20, and a cause of action in tort, under which he recovers less than £5, if he were to bring several actions it would be considered a very harsh proceeding, and he would get only half costs. But to avoid that he unites the causes of action together; and though he recovers on the contract counts less than £20, yet on the whole he recovers more than £20. He recovers more than £5 on the counts in tort, and I cannot understand why we should interpolate words into the Act and read "in case the plaintiff, in any action of contract, so far as his action is grounded upon contract, shall recover less than £20." There is this difficulty, that he has recovered a sum of more than £5. It was suggested that it would be in the power of a plaintiff to avoid the Act of Parliament by joining several causes of action. Well, I confess I think it would be desirable for a defendant to have one action only rather than to have several actions, in each of which he would have to bear all his own costs and pay half the plaintiff's. But the question of getting rid of the Act of Parliament was suggested by a case in which I think we were perfectly right, namely, that where there was one cause of action against an attorney, and where in that case the plaintiff framed his action as in tort and recovered less than £20, there we held that the action was not for a wrong disconnected with contract, because the foundation of the action is on the implied contract; and there we held also that the plaintiff could not by altering the form of proceeding entitle himself to full costs. On these grounds I have come to the conclusion that the plaintiff is entitled to full costs.

LEFROY, C.J.—In this case I agree with my bro-



ther Fitzgerald. He has adverted to the authorities, and therefore I shall not occupy time by further advertent to them; but I think on principle, and looking to the object of the distinction taken by the Legislature, that we are bound to go to the objects of the Act in making the distinction as to costs where the party recovers less than a certain sum. The policy of this new legislation, and certainly it was at least one of its most beneficial policies, was to diminish the costs of litigation, and to hold out the inducement also to parties to sue in the inferior courts, where the parties could have their rights decided on at much less expense than in the superior courts. I would also further add that there was great good sense and policy in making the party plaintiff suffer whose right to costs against the defendant was a mere legislative right, for it is by statute that the plaintiff is entitled to get costs against the defendant; and he gets them in the ordinary manner, by the jury finding, according to the statute, sixpence costs; for the statute is, that the party plaintiff shall recover no costs unless the jury gives costs as well as damages, and the plaintiff gets them under the name of costs so as to cover all his costs in the cause. Now the statute which reduces the plaintiff's right to costs once he does not recover above a certain sum, is an Act made for the ease and advantage of the defendant; and so it does operate, for if the plaintiff has an inducement by being able to look forward to getting his full costs to sue in a superior court, the very threat of an action may compel the defendant to yield to a claim. The threat of an action in the superior courts and the consequences following that, that a party is entitled to his full costs, is very often a persuasive way of obliging a defendant to yield to an unjust claim, and therefore the Legislature have made a distinction which it ought not to be in the power of a party to defeat, by avoiding the law which makes a distinction between costs in tort and costs in contract, by joining and mixing up several matters so as to entitle him by joining the two together to put himself in a position which he would not be in if he rested his claim upon matter of contract alone. Here the party is not put to the election which he ought to be put to, and which the Legislature holds out an encouragement to him to avail himself of,—namely, of his remedy in an inferior court, by holding out the disadvantage of losing half his costs if he brings into a superior court that which could be adequately tried in an inferior one, and therefore he cannot bring two actions, and out of the two to make an amount recovered in the action so as to carry him out of the penalty of not recovering a certain sum. The maxim of law is *quando duo jura in una personâ concurrunt apertum est ac si essent in diversis*. The same rule that applies to rights I apply to disabilities, and he shall not be a devise of his own to relieve himself from the disability under which he is laid in that part of the statute. We never went to trial on the matter *ex delictu*. I am putting it on a principle which shews the mischief which may arise from a party taking himself out of the rule which the Legislature has imposed. I am therefore of opinion that the taxing officer was perfectly right in this case in giving only half costs, and

not allowing him by this contrivance to evade the Act of Parliament.

*No rule on the motion, and no costs of the motion to either side.*

## Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

BENNETT v. SCOTT.—Jan. 14.

*Suggestion—Costs—Common Law Procedure Act, 1856, s. 97.*

*In an action for the diversion of a water-course, which, by consent at the trial, was referred to arbitrators selected from the jury, and in which the findings of arbitrators were entered up as a verdict of the jury, and £2. 10s. damages awarded, the defendant applied for liberty to file upon the record a suggestion that the plaintiff and defendant both resided within the same civil bill jurisdiction in which the cause of action arose. The motion was refused.*

*Martin*, for the defendant, moved for liberty to file on the record a suggestion that the parties both resided within the same civil bill jurisdiction in which the cause of action arose,\* and that the judgment be amended by expunging 6d. costs. [*Monahan, C. J.*—We have decided that already.] Where there are collateral facts outside the record, it is the uniform practice to have a suggestion on the record of those collateral facts. Before the 97th section of the Common Law Procedure Act, 1856, was passed, it was the clear right of the party to file a suggestion. He had that right by common law, and without a statute he could not be deprived of it. What was the object of the Common Law Procedure Act? To let parties have all the rights they had before, and to facilitate the obtaining of these rights; to diminish expense—so says the preamble of the Act. Very recently the Court of Queen's Bench decided that the action of account was not taken away by the Act; that one tenant in common could still maintain that action against a cotenant in common.—*Kearney v. Kearney* (13 Ir. C. L. R., 314). How did the law stand upon previous statutes? 9 & 10 Vict. cap. 95, sec. 129. [*Monahan, C. J.*—There is no doubt that if no provision was made regarding the ascertainment of residence, it would still be necessary to file a suggestion to be tried.] 13 & 14 Vict. c. 61, s. 11, is the first instance in which the words "it shall not be necessary to enter any suggestion" occur. The reason of that is easy; it was to enable the suitor at less expense to obtain his rights. The general principle on which these suggestions rest is this, that if there be not facts on the record sufficient to entitle or disentitle to costs,

\* See *Bennett v. Scott*, 8 Ir. Jur., N.S., pp. 206, 394.



these facts ought to be put on the record. In *Butler v. Corney* (2 Exch. 474) the Court seemed in doubt whether the plaintiff was not entitled to costs. Pollock, C. B., says, "It is sufficient to say that the defendant applies for a suggestion to deprive the plaintiff of his costs, and unless the opposition to that application be successfully made, we cannot deprive the defendant of that right. The question raised under that Act is at all events so doubtful a one, that we feel ourselves justified in allowing this application. [*Monahan, C. J.*—That was a case merely deciding that on the construction of an Act the Court had a discretion to decide by affidavits, or to have the question tried by suggestion.] It is an express decision that though nothing was said about a suggestion, it was the right of the party. What injustice can be done to the other side by entering this suggestion? This record is false from beginning to end.—*Peterson v. Davis* (6 C. B. 235), under 10 & 11 Vict. c. 71 (a local and personal Act) shows that a suggestion can be demurred to. If we are wrong here the other side can demur to the suggestion, and we shall have to pay the costs. These suggestions are both traversable and demurrable. *Hickman v. Colley* (2 Strange, 1120) is the leading case upon these suggestions, and shows that a party who succeeds in that suggestion can have the costs whether of fact or law.—*R. v. Poland* (1 Strange, 49). This is a fair case for a suggestion to be allowed to be entered. [*Monahan, C. J.*—You argument is, that it is *ex debito justitiae*.] The judgment is apparently very much put on this, that there had been a decision upon the point by a court of co-ordinate jurisdiction. The object of this Act, and of all modern legislation, is to facilitate appeal. Why was the Court of Appeal in Chancery established? We are entitled to have this question put on the record, and brought before a superior Court. It may be said we are late in making this application: we are not late. This is the first of the many motions in the case, which was made by us. Each of the others was made by the plaintiff, either to amend something, or to get the opinion of the Court. The proposed suggestion states that this was not a case coming within any of the excepted cases in the section such as replevin, slander, breach of promise, &c. The plaintiff required us to furnish amended books to the Court of Error. [*Monahan, C. J.*—The substantial question is, are you entitled to carry the first part of your motion?] This record is false in every particular. [*Monahan, C. J.*—Is it because our last order struck out what was in it?] Also because of the averment of 6d. costs assessed by the jurors. The jurors assessed no such sum whatever. It is a mere formal matter, but the two jurors did not assess this sum. Serjeant Sullivan refused to assess it. [*Monahan, C. J.*—Was the 6d in the postea?] Yes; what the Court directed was, that the arbitrators should fill up the issues with specific findings the same as a jury. But there was no finding by these arbitrators of 6d. costs. It was filled up, that is, it was entered up by the officer as a matter of form. That was without the sanction of these jurors, and is an additional false averment. So far from being assessed, the application to enter that sum was in point of fact refused.

*Ball, Q. C., and Palles contra.*—The former motion was made with the view that the whole truth should appear. We would have been content to have it in that way. It would be absurd to allow to be entered on the record by way of suggestion what was expunged from the record as record. Not one word is in that suggestion of an order declaring the party entitled to his costs. What do they want? A suggestion which we cannot traverse or demur to, for there is no legitimate pleading we can make, because there is no certificate of the judge who tried the case [*Christian, J.*—Why cannot you plead to that suggestion?] The object of a suggestion is to supply a fact which shall alter the effect of the judgment. This is not to put forward a fact, and by virtue of that to try their case, but to review an order. If the Court had jurisdiction, that order cannot be reviewed. They propose to try the validity of the jurisdiction of this Court in an interlocutory order. There is no precedent for that. Suppose the order were replied. There is but one mode then, to demur to that order. And how could that demurrer be tried, not upon facts, but solely upon the 97th section? This would be reviewing the whole matter which the Court decided that it had no jurisdiction because there was a trial. "Either party alleging error in fact may deliver to the Master of the Court a memorandum in writing alleging that there is error in fact in the proceedings, together with the affidavit of the matter of fact, whereupon the master shall file such memorandum and affidavit."—Section 179 of Common Law Procedure Act, 1853. The suggestion cannot be allowed in any case where there exists either an order or a certificate. The suggestion should negative the whole section, and that they cannot do. [*Monahan, C. J.*—It is argued that as we might have decided upon affidavits, whether the parties resided within the same county, there could be a suggestion to have that tried as a question of fact.] It is essential to them to assert there has been a trial. It never was the office of a suggestion to raise the question of jurisdiction. The words, "In case there shall be no such certificate or order," show that the only case where it had a right to be entered, was where there was no such certificate or order. If there was a certificate on the back of the record, would they be allowed to file it? Nor ought they, where there is an order. We called on them to amend, because of their sending in their book into the Court of Error without waiting for the decision. There is a mistake as to the duty and office of suggestion. Prior to the Common Law Procedure Act, its duty was to bring forward facts to enable the Court to give a proper judgment. The office of a suggestion is extended very much by the Common Law Procedure Act, 1853. The Court is asked to give leave to file a suggestion bringing new facts on the record after judgment—for what purpose? To show that that judgment is erroneous, and to enable the Court of Error to say this Court was wrong in giving the judgment. In the case of infancy a suggestion is not entered, but error in fact alleged to show that the judgment went upon wrong facts. It is said the Act of 1856 does not take away a right previously vested in the suitor. This is an Act to regulate practice. It substitutes a new and a more satisfactory tribunal

for ascertaining a fact which under the old and under the new practice we admit must be ascertained. Supposing a question arising upon a money demand, where the cause of action arose might be a complicated question of law and fact, the Court decides it upon affidavits. Was it ever intended that one of the parties decided against should have a right of appeal, to what, not to a Court of Error, but to a jury to try the decision of the Court? If this asked for was *ex debito justitiæ*, that result would follow. Suppose an application to set aside the verdict because against the weight of evidence; it goes again before a jury—the jury again decide as was decided, and the case comes back in a never-ending circle, where the judge differs from the jury, and the jury from the judge. The object of the section is to save expense. How does it do that, if the party can try by suggestion the very matter decided by the Court? Again the judge should “certify on the back of the record.” The back of the record is not part of the record. It would become a question of fact for the jury whether the judge had signed the certificate at the trial, and when the trial ended, which is decided by the Court on motion.—Common Law Procedure Act, 1863, s. 163. As to the 6d. costs. They did not ask to have the postea amended. The judge who tried the case should do that. The finding of the 6d. costs has nothing to do with the jury. The statute of Gloucester applies. The cases referred to were cases where there was no other way of trying the question but by suggestion. The consent referred everything to the registrar. We have a judgment, and we object to that being interfered with.

*Macdonogh, Q.C.*, in reply.—It is said no case in England or Ireland showed that a suggestion was entered after judgment.—*R. v. Erle* (5 Dowl. N. P. 595) Parke, B., says, “The only question here is, whether the defendant might not have applied to a judge at Chambers to stay proceedings.” [*Keogh, J.*—Was that a judgment of a Superior Court?] It is not said so, but it must have been. Watson moved to set aside a judgment so far as regarded costs. There has been a series of applications, but no proper final judgment. The Court makes an order, and the Master inserts what they come to expunge. It is said, in effect, the words “shall not be necessary to enter,” &c., prohibit a suggestion. It is a common law right. The common law has a remedy for every injury. Where a statute deprives a party of costs to which he is entitled under the statute of Gloucester, it is by the common law that there should be a suggestion of a matter prior to the judgment. “It is not to be presumed that the Legislature intended to make any innovation upon the common law further than the case absolutely required.”—Dwarris on Statutes, 564. The common law, which always favoured the *divinum imperium*, which did not give to either Court or jury exclusive jurisdiction, allows every fact to come upon the record. The section is remedial, and in our use and benefit. Section 163 of the Common Law Procedure Act, 1863, is solely in case of the subject. The only objection made is this, that if we file a suggestion of where the cause of action arose, if we deny there was a certificate of the judge, they will have no answer. True it is there was no certificate, but the case was

referred to three arbitrators. Cannot these matters of fact entered by suggestion be met by other matters of fact? But there is another way—let them demur to the suggestion. In one of these cases already cited, the Court gave judgment on demurrer upon the very suggestion allowed to be pleaded. [*Monahan, C. J.*—In many cases the question must arise as to whether the party is entitled to costs. It is the defendant that is bound *prima facie* to show the plaintiff is not entitled, and he must make a case before the master or before the judge. Do you push your argument to this? That matter is discussed before the master, and, on appeal, is discussed before the Court upon affidavit, and no one can doubt that the Court has jurisdiction to entertain the matter without suggestion. Suppose they do so, and give the plaintiff full costs. If that occurred, do you argue that the Court would be bound to allow you to file a suggestion repeating the same fact, to allow the matters to be retried before a jury?] The labour is not on the defendant in the first instance. [*Monahan, C. J.*—I assume there is nothing on the record showing where the cause arose, or the parties resided. It is plain that the labour is on the defendant, because the plaintiff may tax his costs, and it is for the defendant to show, &c.] Suppose the case tried at Nisi Prius, a verdict of £2 10s., where is the labour? [*Monahan, C. J.*—I am not asked for a certificate, but I am supposing a case where no judge would give the certificate, where the judge has nothing to do with where the parties reside. It is plain that the master, in the absence of something to the contrary, must tax the plaintiff's costs, and the labour is on the defendant to satisfy him that both parties reside in the same jurisdiction. I assume that is the ground. Affidavits are made, and the parties come to the Court on these contrary affidavits, and we decide they do not reside within the same jurisdiction, and the costs are then taxed. Could you come as of right to us for leave to file a suggestion?] The plaintiff's duty is to apply for a certificate at the trial. He says he did not. If he did not think proper, what is the course of the common law? The defendant files a suggestion. That was the defendant's common law right, if not taken away by the two last lines of the 97th section. [*Christian, J.*—If there be the two modes provided, must there not be an election? If the party allows this to be discussed on motion after motion before the Court, is he to be allowed after a decision has been given, to resort to the other method?] They committed mistake after mistake. We were not bound to do anything at all. The contention was if there was a trial or no trial. [*Christian, J.*—Were they not going on these matters which you want to have going on over again?] Why put us to the expense of a writ of error in fact? [*Monahan, C. J.*—What is the difference in expense?] We should have to give security.

*MONAHAN, C.J.*—We have heard the case at very considerable length. We have had the case before us often, and all the facts. We came to the conclusion that the matters which the party wanted to have on the record were not proper to have on the record. We cannot, without undoing what we did on a former occasion, hold that this is a proper matter for a sug-

gestion. If an Act entitle or disentitle a party to costs, in the absence of a mode of determining the right, a suggestion is the proper and true mode. But if the Act says a suggestion shall not be necessary, we are of opinion it was not the meaning of the section that the party was, at his option, to file a suggestion or have recourse to another mode; but that it should be disposed of by interlocutory motion, and if so it must disentitle the party to have that reviewed by a Court of Error, because interlocutory orders are not to be the subject of appeal. But we never could allow by suggestion the orders of a Court on interlocutory motion to be reviewed by another Court or by a jury. On the whole, we are of opinion there are no grounds for this application. We thought before that there was something to be done on the motions made, and we allowed the parties to abide their own costs, but here we think there was no ground for this application, and we give the plaintiff the costs of this motion.

CHRISTIAN, J.—If no means can be discovered for bringing under consideration some of the orders made in this case, I think it is most desirable that the decisions in this case, following the case in the Queen's Bench, should be the subject-matter of a higher Court. But we cannot make exceptions. I thought the 97th section plainly showed it was the intention of the Legislature that this was a matter of taxation to be dealt with outside the record, and not to be put on the record at all. The statute provides that the record be made up. This is not a discretionary clause, or one giving an option to the party, but it provides that this shall be dealt with *dehors* the record; and everything which made the Court strike out what they did before is a reason for not now putting it on the record.

BALL, J., concurred.

*Motion refused.*

The other branch of the motion stood over till the next morning, to allow the defendant's counsel to make their election.

Jan. 16.—*Macdonogh*, Q.C., intimated that he would withdraw his writ of error, and would make a separate motion.

FERGUSON v. HELY—Jan. 26, 29, 1864.

*Inspection and Copy of Writing.*

*To an action for breach of promise of marriage the defendant had pleaded a traverse of the contract to marry, and a rescission. The defendant applied to the Court that the plaintiff or her attorney be directed to furnish copies of letters written by the defendant to the plaintiff from Nov. 1862, to June, 1863, inclusive, or allow the originals to be seen. The affidavit to ground the motion stated that there was a correspondence between the plaintiff and defendant from Nov., 1862, to June, 1863, consisting of about thirty letters; and that the latter portion of*

*the correspondence contained statements which the defendant was advised and believed were material to his defence; that he never had copies of these letters: that without said letters he could not make a proper defence to the action; and that he apprehended so much of them only would be produced as would show a contract of marriage.—Motion granted.*

*An affidavit of merits by the defendant is not necessary to support such an application.*

*Clarke*, Q.C., in this case, which was an action for breach of promise of marriage, applied that the plaintiff or her attorney be required to furnish copies of letters written by the defendant to the plaintiff from Nov. 1862, to June 1863, inclusive. The defendant had pleaded two defences: 1st. A traverse of the alleged promise; 2nd. A mutual rescission. On the 18th Jan. last, we served a notice calling on the plaintiff's attorney to let us inspect documents. The defendant's affidavit states a correspondence from Nov. 1862 to June 1863, consisting of about thirty letters, and that he never had copies of these letters. The plaintiff's attorney has made an affidavit, stating that in the writ no letter or other document is relied on; that no application was made to the plaintiff for letters previous to the notice of 18th of Jan., three days prior to serving notice of trial; that deponent believed that the application was not made *bona fide* for the purpose of this action, but to be used in another action by the plaintiff's father against the defendant, which was ready to be tried at the after sittings. We state in our affidavit that these letters are material to our defence. The plaintiff's attorney does not traverse this. There is a recent and unreported case in the Court of Exchequer—*Evans v. Fleming*. That was a case of breach of promise of marriage brought by a lady. The application was on the part of the plaintiff, to get the letters she had written to the defendant, stating they were material—Common Law Procedure Act, 1853, s. 64; Common Law Procedure Act, 1856, s. 55. *Price v. Harrison* (8 C. B., N. S. 617), was an application under the common law jurisdiction of the Court; that is the same as this case. It is not denied that the defendant's case will rest on these letters. [*Monahan, C.J.*—It is apprehended the plaintiff will produce a portion of the letters to show a contract, and will suppress the portion which would show a rescission, and as she or the defendant cannot be examined, you say you are entitled to see these letters.]

*Serjeant Armstrong and Purcell* contra.—The defendant's affidavit mentions about thirty letters, and that the latter portion of the correspondence contains statements which he is advised and believes are material to the defence. There is no allegation in this affidavit of the truth of the defences or either of them. But the stereotyped form of the plea of rescission is followed. The liberty to plead double was obtained on the affidavit of the attorney, so that the defendant has never pledged his oath to the truth of the defences. The Court will take care that these applications will give no unreasonable advantage to one party over the other. [*Monahan, C.J.*—If both parties have the letters on either side, how can there be any?] *Hamer v. Sowerby* (3 Law Times, N.S. 734). The defendant does not say

there was no promise. The facts in that case, in the Court of Exchequer were, that mutual promises were frequently interchanged, and a correspondence continued up to August, 1862. There were eleven letters from the plaintiff to defendant, referring to said promises among other things, which defendant declared were necessary to her trial. Here it is the latter portion of her correspondence the defendant refers to. It is settled that in an application of this description, the inspection is required to support the party's case. In the affidavit there is nothing to show in what particular the inspection will assist; nor does the defendant tell the Court which of the defences it will support. He only swears that the latter portion of the letters contains what he is advised and believes will be necessary. [*Christian, J.*—In a bill of discovery, in a Court of equity, there should be an averment that the thing to be supported is true]. [*Monahan, C.J.*—There is not a statement in the affidavit of the truth of the defence from beginning to end. Have you any case to show that the party must pledge his oath to the truth of the defence?] [*Christian, J.*—I wish that the counsel at either side would refer us to cases from the Court of Equity which would help us].

*Jan. 29.*—*Clarke, Q.C.*, stated that there were one or two additional affidavits.

*Serjeant Armstrong* objected to these being used, and called attention to the terms of the affidavit before made. The application is, "that the plaintiff or her attorney furnish copies of letters from Nov., 1862, to June, 1863, inclusive, or allow the originals to be seen." This is the period during which it is alleged thirty letters were written by the defendant to the plaintiff, and that without said letters he cannot make a proper defence to the action; that he apprehends so much only would be produced as might show a contract of marriage. This is a fishing application. The Court is asked to exercise its power under the 64th section of the Common Law Procedure Act, 1853, and that only. It is not asked that we tell what documents we have, and the Court make such proper order, &c. It is not to the common law jurisdiction the application is made, it would fail if it were. [*Goodliff v. Fuller* (14 M. and W. 4), was before the Procedure Act in England. It was said that a bill of discovery must be had recourse to. [*Monahan, C.J.*—The question is whether in answering the bill you should not set them all forth]. Suppose there was a bill filed asking that the latter part of the correspondence should be furnished would the Court grant it. How could so vague a thing the latter portion be fixed? The affidavit should support what they ask for. The notice of motion is for all; to entitle them to that the affidavit should show the whole correspondence to be material. But it merely states that the latter portion is material. How can the Court speculate on what is the latter part? The defendant does not deny that he knows the dates or the substance of those letters. He says he never had copies of them. He should have specified what he wanted, or have excused himself for not doing so. [*Ball, J.*—Or, thirdly, have confined his application to what he does swear to.]. [*Keogh, J.*—The parties cannot be examined, and the letters must be produced or some of them. The defendant wrote them. Why should he not see the originals? Is it fair he should

go to trial with letters written by him in your possession? is he to go blindfold?] This is to aid another action depending. He has not sworn the contrary. At common law the Court would not have granted them. The question is, if he has brought himself within the 64th sec. [*Monahan, C.J.*—Is a party in possession of ten letters at liberty to produce five out of the ten?] Before the Act was passed he might. [*Thompson v. Robson* (2 H. and N., 412), recognised in [*Woolley v. Poole* (14 C. B. N.S., 538), in which *Earle, J.*, says—"You should identify the documents you ask for. A mere vague suggestion of a suspicion that the defendant had in his possession something which may be useful to support the plaintiff's case, will not do." In this way this gentleman does not swear those letters are, all of them, material to his case. He is not to be favoured. There is no general equity entitling him to all the correspondence or to one portion of it, on the ground that he may want it at the trial. Under what circumstances would a discovery in equity be granted? [*Monahan, C.J.*—Where is the authority?] I could not find any. I have looked into the cases and there is always something tangible. [*Monahan, C.J.*—He says a correspondence occurred, occupying several months, and consisting of thirty letters, and that the latter part of these is necessary; where is there any precedent in the Court of Chancery showing that that would not entitle him to the entire?] There ought to be two things: 1st. Reasonable certainty; 2nd. That the documents sought for are material to the case of the party applying. [*Monahan, C.J.*—Is there any authority for that?] Such a bill as this would be, was never heard of. In [*Hunt v. Hewitt* (7 Exchequer, 236), the application was under 14 and 15 Vic., c. 99, sec. 6. In [*Darcy v. Pemberton* (11 C.B., N.S., p. 628) the affidavit stated distinctly that the defendant never was the author of the libels. There is no averment here that the defendant will be able to maintain this defence to this action. He must show that what he seeks for is material to the maintenance of his case. [*Monahan, C.J.*—You are now on the point of his swearing to a defence on the merits. The doubt I have is, if it be absolutely necessary that he swear he has a defence on the merits]. There must be something to show the Court that the application is *bona fide*, not picking a hole in his adversary's case. [*Monahan, C.J.*—If the plaintiff succeed in showing a contract, by producing a portion of these letters, it does not seem to be picking a hole to get the whole of the correspondence brought out.]. [*Ball, J.*—It does not seem that there are any letters on the other side]. There are. [*Monahan, C.J.*—It would be right to make both parties give all the letters on both sides]. They have no letters we care about.

*Dowse, Q.C.*, in reply.—The application may be made under any of these three, the common law principle, the 14 and 15 Vic., c. 99, and the Common Law Procedure Act, 1853 and 1856. [*Monahan, C.J.*—Was there an affidavit of merits in the case in England?] No; the allegation is not necessary. The affidavit states that without the letters they would not be able to make a valid defence, and that means that with them he would be able. The allegation of the plaintiff's solicitor is that he verily believes the application is not made *bona fide*, but that the letters may

be used in another action, in reference to which he believes that all of them will be necessary to the proof of the plaintiff's case. This ingeniously overlooks our allegation. He does not say the letters are not material. He does not swear we have no defence. A portion of the letters are material in this case, because the parties cannot be themselves examined. If this was in equity, the answer of the plaintiff's counsel would be—because you ask for the latter part of the correspondence, you are not to get the whole; and because you do not ask for the whole, you are not to get any part. *Riccard v. Inclosure Company* (4 El. and Bl., 329). It is sufficient to show that the opposite party had documents, and that they are material. The statement in *Hunt v. Hewitt* is not to be found anywhere else. Five to two is the proportion in which the thing was granted. In *London Gas Light Company v. Chelsea* (6 C.B., N.S., 411), the affidavit had no such statement as is contended for.

MONAHAN, C.J.—Our impression is that the motion must be granted. Be it right or wrong, the defendant is sued for breach of promise of marriage. The parties cannot be examined, and therefore, of all others, it is the case in which it is essentially necessary to see whether *bona fide* such a contract had been entered into. These pleas have been pleaded by permission of the Court; that there was no contract; that the contract was rescinded. There is no doubt of the nature of the correspondence. The defendant says, I want the entire. He gives a reason—that the entire contains the contract, and what he alleges to contain the rescission of the contract. “Unless I get them,” he says, “the plaintiff will pick and choose, and the case will go to the jury on half the evidence.” It would be a perversion of justice if there were not some mode of preventing this. It is said it is laid down by Pollock, C.B., that there should be an affidavit of merits. I was startled to hear that it was so in equity. It is not. It may be so where you go further and ask for an injunction. The Chief Baron made the order. This motion is contested on an intelligible ground, if it was borne out that the letters are wanted for another action. We cannot take the plaintiff's statement to that effect. The defendant has pledged his oath that he wants them for the present case. The defendant undertaking to deliver up, on oath, copies of all the letters from the beginning to the end of the correspondence between the parties, let the plaintiff do the same; and, if required, produce the originals to be compared with them, with the envelopes and post marks. The parties will abide their own costs of the motion.

*Motion granted.*

## Court of Exchequer.

Reported by Oliver J. Burke, Esq., Esq., Barrister-at-Law.

TUDOR v. LAWSON.—Nov. 3, 1864.

*Costs—Civil bill jurisdiction—Attorney's residence—Common Law Procedure Act, 1856. s. 97—5 & 6 Vict. c. 82, sec. 16, Sched. thereto.*

*Plaintiff, whose residence was within the civil bill ju-*

*isdiction of the city of Dublin, brought an action upon a bill of exchange in the Superior Courts, and obtained a verdict for a sum of under £20 against the defendant, who was an attorney-at-law, and whose residence was in the country, and within a civil bill jurisdiction different from that in which the plaintiff resided.—Defendant had an office or registered place of business in the city of Dublin, but the license which defendant had was that of a country practitioner, which license, by the provisions of 5 & 6 Vict. c. 82, sec. 16, Schedule, in fact prevented him living for a longer term than forty days in the year within the limits of the said city. Held, that an attorney who had a country license, but who had a registered place of business in the city of Dublin, was not a resident in said city, within the meaning of the 97th section of the Common Law Procedure Act of 1856.*

THIS case came before the Court on motion by the defendant, “That the taxation of Henry Colles, Esq. taxing master, may be reviewed, and that the plaintiffs may be disallowed any costs of the proceedings in the cause, on the ground that the cause arose in the county of the city of Dublin, and that the parties, at the time of bringing said action and thence hitherto, have resided in said city, and that the plaintiff has recovered, inclusive of costs, a less sum than £20 in this action.” The facts of the case are set forth in the affidavit of the defendant filed the 2nd of August, 1864, which is as follows:—“That the action was brought to recover the sum of £12 10s., the amount of defendant's acceptance of the draft of the said Thomas Tudor on a bill of exchange; that said bill of exchange was accepted in Dublin, and was so accepted in consideration of scrivinery, paper, and so forth, supplied by said Thomas Tudor to the defendant, and to defendant's town correspondent in Dublin. That deponent, at the time of the bringing of this action, and for several years before, and ever since has had an office and registered place of business uninterruptedly from time to time in the county of the city of Dublin; and deponent, therefore, submits that said action ought to have been brought in the Civil Bill Court.” To this affidavit the plaintiff filed on the 24th of August an affidavit in reply—“That the action in this case was brought to recover the sum of £12 10s., the amount of a bill of exchange drawn upon the defendant by the late plaintiff, Thomas Tudor; that said bill appears to have been accepted by the defendant at Kilkenny, where he resides, and said bill was due on the 16th April, 1863. That the summons and plaint in this cause was served on the defendant at Kilkenny on the 6th August, 1864. That the defendant filed his defence thereto; ‘that he did not accept said bill’ on the 20th of said month, on which day the late plaintiff died, and that the proceedings were continued by the filing of a suggestion by the present plaintiff as his executor. That shortly before the trial was to have taken place, the defendant served the deponent with a consent in writing in this cause, dated the 4th of July last, and thereby consented to pay the sum of £6 for debt, together with all costs, properly and necessarily incurred by the plaintiff in this action when taxed and ascertained.

That defendant, on the 5th July last, by Mr. Giltrap, his town agent, signed the usual form of consent for judgment in this cause for £6, and costs, with a release of all errors, and a stay of execution until the 5th of August next. That the plaintiff's costs in this cause were furnished to the defendant, and a summons issued for the taxation thereof by Henry Colles, Esquire, the taxing master, for the 18th July next ensuing, upon which day the defendant, by his said town agent, attended the taxation thereof, and objected to any costs being taxed or allowed to the plaintiff, as the amount for the debt sued for was under £20. That notwithstanding the objection so made on the part of said defendant, the taxing master taxed the said costs, and certified same to the sum of £12 9s.; and in said costs so taxed the plaintiffs are allowed half costs only. That judgment has been marked in this cause for the sum of £18 9s. for debt and costs, and an execution issued against defendant for the recovery of said sum. That on the 6th of August last the defendant served deponent with notice that he would move this Court on Wednesday, the 2nd of November, to have the plaintiff's costs referred back to Master Colles for review. That the defendant was described in the summons and plaint in this cause as resident in Kilkenny, and defendant's affidavit, upon which this motion is grounded, appears to have been sworn at Kilkenny, and defendant has taken out a country attorney's licence, and in all letters written by the defendant to the late plaintiff relative to the bills of exchange in this cause, are dated Kilkenny."

*Harris* now moved in the terms of the notice.— This is an application under the 97th section of the Common Law Procedure Amendment Act of 1856. By that Act it is enacted, that "if in any action of contract brought after the commencement of this Act in the Superior Courts (save for breach of promise of marriage), where the parties reside within the jurisdiction of the Civil Bill Court of the county in which the cause of action has arisen, the plaintiff shall recover, exclusive of costs, a sum less than twenty pounds, or in any action for any wrong or injury disconnected with contract (not being for replevin, slander, libel, malicious prosecution, seduction, or criminal conversation), a sum not exceeding five pounds, the plaintiff in any such action shall not be entitled to any costs, unless at the trial of such cause the judge shall certify on the back of the record that the case was not one that could be tried in the Civil Bill Court," &c. The main question for the consideration of the Court here is, what was the meaning of the word "residence." Did the parties reside within the same Civil Bill Jurisdiction? If they did, plaintiff was entitled to no costs.—*Moffatt v. M'Ternan* (6 Ir. Jur. O. S. 177). [*Hughes, B.*—Which license does the defendant pay, town or country?] He pays a country license, but he has his registered place of business in Dublin within the same civil bill jurisdiction as the plaintiff.—*M'Dougall v. Patterson* (21 L. J., 27, G. P.) The case that governs this is *Darcy v. Hastings* (10 L. C. L., App. xxv.) There the plaintiff, in an action of contract, in which he had recovered a sum under £20, had an office within the civil bill jurisdiction where the defendant resided, but the plaintiff's dwelling-house where he lived with his family, was in another civil

bill jurisdiction, and it was held under the Common Law Procedure Act of 1856, s. 97, that the plaintiff was not entitled to costs. In that case it was the plaintiff had the office in the city of Dublin, while in the case before the Court it is the defendant's office that is within the city; and Monahan, C. J., says in that case, that the plaintiff, whose office was within the city, "would have been liable to have been sued in the Civil Bill Court," his office being within the city. In fact, the having of an office within the same civil bill jurisdiction would have, in the case just cited, been quite sufficient to disentitle the plaintiff from getting the costs of the action: *Keegan v. Mowlds* (8 Ir. Jur., N.S., 416) shews that the place where an attorney has his registered office is the place of his residence; though he lives in the country. On these grounds it is submitted that, having an office in Dublin, defendant should have been sued in the Civil Bill Courts, in which jurisdiction the plaintiff also resided—for by statute every solicitor must have an office in Dublin.

*O'Driscoll* contra.—The residence of the defendant is in the city of Kilkenny, and the registering of his place of business or office is not a residence within the meaning of the Common Law Procedure Act. *Keegan v. Mowlds* was decided, not on the point of residence, but was entirely as to whether Mowld's business as an attorney was transacted in Dublin although he paid but a country license, and lived in the country, and it was decided that his business being town, and not country, he should have paid the city license, residence was not an element in the case; but it was held in *Tom v. Nagle* (13 I. C. L., App. xxxviii.) that the house where a person sleeps, and not the house in the city to which his letters are addressed, is to be held as his residence. The case cited on the other side of *Moffatt v. M'Ternan* turned on where the plaintiff spent the greater part of the year, and not as to whether an office was sufficient to mean residence. In the case before the Court the defendant, by paying a country license, held himself out to the world as living in the country, while in the above cited case of *Darcy v. Hastings* it appeared the plaintiff whose office was in Dublin attended it every day in the week, while, on the contrary, an attorney who had taken out a country license could not spend more than forty days in any one year in Dublin. But the question of residence here is set at rest by the Act of Parliament which regulates the amount of duty to be annually paid by attorneys whose residence is not within the limits of the city of Dublin, 5 & 6 Vict. c. 82, sec. 16, and Schedule thereto, whereby any notary, attorney, solicitor, or proctor delivering a false note as to his residence, &c. is to forfeit £50, and if any attorney "shall for the space of forty days or more in any one year reside within the limits aforesaid," viz. the limits of the city of Dublin, "every such person shall be deemed to be resident within such limits, within the true intent and meaning of this Act, and shall be liable to the higher duties hereby imposed;" those duties are regulated by the Schedule to the Act, which provides that all attorneys or solicitors who shall reside in the city of Dublin, or within three miles thereof, shall take out an annual certificate, and pay therefor the sum of £12; but if such

attorney "shall reside elsewhere in Ireland," the duty to be paid is £8. This, then, determines the residence of the plaintiff to be in Kilkenny.

*Nov. 26.*—*PIGOT, C.B.*—This case came before us on motion to review the taxation of costs by the taxing master for the purpose of disallowing the plaintiff any costs of the proceedings in this cause, on the ground that the parties, the plaintiff and defendant, have their residence within the same civil bill jurisdiction. The plaintiff, it appears, resides in the city of Dublin, and has brought his action against the defendant, who is an attorney, to recover the sum of £12 10s., the amount of the defendant's acceptance of the plaintiff's draft. On the 5th of July the defendant signed a consent for judgment for £6 and costs. On the 15th July, the costs were taxed by the taxing officer at half costs, the sum recovered being under £20. The defendant denies that any costs whatever should be given against him, on the ground that his residence was within the same civil bill jurisdiction, he having a registered office or place of business in the city of Dublin. The defendant here, as it appears, lives in the city of Kilkenny, and the plaintiff insists that, having an office in Dublin, is not a residence within the meaning of the Act, and on these grounds the taxing officer gave the plaintiff half costs, and from that decision this appeal is now brought. It was contended by the defendant's counsel that although the attorney resided in Kilkenny, yet by statutory enactments he was bound to have a registered office in the city of Dublin, and that this entitled him to be treated as a resident in Dublin. We are, however, of opinion that a solicitor who has only a registered office in Dublin, and who pays such a license as holds him out to the world as living and practising in the country, cannot be held to have a residence in Dublin, that is to say, a residence within the same civil bill jurisdiction as the plaintiff—consequently the decision of the taxing master was right. Refuse the motion with costs.

### Court of Probate.

Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law

*COWAN v. RANKIN.*—Jan. 27.

*Evidence of execution—Attesting witnesses out of the jurisdiction.*

*Where one attesting witness had gone to America, and had not been heard of for seven years, and the other was in England, but refused to attend to be examined unless on receipt of sixty guineas, the will was established on the evidence of the handwriting of the testatrix and of the two witnesses, and of the due execution of the will, given by a person who was present at the execution, and by evidence of others as to the handwriting.*

THE testatrix in this case was Mrs. Elizabeth Rankin. She left two wills; one dated 19th May, 1853, the other in 1850; but this, it appeared from the watermark and was admitted at the hearing, was a mistake, as the watermark on the paper was evidently 1855, and it was alleged in the declaration that the correct date was 1856 or 1857. One witness, Woods, had gone to America long since and had not been heard of

for seven years. The other, a Mr. Godwin, lived in Bristol, was an architect, and refused to come over for examination or make any affidavit unless he was paid a sum of sixty guineas.

*Dr. Townsend*, for the plaintiff, proposed to prove the foregoing facts, and also by a person who was in the room at the time of the execution, though not a formal witness to the will, the due execution: and also to prove by other persons the handwriting of the testatrix and of the two witnesses. No case had been decided since the Wills Act, either in the Probate Court or the Law Courts, whether in such a case it was necessary to produce the attesting witnesses. In *Potts v. Ratty* (6 Ir. Jur. N.S., 45) the Court appeared to doubt that it possessed the power of enforcing, as the Law Courts could, the attendance of any person out of the jurisdiction. The rules of evidence now are in this Court the same as in Courts of law; and by the Procedure Act of 1856, s. 29, it is not necessary to produce the attesting witnesses to any document not requiring attestation. That would exclude a will or any document requiring attestation, but it would come under the seventh exception mentioned in 2 Tayl. Ev. 1544, where from physical or legal obstacles the witnesses could not be produced, as if dead or out of jurisdiction, or could not be found, &c. He also cited *Glubb v. Edwards* (2 M. & R. 300.)

*Dr. Ball, Q.C.*, for the defendant, did not object. [The evidence was given, and the will established by decree.]

*COWAN v. RANKIN.*

*Costs—Legatee.*

*Where a later will was erroneously antedated before a former one, as appeared from the watermark, a legatee in the former will disputing the due execution of the later one, was allowed his costs.*

*Dr. Ball, Q.C.* for the legatee in the former will, asked for costs.

*KRATINGE, J.*—I think you are entitled to costs. It was the mistake of the testator which led to the suit, and in that case costs are always allowed.

### Consistorial Court.

[Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.]

*IN RE THE DILAPIDATIONS OF THE DEANERY-HOUSE, ST. PATRICK'S, DUBLIN.*—6th Dec., 1864.

*Dilapidations—Objections to report of Commissioners—Natural decay—Wilful default—Folding doors—Dean and chapter—Faculty*—14 & 15 Vic. c.73.

*Dilapidations resulting not from wilful default on the part of the late dean, but from natural decay, charged on the benefice and not on the executors of the late dean.*

*Contra, as to those resulting from such wilful default. Folding doors introduced by the late dean into the wall of the parlour is waste, and their removal and the restoration of the wall charged against the executors of the late dean, the value of the doors being allowed for.*

*A gate house removed by the late dean, with the assent of the dean and chapter, but without any fa-*



*culity held waste, and the amount necessary to rebuild it charged against the executor of the late dean. Suggestions on the present law of dilapidations, and for its improvement.*

THIS case came before the Court on objections taken by W. H. Pakenham, the executor of the late Dean Pakenham to the report of the commissioners appointed on the application of the present dean, to report on the state of the Deanery-house, and to the schedule annexed.

Two objections were taken by the executor: 1st. That the report was erroneous; because the dilapidations in the first column of the schedule were not, and could not be, wholly caused by the want of annual and necessary repairs, but were in a great degree also occasioned by the natural effect of time and decay upon the materials of a very old house; and, therefore, an abatement should have been made on the whole amount to represent the degree in which lapse of time contributed to decay: 2nd. Because it was in error, in finding that the estate of the late dean was liable in respect of the following items in the first column of the schedule of the said report, and the executor objected that said items should not be included in the said first column, and claimed that the amount to be paid to him should be reduced by the amount of said items.—[Then followed a list of the items in detail].

*Dr. Darley, Q.C.*, for the Very Rev. John West, D.D., Dean of St. Patrick's.

*Dr. J. E. Walsh, Q.C.*, and *Dr. Townsend*, for W. H. Pakenham, Esq., the executor of the late Very Rev. Dean Pakenham, D.D.

The facts will fully appear from the following judgment:—

*DR. BATTERSBY, Q.C., V.G.*—The deanery house, the subject of this proceeding, was built in 1782, at an expense of £2,761 18s. 7½d. It was newly slated and repaired in the year 1839, at an expense of £250 charged on the benefice. In 1843, Dean Pakenham obtained a certificate against his predecessor, Dean Dawson, for the sum of £506 11s. 6d., and there is evidence that in 1845 Dean Pakenham expended £388 5s. 1½d., of that money in building a porch and in other improvements; but for this outlay there is neither report nor certificate, and consequently there cannot be any allowance or deduction. The report of the present commissioners who were appointed on the death of Dean Pakenham, charge his executors with £1,277 14s. 10½d. to be expended in present repairs, and £46 10s. 10d., making together £1,324 5s. 8½d. without charging anything on the benefice for dilapidations occasioned by lapse of time. In 1839 the value of the preferment was stated in Dean Dawson's memorial to be £1,700 a-year. Now, after deducting taxes and other outgoings, it is probably about £1,000 a-year; not a large allowance for the dignity next in rank to a bishop; and for a person with that income the amount of dilapidations reported ought to build a sufficiently good house, or to go very near doing so. The report of the commissioners is objected to, 1st. Because an abatement should be made on the whole amount, to represent the degree in which lapse of time contributed to decay: 2nd. Because all the items in the schedule to said objections annexed (about £650) ought to be charged against the bene-

fice, and not against the executors. The case was before the Court on several days, five witnesses being examined for one party, and seven for the other. These witnesses were all architects and builders, or manufacturers of the greatest respectability, yet those produced at one side differed from those produced at the other to the extent of at least 30 per cent. It would seem that the executor produced every body who would work at the lowest rate, but the present dean produced only those who required the highest attainable remuneration. One of the latter calculates on a profit of from 15 to 20 per cent. on his contracts; possibly the others might be content with 5 or 10 per cent., and if so, that would account for a good deal of the differences between them. But this is clear, that witnesses could not be found to swear up to the full amount of the commissioners' valuation in all cases; and, therefore, it must be concluded that their award is not only made at the rate of the highest marketable charge, but beyond it, which ought not to be, the statute requiring only "staunch and habitable order," and the poverty of the clergy being such, that the greatest economy ought to be practised so as to avoid, as far as possible, the involving of them in any unnecessary expenses. Some of the witnesses stated that contracts for the building and repairing of ecclesiastical residences are not, properly speaking, open to competition; but that the practice is to invite one or two persons to propose for them, and to give the contract to one of them; and it appeared that one of the gentlemen engaged in preparing the report of dilapidations himself occasionally accepted the contracts. If this practice prevail, it is not right. The diocesan architect cannot be too particular in seeing that the work is properly done, the plan of the building suitable, and the materials of the proper description, subject to this, that any clergyman should be allowed to make the best bargain he can; and I would suggest that whenever a building plan is approved of, an accurate specification should be given to the incumbent, in order that he may be able safely to advertize and contract. On the first objection, as to the degree of decay arising from lapse of time, there is no evidence. The second objection claims that the amount of the items specified in the schedule thereto being about £650, should be charged on the benefice and not on the executor: 157 items are specified, each of which has been investigated with as much care and expense as if a sum of money equal to the amount of every such item was contested in an action at law: and to the extent of £116 3s. 3d. that objection appears to be well founded, on the ground that the roof of the house for which that sum is principally charged, is in good order, with some trifling exceptions, and will last forty or fifty years, although worm or dry rot has commenced in it. I agree with the witnesses of the executor that it will be better not to disturb the roof at present; and as Dean West, since the hearing, concurs in this view, that charge will be placed in the column of prospective repairs, the necessity for it being occasioned by natural decay of things requiring permanent and substantial repairs, and not from wilful default in the late dean, such repairs coming directly within the terms of the decision of the Privy Council on *The Bishop of Limerick v. Stevenson* (1



Ir. Jur., N. S., 113). Next as to the offices, that is a case of total and absolute neglect and default. If any part of those dilapidations was the result of natural decay it has not been proved or distinguished, and would seem to have arisen from a neglect to repair the other part in time, therefore the whole of this must be borne by the executor. The folding doors between the parlours were the subject of much discussion. They were set up by the late dean in an opening made by him for that purpose; and it is insisted that they should be removed, the partition being made complete as before with a single door in it, and the breastsummer or beam at top removed. The breaking down of the partition was waste; and the present dean is entitled to have his residence as it was before the alterations, but he must allow for the value of the folding doors, which are described as of superior quality; and the breastsummer or beam over the door is not to be removed, as its disturbance might cause injury, and would not be either useful or ornamental; and a new door would lessen the privacy of the smaller room, on account of which privacy the dean insists on the removal of the folding doors. The question principally discussed was, whether the executor is liable for the destruction of a gate-house which has been partly removed to make room for a new approach to the cathedral; and it was contended that because the dean and chapter assented, though not by any act in writing or under seal, the dean was justified in allowing this waste. The gate-house was attached to the mansion, at one end of it, and fronted the entrance gate; there was no other station for a porter to attend to the gate; and it was proved that the late dean intended to build, and said he would build, a new lodge at the other end of the mansion. Under these circumstances it appears to me that the dean and chapter did not attempt to give away the property of the deanery; that if they could do so still, it must be by act under their corporate seal; and I do not think they could effect such a conveyance or gift without a faculty, which they never got—(Wiley, Dilap. 20). The sum allowed by the commissioners for rebuilding this house is £200, which appears upon the evidence to be too much, and the amount to be given will be £100.

This case illustrates so fully the hardship imposed upon the clergy by the present law of dilapidations, perhaps I may be excused for calling attention to the subject, and suggesting what appears to me to be a proper remedy, and that is, instead of the diocesan architect now paid by the clergy, to appoint two provincial architects, with adequate salaries, to be paid by the Ecclesiastical Commissioners, whose duty it shall be to visit every ecclesiastical residence once in every three years and to certify the then state of repairs thereof, which certificate when granted absolutely, or after the execution of any necessary repairs therein specified, should discharge the incumbent from all liability up to that time. On the occasion of the first visit this plan might create some trouble and expense, but afterwards it would not be attended with either, the shortness of the intervals precluding the possibility of much controversy as to the nature of repairs. It would also prevent an evil which I fear will soon be of frequent occurrence and has always happened occasionally, that is—an incumbent dying insolvent,

with his residence out of repairs, perhaps falling down, and the benefice already charged to the utmost extent that the law allows, in which case there is no available fund for repairs, when the average net income of the beneficed clergy does not amount to £200 a year, and very many are under £100. They cannot be expected to leave assets at their death: and unless repairs are done by little and little, as occasion may require, they cannot be done at all. The very costs of the commission and objections just disposed of would exhaust two years' income of many a benefice. This plan is on the same principle as that of a county surveyor; and I learn from persons who have considered the subject that the Ecclesiastical Commissioners have abundant funds for the purpose if properly applied and managed. Indeed the clergy have a primary claim on these funds, for, in addition to the property which has been taken altogether from the Church, the clergy pay a very heavy annual tax, more than sufficient to pay, and which ought to be applied to the payment of all the ecclesiastical officers. It is painful to see an educated gentleman with an income possibly not exceeding £50 a year, or even less—for there are such cases—coerced or importuned to pay the doing of necessary acts which people will not perform without remuneration, and which, being of a public nature, such as the payment of fees at visitations or the like, ought to be paid to the several officers out of the public funds of the Church in the hands of the commissioners.

The curial part of the order was as follows:—

It is ordered that the several items in red ink in the third column to said report annexed being in respect of permanent and substantial decay, and not occasioned by wilful default but by lapse of time and natural decay, amounting to the sum of £49 9s. 10d., be struck out of said first column and remain in said third column; and the repairs to which same are in said schedule allocated, together with the sum of £46 13s. 10d. in said column mentioned, making together £96 3s. 8d., be executed by money raised by way of mortgage or by money raised on mortgage pursuant to the statute 14 & 15 Vict. c. 73, s. 27, at a future time when, from the progress of natural decay, the said mansion-house shall cease to be in staunch and habitable order. And it is further ordered that the several items now appearing in the left margin of said schedule being overcharges amounting to the sum of £145 12s. 3½d. be deducted from said first column; and that the balance remaining in said first column, amounting to the sum of £1087 12s. 9d. be paid forthwith by the executor of the said late Dean Pakenham to the Very Rev. John West, the present Dean, and be by him expended within twelve months from this day, in the repairs of the dilapidations to which the sums in said first column are allocated in said schedules, and that he do produce proper vouchers within the time aforesaid to show that said money has been properly expended thereon. And it is further ordered that each of said parties do pay and discharge one moiety of the costs and expenses of said commission and report; and that each party bear his own costs of said objection and of the hearing thereof; and with these alterations it is ordered that the said report be confirmed.

Dated, &c.

## Court of Appeal in Chancery.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

**SIMMS v. QUINLAN AND OTHERS.**—Nov. 22, 1864;  
Jan. 23, 1865.

*A testator, by his will dated 15th November, 1861 bequeathed £500 to two Roman Catholic priests, or the survivor of them, "to be applied as they shall deem best for the maintenance and education of two priests of the order of St. Dominick in Ireland," also £500 to another Roman Catholic priest, the Rev. Patrick Thomas Conway, on a secret trust disclosed to him by the testator during his lifetime, the trust being, to apply said sum towards the redemption of the rent of the church of the Dominican Friars in Cork. Held, with reference to the former bequest (varying the order of the Master of the Rolls, which declared said bequest was not contrary to any express provisions of 10 Geo. 4, c. 74, and should not accrue to the residue, but should be carried out cy pres), that same was null and void, as being opposed to the Act of 10 Geo. 4, c. 74, and should accrue to the residue of the personal estate of the said testator; and with respect to the latter bequest (confirming the order of the Master of the Rolls), that being given on an invalid trust, it was void and could not be carried out cy pres.*

THIS was an appeal from the decretal order of the Master of the Rolls. The facts of the case are fully stated in the judgment of His Honor, delivered on the 3rd November, 1864, and reported 9 Ir. Jur., N.S., p. 404. The bequests contained in the will of the testator, dated 15th November, 1861, upon which the opinion of the Court was now required, were in these words:—"I bequeath £500 to the Rev. Robert White and the Rev. Bartholomew Thomas Russell, of St. Saviour's Roman Catholic Church, Dublin, or the survivors of them, to be applied as they shall deem best for the maintenance and education of two priests of the Order of St. Dominick in Ireland," and also, "I bequeath £500 to the Rev. Patrick Thomas Conway, of St. Mary's Priory, Cork, Roman Catholic clergyman." With respect to this last-mentioned bequest, although no trust appeared on the will, yet it was admitted that there was a secret trust disclosed to Mr. Conway by the said testator, in his lifetime, in effect that the said sum of £500 which he had bequeathed to him, was to be applied for the redemption of the rent of the Dominican Church, to which said Mr. Conway was attached, viz., a rent of £60 a year. The following was the order of the Master of the Rolls, from which the present appeal was brought:—"It is declared that the bequest in the will of the testator to the said Rev. Robert White and Rev. Bartholomew Thomas Russell, to be applied by them as aforesaid, is null and void, as being contrary to the sections of 10 Geo. 4, c. 7, from the 28th to the 31st, both inclusive; but that the said bequest is

not null and void by the provisions of the statute, but is only null and void as being contrary to the policy of the statute, and accordingly it is thereby further ORDERED and declared that the said legacy ought not to accrue to the residue of the personal estate of the said testator, but ought to be applied to some other charitable use, and that the appointment thereof belonged to the crown under its sign manual. And it is hereby further ordered that the said order of William Brooke, Esq., be varied accordingly, and also that the said Robert White and Bartholomew Thomas Russell are entitled, out of the assets of the said testator, to the costs of the said motion," *id est*, the motion of appeal to the Master of the Rolls from the order made by Master Brooke, declaring the bequest "null and void, and that being so void by the statute law, the same formed part of the residuary personal estate of the said testator." The following was the appeal from the said order of the Master of the Rolls by the Rev. Messrs. White and Russell:—

"That Michael John Simms, by his will of the 15th November, 1861, amongst other bequests, bequeathed to the appellants the sum of £500, for the support and maintenance of two priests of the Order of St. Dominick, in Ireland. James Richard Simms, the residuary legatee, impeached the said bequest as given upon a trust void by law, and claimed that the amount thereof should fall into the residue. These appellants asserted, first, the validity of the said bequest, and secondly, that in any case it should not fall into the residue, but should be applied *cy pres* for a valid charitable purpose; and they submitted that Her Majesty's Attorney-General should be made a party in the matter, and he was made a party accordingly. Master Brooke, by his order of 13th January, 1864, declared the said bequest to be void, and that the amount thereof should fall into the residue; but he made no declaration as to the costs of these appellants. The Master of the Rolls, on appeal by these appellants from the said order of Master Brooke, affirmed the said order so far as it declared the bequest void, but he reversed it, in so far as it made the amount fall into the residue, the Master of the Rolls declaring that the amount should be applied by the Crown for a valid charitable purpose, and he declared the appellants entitled to their costs of their appeal, but made no declaration as to their costs in the office. Your petitioners are advised that the said order is erroneous, in so far as it does not give to the appellants the costs of their claim in the office, and they appeal therefrom, and pray that the said bequest may be declared valid, and the appellants entitled to their costs, for the following (amongst other) reasons: First.—The said bequest is not susceptible of a construction not opposed to the policy of the law. Secondly.—Your petitioners should in any case be declared entitled to their costs, inasmuch as they, by their charge in the office, submitted in the alternative that even if the bequest were in itself void, the amount should be applied for a valid charitable purpose—and it has been so ruled by the Master of the Rolls. Thirdly.—But for these appellants raising that question and requiring the Attorney-General to be made a party, the amount would have been permitted to fall into the residue. Fourthly.—They should be declared

entitled to their costs on account of the great difficulty of the questions involved."

With respect to the bequest to the Rev. Patrick Thomas Conway, Master Brooke declared "that the bequest of £500 in the will of the testator, Michael John Simms, to the Rev. Patrick Thomas Conway, as trustee, for the benefit of the Order of Dominican Friars, is null and void, and being null and void by the statute law, said sum forms part of the residuary fund of said testator." Upon appeal from this order, the Master of the Rolls ordered and declared, "That the bequest in the will of the testator, Michael John Simms, of £500 to the Rev. Patrick Thomas Conway, of Saint Mary's Priory, Cork, Roman Catholic clergyman, is null and void as being contrary to the policy of the sections of the 10 Geo. 4, c. 7, from the 28th to the 30th both inclusive, having regard to the evidence in the case as to the trust upon which the said bequest was made; but the Court doth declare that the said bequest is not null and void by the express provisions of the said statute, but is only null and void as being contrary to the policy of the said statute; and it is further ordered that the rest of the motion do stand for judgment." The Rev. Mr. Conway now appealed from the said order of the Master of the Rolls, in so far as it declares that the bequest of the sum of £500 to this appellant is void as being contrary to the policy of the sections of the Act of Parliament therein referred to; and the appellant prayed that the said order may be varied accordingly for the following reasons: First.—The Act of Parliament in question in no way invalidates a gift clothed with such a trust as the said bequest of £500 to this appellant. Secondly.—Even supposing that by the indirect effect of the Acts, gifts whose tendency is to perpetuate the religious orders therein mentioned, are void as being contrary to the policy of the Act, yet no such tendency is necessarily involved in the bequest to this appellant, or by the parol trust attaching to that bequest. Thirdly.—So long as members of the Dominican Order are permitted to remain in this country, and to exercise their vocation as priests, there is nothing in the Act of Parliament or in the policy of the Act to incapacitate such members from holding property. Fourthly.—More especially must this be the case, considering that there are still members in Ireland of the Dominican Order, who were such before the passing of the Act of Parliament in question, and who have been duly registered pursuant to that Act, and who, therefore, enjoy to the full extent all the rights of British subjects. Fifthly.—The Roman Catholic Chapel for whose benefit the bequest was given, is as it appears by the evidence, one of the public chapels in the city of Cork, largely frequented by the Roman Catholics of that city, and as such is the object of a valid charitable disposition. Sixthly.—Because the aforesaid trust for the redemption of a rent of £60 per annum, was a valid and legal trust being for the benefit of the trustees liable to the payment thereof.

The petitioner brought his appeal against so much of the decretal order of the Master of the Rolls as declared that though the bequests were invalid, yet the testator's intention might be carried out by applying same to some other charitable purposes, in the following terms:—

That in the said petition to the Court of Chancery for administration of the assets of the said testator as aforesaid, it is charged by your petitioner that several of the legacies given by the will of the said testator are void, as being contrary to the laws and statutes of the realm; and that in the charge filed by your petitioner in said matter for the purpose of impeaching the said legacy to the said Messrs. White and Russell, and claiming the benefit thereof for petitioner as residuary legatee as aforesaid, it is alleged and charged—"That the said Order of St. Dominick in Ireland, for the education and maintenance of two members of which Order the said legacy is so bequeathed as aforesaid, is a religious order, community, or society of the Church of Rome, resident in the United Kingdom, and bound by monastic vows," and that same was an illegal society; and it is thereby submitted that the said legacy having been bequeathed for the maintenance of the said Order, and for the education of priests to be members of the same, is void for illegality, and also for uncertainty, and in the affidavit made by your petitioner in support of the said charge, and filed on the 26th day of June, 1863, to which petitioner begs to refer, it is stated that the said Rev. Robert White and the said Rev. Bartholomew Thomas Russell are members of the said society, and that the same is a religious order, community, or society of the Church of Rome, resident in Ireland, and bound by monastic vows, and that most of the members of the said society at present in Ireland have joined same within the last thirty years. That the said Rev. Robert White and the said Rev. Bartholomew Thomas Russell, by their charge filed in this matter on the 5th day of May, 1863, admit that they are members and priests of the said Order of St. Dominick, and that same is an Order of the Roman Catholic Church, bound by monastic vows, but say they were members of the said Order prior to the 19th of April, 1829; and that the said Rev. Robert White delivered to the clerk of the peace for the city of Dublin, in or about the month of October in said year; and that the said Rev. Bartholomew Thomas Russell, on or about the 7th day of October in the same year, delivered to the clerk of the peace for the county of Cork the notice or statement in writing required by the 28th section of the statute of the 10th of George the IV., chapter 7; and it is further stated in the said discharge that there are in Ireland considerable numbers of the said Order who were members thereof before the passing of the said statute, and who had delivered to the clerks of the peace for their respective counties such notice or statement as aforesaid; and the said Rev. Messrs. White and Russell submitted that the said bequest on the trust aforesaid was not invalidated by the terms of the statute aforesaid; and they further submitted that even if the said bequest should be deemed illegal, same should be applied under the directions of the Court of Chancery to some such charitable purpose as would most nearly approximate to the object specified by the testator, and a scheme accordingly settled under the directions of said court. That the Right Hon. Thomas O'Hagan, Attorney-General for Ireland, by his charge filed on the 17th day of November, in the year 1863, submitted to the said Court, that if it should be of opi-

nion that the trust on which the said bequest was made was illegal the same was not invalid or void, but having been made with a charitable purpose should be carried into effect, either by the Crown or under the direction of the said Court, by a scheme to be settled *cy pres*. That the said Rev. Thomas White and the Rev. Bartholomew Thomas Russell appealed from the said order of the said William Brooke, Esq., to the Court of the Right Hon. the Master of the Rolls, but that no appeal from the said decision was lodged on behalf of the Crown by the Attorney-General, who it is submitted must be thereby taken to have acquiesced in the said order of the 13th of January, 1864. That accordingly on the hearing of the said appeal of the said Messrs. White and Russell before the Right Hon. the Master of the Rolls, it was submitted by counsel for the petitioner, that inasmuch as there was no appeal by the Attorney-General from the said order of the 13th January, 1864, the Crown was concluded thereby and could not be heard to dispute the validity of same, and that neither were the Messrs. White and Russell entitled upon the ground of any supposed right in the Crown or the Court of Chancery to the application of the fund, to have the said order varied or set aside if the Court should be of opinion that the said order was right in so far as it declared the said legacy to the said Messrs. White and Russell to be null and void, owing to the unlawfulness of the trust on which the same was given, but nevertheless counsel for the Attorney-General, and also for the said Messrs. White and Russell, were heard against the said Order, upon the ground, amongst others, that even if the said legacy was thereby properly held to be void, same should have been held to be applicable to some other charitable purpose *cy pres* or by the Crown under its sign manual. The grounds of appeal are as follows: Firstly, that his Honor should have held that the said legacy was null and void, as being by necessary construction and intendment in contravention of the provisions of the 10th of George IV., chap. 7, making it illegal from thenceforth to enter into such an order or society as that of the said Order of St. Dominick, and therefore illegal to give or direct money to be applied for the education and maintenance of persons with the view to their transgressing the said provisions of the said statute by becoming members of the said Order. Secondly, that whether his Honor was right or not in holding that the said legacy was null and void, not as being contrary to the provisions of the statute, but as being contrary to the policy thereof, he should have held that the said legacy being given on a special trust, which failed for illegality, no such general charitable intent was disclosed thereby as entitled the Crown or the Court of Chancery to the application of same, and should therefore have declared that the said legacy accrued to the residue of the testator's personal estate. That as the Attorney-General did not appeal from the said order of the 13th January, 1864, the Crown was bound thereby; and therefore his Honor being of opinion that the said legacy to the said Messrs. White and Russell was null and void for illegality, should have dismissed their appeal with costs, same having failed on the only ground on which it was competent for them to object to the said order—namely, their right

to be paid the said legacy to be applied on the trust indicated by the said testator.

*Flanagan, Q.C.*, with *John O'Hagan* appeared for the appellants, Messrs. White, Russell, and Conway.—By the common law from the earliest times to the times of the change of religion in this country, bequests to monastic institutions were good and valid. The statute law after the Reformation changed the system and prevented bequests from being then valid, which at common law might, and so things remained until the 10 Geo. 4, chap. 7, A.D., 1829, which was "An Act for the relief of His Majesty's Roman Catholic subjects," that Act relieved the Roman Catholic subjects of his Majesty from the burdens imposed upon them by statute, and, save so far as was excepted by that or other unrepealed Acts, it restored the common law, which, in this case, was to the extent of admitting bequests to monastic institutions to be good and valid. From section 28 to the close of the 36th, are the sections relied upon on the other side as the sections disqualifying monasteries from receiving bequests, but it will be observed that those sections merely impose restriction upon those bound by monastic or religious vows, by the schedule to the Act, a registry of the name of the parties, their age, place of birth, the name of the order or community, and the usual residence of the superior, are required to be lodged with the clerk of the peace of the county where such person shall reside. In *The Attorney-General v. Gladstone*, (13 Sim. 7) the testator gave to T. R. £15,000, to be by him applied for the use of Roman Catholic priests in and near London, at his absolute discretion. T. R. died in the testator's life time, and it was there held that the legacy was not void for *uncertainty*, and did not lapse by T. R.'s death in the testator's life time, but was good as a charitable legacy, and that it must be applied for the benefit of persons filling the character of Roman Catholic priests in and near London at the testator's death, and, afterwards, according to a scheme to be approved of by the Master.—There can be no possible objection to the redemption of the rent of the chapel on Pope's Quay in Cork, for by statute 7 & 8 Vict., c. 97, s. 15, it is enacted that persons or bodies may by deed or will vest lands in the commissioners of charitable bequests for Roman Catholic purposes, such as follows, "building, enlarging, upholding, or furnishing any chapel or place of religious worship, professing the Roman Catholic religion, or in trust for any archbishop or bishop, or other persons in holy orders of the Church of Rome, officiating in any district or having pastoral superintendence of any congregation of persons professing the Roman Catholic religion, and for those who shall from time to time so officiate or shall succeed to the same pastoral superintendence, or for building a residence for his or their use, and such estate, interest, or property, in such lands, tenements, or other hereditaments, goods and chattels, shall vest in and be holden by the said commissioners subject to the trusts of such deed and will respectively, and shall be holden without any writ or licence other than this Act." This section concludes with a proviso which goes no further towards restraining or rendering incapable monastic persons, than the 10th Geo. 4, c. 7, had done before. The following is the proviso:—"Provided always, that nothing herein contained shall

be construed to render lawful any donation, devise, or bequest to or in favour of any religious order, community, or society, of the Church of Rome, bound by monastic or religious vows, prohibited by an Act passed in the 10th year of King George 4, entitled 'An Act for the relief of His Majesty's Roman Catholic subjects,' or to or in favor of any member or members thereof." A bequest to the monks of Shandon has been held to be a good bequest in *Carberry v. Cox*, (3 Ir. Ch. 231). Should, however, the Court hold that the bequests were void, then and in that case their Lordships would be called upon to confirm the judgment of the Master of the Rolls, whereby his Honor decided that they were bequests which might be carried out *cy pres*. The cases are many on this point, some of which had regard to bequests prior to the Roman Catholic Relief Act, where the bequests were carried out *cy pres*, the bequest being for charitable purposes.—*The Attorney-General v. Todd*, (1 Keene, 803); *Muggoridge v. Thackwell*, (7 Vesey, Jun. 36); *Carey v. Abbot*, (7 Vesey, Jun. 490); *Attorney-General v. Baxter*, (1 Vernon, 248); *Corbyn v. French*, (4 Ves., Jun., 418). This last cited case will be relied upon on the other side as an authority to shew that this bequest, if invalid, shall not be carried out *cy pres*, but that case is distinguishable from this, because that was in direct violation of the provisions of the 9 Geo. 2, c. 36.—There a legacy to the trustees of a chapel for Protestant dissenters, to be applied by them towards the discharge of the mortgage on the said chapel, was held void under the last mentioned Act, and so the Court was of opinion that it might not be applied *cy pres*. The gift, however, in the case before the Court, if it can be held at all that the bequest is void, it must be as against the policy and not the letter of the law. The most remarkable case in the books on this doctrine of *cy pres* is that of *Da Costa v. De Pas* (1 Amlb. 228)—that was a legacy to establish a Jesuba for instructing Jews in their religion, and it was held that it was for a charitable purpose and should be applied *cy pres*.—*Jeffreys v. Alexander* (8 H. L., 594).

*Serjeant Sullivan, Brewster, Q.C., and Dwyer* were for the residuary legatee, those bequests are opposed to the policy of the law: [The arguments against the validity of these bequests are fully given in the judgment of the Master of the Rolls, 9 Ir. Jur., N.S., p. 406]. The judgment of his Honor, however, though correct in holding the bequests to be void, is erroneous in holding that they might be carried out *cy pres*, and Master Brooke was right in the view he had taken, namely, that the *cy pres* doctrine did not apply.

*The Solicitor-General (Lawson)* with *Waters* appeared for the Attorney-General.

*Jan. 23.*—THE LORD CHANCELLOR.—This is a petition of Appeal by different parties, and comes before us complaining of an order made by the Master of the Rolls, varying in part an order made by Master Brooke in reference to certain bequests and legacies contained in the will of Mr. Michael John Simms. The first question arises upon a bequest to the Rev. Robert White and the Rev. Bartholomew Thomas Russell, and next as to a bequest to the Rev. Robert Conway. Two questions, or rather three, arise on each of these

two bequests, first, whether they were void; secondly, if they were void, were they actual charitable bequests which the Court would direct to be carried out, either by their own authority, or by application of the *cy pres* doctrine, or by the direction of the Crown under its sign manual. These two questions resolve themselves into two others of importance in the case; but the main questions are whether the bequests are void, and whether although they be void, they are so far void as to let the doctrine of *cy pres* have application as being charitable bequests. Now, the principal discussion upon the subject arose upon the latter of these two questions—whether these were charitable bequests capable of being administered according to the *cy pres* doctrine, or by the authority of the Crown under its sign manual. The first question is to be considered, and before we approach the latter one at all, we must come to the conclusion as to the mode in which, and the character in which the law operates upon these bequests, so as to make them void. Now, I may say the three modes in which bequests of this kind would be void are—first, one might be a bequest in contravention of the express words of the statute; the second is, whether, even though they be not prohibited by the express words of the statute, they are not so directly in contravention of its policy as to be void; and the third is, whether they be not void by the policy of the common law, having regard to the constitution of the societies, and the state of legislation in reference to them. Now, the first question is—are the bequests void by the operation of any Act of Parliament? I don't mean void by analogy to the Act, or from necessary intendment arising out of its construction; but are they, or are they not void by the general operation and effect of any Act of Parliament? That question appears to me to lie at the root of the whole of this case, and particularly, I believe, in reference to the bequest to the Rev. Robert White, and the bequest to the Rev. Bartholomew Thomas Russell. The passage in the will is as follows:—"I bequeath £500 to the Rev. Robert White and the Rev. Bartholomew Thomas Russell, of St. Saviour's Roman Catholic Church, Dublin, and the survivor of them, to be applied as they deem best for the education and maintenance of two priests of the order of St. Dominic in Ireland." I quite concur in the opinion of the Master of the Rolls, which is very clearly put by him—that, reading these words, as we are bound to do, in the fair and ordinary acceptance of them, this cannot be considered as a bequest for the benefit of any person who was a member of the order at the time of the passing of the 10th Geo. IV., cap. 7, the Catholic Relief Act. It speaks of the education of gentlemen who would be now at an advanced period of life, and whose education would be long since completed. I must read this passage, as intended to provide for the education and future maintenance of two priests to be added to the order of St. Dominic. It is very clear—upon the evidence there is no controversy about it—that the order of St. Dominic is a monastic order, consisting of persons bound by monastic vows, and consequently an order to which the provisions of the 10th of Geo. 4, cap. 7, are plainly referable; but there is no particular evidence as to what the object of the order was. We are only to consider now, what is

the operation and effect of that statute on gifts for the maintenance and education of persons who are to become members of that order? We must notice the provisions of 10 Geo. 4, c. 7, every one of them. They begin by reciting "that, whereas, Jesuits and members of other religious orders, communities or societies of the Church of Rome, bound by monastic or religious vows, are resident within the United Kingdom, and it is expedient to make provision for the gradual suppression and final prohibition of the same therein. Be it therefore enacted." That section then is directed against the future existence of such bodies in this kingdom, and the section then requires that all existing members of such orders shall deliver a certain memorandum to the clerk of the peace, and thereupon that person is relieved from all the consequences of the Act. Well, then, we come to the 29th and other subsequent sections which proceed to say—

"That if any Jesuit, or member of any such religious order, community, or society as aforesaid, shall after the commencement of this Act, come into this realm, he shall be deemed and taken to be guilty of a misdemeanour, and being thereof lawfully convicted, shall be sentenced and ordered to be banished from the United Kingdom for the term of his natural life. Then follows the 33rd section—

"That in case any Jesuit, or member of any such religious order, community, or society as aforesaid, shall, after the commencement of this Act, within any part of the United Kingdom, admit any person to become a regular ecclesiastic, or brother or member of any such religious order, community, or society, or be aiding or consenting thereto, or shall administer or cause to be administered, or be aiding or assisting in the administering or taking, any oath, vow, or engagement, purporting to bind the person taking the same to the rules, ordinances, or ceremonies of such religious order, community, or society, every person offending in the premises in England or Ireland shall be deemed guilty of a misdemeanour, and in Scotland shall be punished by fine and imprisonment." By the 34th, 35th, and 36th sections it is enacted—

"That in case any person shall, after the commencement of this Act, within any part of this United Kingdom, be admitted or become a Jesuit, or brother or member of any such religious order, community, or society as aforesaid, such person shall be deemed and taken to be guilty of a misdemeanour, and being thereof lawfully convicted, shall be sentenced and ordered to be banished from the United Kingdom for the term of his natural life.

"That in case any person sentenced and ordered to be banished under the provisions of this Act shall not depart from the United Kingdom within thirty days after the pronouncing of such sentence and order, it shall be lawful for his Majesty to cause such person to be conveyed to such place out of the United Kingdom, as his Majesty, by the advice of his Privy Council, shall direct.

"That if any offender, who shall be so sentenced and ordered to be banished in manner aforesaid, shall, after the end of three calendar months from the time such sentence and order hath been pronounced, be at large within any part of the United Kingdom, without some lawful cause, every such offender being so at

large as aforesaid, on being thereof lawfully convicted, shall be transported to such place as shall be appointed by his Majesty for the term of his natural life."

We have here distinct enactments of a most stringent and penal character against the after creation of any member of this order. By the 34th section, any person who shall become a member of the order thereby *instantly* becomes guilty of a high misdemeanour, and the Act declares that if he is lawfully convicted he shall be ordered to be banished from the kingdom for the term of his natural life: If he be found in the kingdom within thirty days after that, again, he is liable to be transported, or to be conveyed rather, out of the kingdom, and if he return again, he is liable to be transported for life. All these provisions declare the acts to be misdemeanours, and declare the punishment to be banishment or transportation for life, as the case might be. That being so, we have to consider what is the character of a bequest or devise of anything, the effect of which should be to prepare a man for the commission of this highest class of misdemeanour known to the law, and to maintain him in the commission of it—that is, simply and solely; What is the character of a bequest which should have the effect of flying in the face, I may say, or enabling any person to fly in the face, of the Act of Parliament—to commit a misdemeanour, and persist in the commission of it, by maintaining him in the commission of that act? It strikes me that that is a very serious question, and one that appears to have been rather overlooked in the argument. It is said there is no provision directly invalidating such bequests. No doubt there is not in words, but the question is, is there not in substance and effect? Before the Act of Parliament made certain acts a new felony or new misdemeanour, the settled law of the land was laid down in Bacon's abridgement, tit. statute B., vol. 7, p. 438, "That whenever a power is given by a statute, every thing necessary to the making it effectual is given by implication, for the maxim is *quando lex aliquid concedit concedere videtur et id per quod devenitur ad illud*." Any person aiding and abetting another person to commit a misdemeanour then becomes himself a misdemeanant and liable to indictment. Now, a bequest which is intended to operate for the purpose of enabling a person to commit that misdemeanour—to educate him for the purpose—is not that within the penal provisions of the statute, and as much prohibited as the act itself? It appears to me that the clause has naturally the effect of aiding and encouraging another person to commit misdemeanour, and therefore comes within the doctrine applicable to such offences. On these grounds it appears to me that this question is cut short *in limine* by the operation of the Act, and we have nothing—absolutely nothing—to do with the questions as to charitable bequests or the *cy pres*, which are very embarrassing and very entangling, and we possibly may admit—I will not say that we do not admit—that the decision of the Master of the Rolls is perfectly right in that respect; but I think he took far too easily the position that these bequests were not prohibited by Act of Parliament. In my mind they are distinctly prohibited—they are misdemeanours; and it appears to me this bequest we are now considering is totally void, not

only by analogy, but by the policy of the statute—by the express operation and effect of the Act itself upon such bequests—bequests having the tendency which I have referred to. The cases on the construction of the Mortmain Act must be considered as going the greatest length in holding bequests void within the penal operation of the statute. There cannot be a more extraordinary instance of that than the case of *Jeffreys & Alexander* (8 Ho. of L. 594). In that case a party being possessed of some pure personalty, and of considerable property in mortgages executed some years before his death, an indenture by which (declaring a wish to found certain charities) he covenanted to pay—or if he did not pay during his lifetime, his executors should within twelve months after his death pay—to certain persons therein named the sum of £60,000, to be invested in their names on the trusts therein declared. The trusts were for charitable purposes, viz., for the benefit of the poor of Ipswich; and the Court held there, Lord Cranworth and Lord Wensleydale, however, dissenting, that so far as realty was affected it was void within the statute of Mortmain, 9 Geo. 2, c. 36. The judges were divided in that case, but it is now the law of the land. Here was an attempt made not merely to evade the provisions, but to violate the very provision of the statute, and to provide a fund for the very purpose of doing that which the law declares to be a high misdemeanour. One is not very likely to find many cases bearing on this, but there is a case of *Thrups v. Collet* (26 Beav. 125), which shows that the courts will not support a charity which would protect persons from the consequences of their offences against the laws, on the grounds of public policy. In that case there was a bequest of £5000 for purchasing the discharge of poachers “committed to prison for non-payment of fines, fees, or expenses under the Game Laws;” and it was held that the bequest was void, as encouraging offences and opposed to public policy, though there was an attempt made to make it a charitable bequest, because in the Act of Elizabeth there is a provision for the relief of prisoners and captives. That bequest was set aside because it was an attempt to evade the law. For the reasons I have stated it appears to me that the bequest to the Rev. Mr. Russell and the other clergyman is totally void, and cannot be disposed of in the way which is mentioned in the will. The other question, as to Mr. Conway, perhaps, may not be so directly considered as a violation of the Act, the bequest being for the construction of a chapel for the existing members of the Order; but, nevertheless, it offends equally against the intent of the statute, and so far I agree with the Master of the Rolls, but I differ from him as regards the application of the money in the first question discussed, which must go to the petitioner as residuary legatee.

**THE LORD JUSTICE OF APPEAL.**—I am of the same opinion. I think the bequest for the maintenance and education of two priests of the order of St. Dominick is utterly void, and that it neither devolves on the Court nor on the Crown to apply this fund to any charitable purpose. It is the duty of this Court as in all similar cases, to ascertain the subject—the quality of the bequest—whether it is for a single purpose, to the exclusion of any other,

and whether that purpose be a legal one or not. In reading this bequest we must at once refer to the institution, and see what was the object of the bequest. It is plain to me that the object of the bequest was to educate and maintain persons in Ireland thereafter, and who thereafter should become members of this religious order. It was plainly not for the benefit of any then living existing members of it. The question is whether this was contrary to the provisions of the statute that has been so often referred to, and what do those provisions prohibit—the continuance and after existence of these religious orders; and further to effectuate this purpose, means and powers of a highly penal character are provided. The 28th section states, that it is expedient to provide for the gradual extinction of all monastic orders!! What is the object of the bequest here? It is to make provision both for the maintenance and education of the future members of that order—in other words, to afford means of continuing and perpetuating an institution which the Legislature has declared ought to be abolished, nay, which the Legislature, by a series of penal enactments, endeavoured to discountenance and suppress. These enactments place the then existing members of such orders within the kingdom under penalty to register themselves within a limited time; secondly, to make it highly penal in any members of this order to come within this realm, finding that such an act should be a misdemeanour, and punished by banishment for life; thirdly, it makes liable to fine and imprisonment any member of the prohibited orders who shall admit any one to be a member of this order, and makes a person so admitted guilty of a misdemeanour. There are besides, other clauses framed to effectuate this prohibition with penal provisions—for example, one which provides that if any one is sentenced to be conveyed away, and if after sentence he returned, he shall be transported for life. If further words were required to show the intention and object of this enactment, it is supplied by the 7 & 8 Vict., c. 97, which, after providing for the endowment and maintenance of Roman Catholic and other places of worship, provides expressly that nothing therein shall be taken as in favour of any religious order bound by monastic vows, prohibited by the 10th Geo. 4, or in favour of any member or members thereof. It is utterly impossible to read this prohibition and penal provisions, and also the bequest for the education of the future members of this order, without coming to the conclusion that it tends necessarily and inevitably to produce the particular result of perpetuating those institutions which are prohibited, and so violating the express provisions of the statute. That purpose, I need not say, is illegal: The testator says my intention is to accomplish that, and to violate the law—this is, beyond doubt, the sole and exclusive object of the bequest. I think there is no authority in this Court or the Crown to give effect to this bequest, which in my opinion is void; and with respect to the bequest to the Rev. Mr. Conway, it was given on an invalid trust, and therefore cannot be carried *cy pres*. I fully concur in the judgment of the Lord Chancellor.



[BEFORE THE LORD CHANCELLOR AND THE LORD  
JUSTICE OF APPEAL.]

IN RE THOMPSON'S ESTATE.—Nov. 28, 1864.

*Will—Construction of—Meaning of the phrase “always go in the male line”—Tenancy in tail.*

*M. T., owner in fee of the lands of Garwick, devised same to his “third son, Meredith, for ever; but in case he should die unmarried, or without leaving lawful issue, in that case he may will half of it as he pleases, and the other half to go share and share alike between my surviving sons and their families.” The will thus concluded—“All the bequests given my son R., my grandson M. son to my son J., and also my three other sons, Meredith (aforesaid), C., and H., of my property, no part of it shall or will be liable, or pay any debts they may contract, nor sell or mortgage same, but always go in the male line, free of any debt of theirs.” Held, that Meredith took an estate tail under said devise in half of the said lands.*

THE question in this case for the consideration of the Court arose on the will of Meredith Thompson, deceased. The appeal was from the Landed Estates Court, and is as follows:—

“That on the 17th of February, 1864, Meredith Thompson, of Knockadoo, in the county of Sligo, presented his petition, as an owner of land, to the Landed Estates Court, Ireland, wherein the said Meredith Thompson stated that he was owner as tenant in fee of the premises described in the first part of the first schedule thereunto annexed, amongst which premises were included the lands of Garwick hereinafter mentioned; and the said Meredith Thompson, by the said petition, prayed that the said premises or such part thereof as the Court should direct might be sold. That on the 26th day of February, 1864, an order was made by the said Court that the premises in said schedule set forth, including therein the said lands of Garwick, should be sold for the purpose of discharging the incumbrances thereon, unless cause to the contrary should be shown within the time in said order specified. That on the 30th day of March, 1864, your petitioners caused an affidavit made and sworn by your petitioner, William Thompson, to be duly filed by the proper officer in said Court, as cause, wherefore the said order for sale so far as the same directed a sale of the said lands of Garwick should not be made absolute with respect to a moiety of the said lands of Garwick. That in and by the said affidavit your petitioner, William Thompson, stated that Meredith Thompson, late of Knockadoo, in the county of Sligo, deceased, was in and previous to the month of May, 1837, seised in fee-simple of (amongst others) certain lands called the lands of Garwick, situate in the county of Sligo aforesaid. That being so seised, the said Meredith Thompson (hereinafter called for distinction Meredith the first), on or about the 26th May, 1837, duly made and published his last will and testament in writing, executed and attested as by law required; and thereby, amongst other matters, he devised the said lands of Garwick in the words following:—‘I leave my third son, Meredith Thompson,

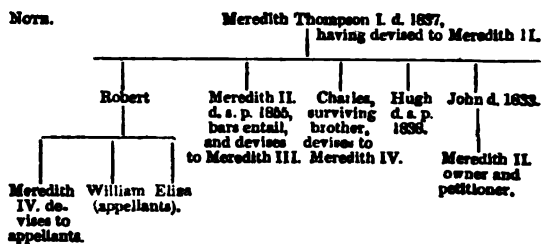
the lands of Garwick for ever; but in case he should die unmarried, or without leaving lawful issue, in that case he may will half of it as he pleases, and the other half to go share and share alike between my surviving sons or their families, as my executors hereinafter mentioned may think most wanting it.’ And after appointing his brother-in-law, Hugh Gray, and his son, Meredith Thompson, executors of his will, the said testator concluded the same in the words following:—‘All the bequests given my son Robert Thompson, my grandson Meredith Thompson, son to my son John, and also my other three sons, Meredith, Charles, and Hugh Thompson, of my property no part of it shall or will be liable to pay any debts they may contract, nor sell or mortgage same, but always go in the male line free of any debt of theirs;’ as by the said will or the probate copy thereof, reference being thereunto had, will more fully appear. That the said Meredith Thompson, the testator, died upon the 14th of June, 1837. That the said testator left surviving him four sons, namely, Robert, Meredith, Charles, and Hugh Thompson. That John Thompson, another son of the said testator, died during the lifetime of his father, in or about the year 1833, and there were living at the time of the death of the said testator three sons of the said John Thompson, namely, Meredith (called for distinction Meredith the third,) Roger, and Henry Thompson. That the said Robert Thompson, the son of the said testator, died on the 10th of January, 1838, leaving surviving him Meredith, his eldest son (in said affidavit called Meredith the fourth), Robert, his second son, your petitioners, William and Elizabeth, and three other children, Anne, Henry, and John. That the said Hugh Thompson, the son of the said testator, died in the month of April, 1838, intestate and unmarried. That upon the death of the said testator, his son Meredith (called Meredith the second) went into possession of said lands of Garwick. That the said Meredith the second duly made and published his last will and testament in writing, bearing date the 9th day of September, 1855, and thereby, after certain devises therein mentioned, as to all the rest, residue, and remainder of his fee-simple and freehold estates, he devised the same to his nephew, the said Meredith the third, his heirs and assigns, for ever. That the said Meredith the second died on the 17th September, 1855, without leaving lawful issue him surviving. That neither the said Meredith the second, nor the said Hugh Gray (who renounced) exercised any discretion, or gave any direction in accordance with the powers (if any) conferred upon them by the clause for that purpose, having reference to the said lands of Garwick, in the will of Meredith the first contained. That the said Charles Thompson was the only son of the said Meredith the first, who was living at the time of the death of the said Meredith the second. That while your petitioners were willing to admit that the said Meredith the second had under the will of the said Meredith the first, an absolute power of disposition over one undivided moiety or share of the said lands of Garwick, your petitioners submitted, as they now submit, that upon the death of the said Meredith the second, without having issue then living, the said Charles Thompson became entitled ab-



solutely to the remaining undivided moiety or share of the said lands. That by the further statements in said affidavit contained, and to which your petitioners refer, your petitioners showed how, in the event that had happened, namely, of the death of the said Meredith the second, without leaving issue then living, your petitioners ultimately became and are now entitled to the said undivided moiety or share of the said lands of Garwick. That on the 28th of April, 1864, the said Meredith Thompson, the said owner and petitioner, herein-before called Meredith the third, filed an affidavit in reply to the said affidavit of your petitioner, William Thompson, and thereby, after referring to said will of the said Meredith the first, the said Meredith Thompson stated that by a certain indenture, duly executed and enrolled, and dated the 9th March, 1841, the said Meredith Thompson (called Meredith the second) barred all the estates tail of him the said Meredith Thompson of and in the aforesaid lands, and granted unto Hugh Gray the said lands of Garwick, to the use of the said Meredith Thompson (herein-before called Meredith the second), his heirs and assigns, for ever. That the said matter, on the 12th of May, 1864, came on to be heard before the Hon. Judge Hargreave, who disallowed the cause shown, on the ground that under the limitations in the said will of the said Meredith the first, the said Meredith Thompson (herein-before called Meredith the second) took in the said lands of Garwick an immediate estate in tail male. That your petitioners submit that the said order of the Hon. Judge Hargreave is erroneous, and that Judge Hargreave ought to have allowed the cause shown, on the ground that the said lands of Garwick were by the said will of the said Meredith Thompson (herein-before called Meredith the first) limited to the said Meredith Thompson (herein-before called Meredith the second) in fee, subject to a valid executory devise over, in the event of the said Meredith the second dying without leaving issue living at his death; and that in the events that happened, and herein-before stated, the said Meredith Thompson (herein-before called Meredith the third), the said alleged owner and petitioner, was not entitled to any estate in the said moiety of the said lands of Garwick.

The following is the answer of Meredith Thompson:—The said Meredith Thompson, by way of answer, said that he craves leave to refer to the petition for sale presented by him in this matter, the conditional order for sale, as also the order making the same absolute, together with all the other deeds and documents in the petition of appeal referred to; and more particularly, respondent refers to the will, or probate of the will, of Meredith Thompson the first, dated the 26th of May, 1837, for greater certainty as to the contents thereof respectively. And respondent submits that the order of Judge Hargreave of the 12th day of May, 1864, was correct, and should be affirmed, for the following reason:—That upon the true construction of the will of Meredith Thompson the first, Meredith Thompson the second, took an immediate estate in tail male in the lands of Garwick; and that in the events which have happened, the respondent is now owner in fee simple of the same lands."

The appellants claim under the will of Meredith the fourth, and his title was derived under the will of Charles, who was the only brother who survived Meredith the second, who died without issue.



*H. Law, Q.C., (with A. S. Jackson)* appeared as counsel for the appellants, William and Elisabeth Thompson.—Judge Hargreave was wrong in holding that Meredith the second took an estate tail male in the lands of Garwick. The testator evidently gives an estate in fee-simple to his son Meredith, with an executory devise over of half Garwick, in case said Meredith the second should die without issue. *Home v. Pillans* (2 M. & K. 26) is an authority to show that if there be a clear positive gift in one part of a will, that it cannot afterwards be cut down to a lesser estate, and therefore, that the gift of the fee here cannot be cut down to a fee-tail by the subsequent clause of the instrument; and Lord Brougham, in giving judgment in that case, said, "That when there is a *clear* gift, it can be only altered and retracted by the most plain, and unambiguous, and unequivocal words, and the Court will in *dubio* justly prefer that construction of any subsequent clause which will make it consistent with the intention plainly expressed in the preceding part."—*Abbott v. Middleton* (7 H. L. C. 84); *Thornhill v. Hall* (2 Cl. & Fin. 36). Apply that doctrine of Lord Brougham to the present case, and we find that no plain and unambiguous words were used by the testator cutting down the fee first given. In fact, the only thing that can create a difficulty is the use of the expression, that the property so devised was "always to go in the male line;" but this expression does not give an estate tail, for by giving an estate tail it must mean heirs male of the body of Robert, while it is plain that, under this devise, the ascending, as well as the descending male line would take—neither does this expression exclude the male line descending from females. *Boys v. Bradley* (4 De Gex, M'N. & G. 58,) was where a testator directed that the interest and dividends of the remainder of his stock should be invested so as to accumulate until the end of twenty-one years from his death, when the whole was to be disposed of towards his nearest of kin in the *male line* in preference to the female line, and it was there held that the son of the testator's paternal uncle was not entitled in preference to the testator's sister. This case was afterwards carried to the House of Lords, and is reported in 5 H. L. C. p. 874, where it was "held that the paternal uncle was not entitled, the words of the gift not restricting the will to a male through the males." *Vide* also 2 Jarman on Wills, 3rd ed., 97. The decision of Judge Hargreave, in this case, however, is at right angles with *Boys v. Bradley*. In the case of *Malone v.*

*O'Connor* (Lloyd & Gould, 465), decided by Lord Plunket, the marginal note was as follows—"A. M. devised certain estates to his nephew, R. M., and his heirs, 'not entertaining the least doubt but that he would in due time, and upon the first proper occasion, take care not only to have the said estates so devised to him by me, but my paternal estates, settled in such manner, that the said estates may continue in the male line of our family, and in our name and blood.' At the death of the testator there were seven persons of the male line of his family, and of his name and blood, alive, one of whom was the plaintiff's paternal grandfather, who was descended from the paternal great grandfather of the testator. Held, that the objects were sufficiently defined and certain to enable the Court to execute the trusts created by the words of recommendation in the will, and that the Court, in executing the trusts, might go into the ascending line, and was not confined to the descendants of the father of the testator," and therefore the limitation cannot be read, "to Meredith the second, and the heirs of his body."—*Woolmore v. Burrows* (1 Sim. 529). Upon these grounds we submit that Judge Hargreave was wrong; that Meredith the second had no estate that he could devise, as he died without issue, and that upon his decease his surviving brother, Charles, became and was, under the terms of the will, entitled thereto, and the appellants claim under the will of Meredith the fourth, who claims under the will of his uncle Charles.

The Solicitor-General (Lawson), with Brewster, Q.C., and Warren, Q.C., *contra*.—Meredith the second took an estate tail, and not an estate in fee as to half the lands of Garwick, which estate being first limited, an executory limitation is made upon that estate, and consequently it was open to the tenant in tail to bar same.—*Fearne on Contin. Rem.* 424. The Court will read "go in the male line" as if the testator had devised to Meredith the second and the heirs male of his body.—*Co. Lit.* 27, b. In *Denn v. Hobson* (5 Bar. 2609), it was held "that a remainder to the heirs of W. C. on the body of S. begotten, the male to be preferred before the female, and the older before the younger, creates an estate in tail male." The testator evidently had the successive generations of future owners springing from himself in his mind. [*Lord Justice of Appeal*.—The testator supposes his descendants being owners will last for ever.] Precisely so. There are a number of cases collected on this point in *Watkin's Conveyancing*, by Merrifield, 85.—*Richards v. Davies* (13 C. B., N. S., 69, 861).

THE LORD CHANCELLOR.—The testator in this case, without doubt, first gives his son, Meredith Thompson, the lands of Garwick in fee-simple, subject to be defeated as to half by an executory devise on his dying without issue to his surviving sons. Had the will gone no further, no difficulty would have arisen, but the testator has gone on and used language in the second portion of the will evidently varying the estates even as to the fee-simple, which he was then giving to different members of his family, supposing we were to hold that a fee-simple defeasible had been so limited by the whole instrument. There is, however, sufficient on the face of the instrument to shew that the intention of the testator had altered *currente calamo*; in the

first clause he leaves his son Meredith the whole of the lands of Garwick *for ever*, subject, however, to be defeated as to half; in the second part he would appear to cut down the estate in fee by restraining the several takers, among whom was Meredith Thompson, from encumbering the same with any debts, and expresses his desire that same would always go in the male line, that is, in my mind, an estate in tail male to each of his sons, exactly as if the testator had made use of the words, "to the heirs male of their bodies." In the case of *Denn v. Hobson* put by the Solicitor-General, without express words the Court construed the estate given to be an estate in tail male. The intention of the testator then was to give an estate to his son or sons, from generation to generation in *perpetuum*.—This, then, is no more than giving an estate in tail male. That being so, Meredith Thompson the second took an estate tail, which he has barred, and consequently Meredith Thompson the third has such an estate as he can dispose of: accordingly the judgment of the Court below stands.

THE LORD JUSTICE OF APPEAL could add nothing to what had fallen from the Lord Chancellor; he was of opinion that Meredith Thompson the second took an estate tail under his father's will, which estate he had barred.

## Court of Chancery.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

IN THE MATTER OF GRADY, A LUNATIC.—Jan. 24, 1865.

*Costs—Number of counsel allowed on a motion.*

*On taxation of costs, only two counsel shall be allowed on a motion except under very special circumstances.*

THIS was a petition presented by Edward Mannsell, of Deer-park, in the County Clare, the committee of the person and fortune of William Gray, a lunatic. The petition stated that by order, bearing date 12th November, 1864, a Mrs. Mannsell was declared entitled to her costs of appearing on a certain motion in the lunacy matter; "That the taxing master in taxing his costs allowed for three counsel, and a brief for third counsel of all the proceedings taken in the master's office, and that the brief so allowed amounts to £11 13s. 2d.; that said costs have been certified to £28 5s. 1d. Prayer:—That said sum of £11 13s. 2d. should be disallowed, and that the sum so certified by the taxing master be reduced by said sum of £11 13s. 2d.; or that the taxing master be directed to review his said taxation, and that in reviewing same he should allow only two counsel."

*J. Murphy* was heard in support of the motion.

*G. Cree* *contra*.

THE LORD CHANCELLOR.—I must direct the taxation in this case to be reviewed. Only two counsel shall be allowed on a motion except under very special circumstances.

## Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

HASLETT v. HALL.—April 24, 1864.

### Setting aside defences.

*In an action by the assignee of a bond against the surety for an administrator de bonis non, the second count of the summons and plaint complained that the said J. S., before he became administrator, was himself indebted to the assets of the deceased J. P. in the sum of £200, on foot of a judgment obtained by the administratrix; and that he had not repaid the said sum though required to do so by an order in the cause in the Court of Chancery. The defendant pleaded—"As to the second count, that the sum of £200 in said count mentioned was lent to said J. S. by the said T. P., the administratrix with the will annexed of the said testator while she was such administratrix, and long before said J. S. became such administrator de bonis non, and long before the execution of said bond by defendant; and that said judgment was confessed to said T. P. while she was such administratrix, and long before said J. S. became such administrator, and long before the execution of said bond by defendant; and that said sum of £200 did not come to the hands of said J. S. as administrator of said testator." A motion to set aside this defence as embarrassing was refused.*

*Exham, Q.C., in this case moved that the defence be set aside as embarrassing. The action was by the assignee of a bond against the surety for an administrator de bonis non for £200. The second breach stated in the summons and plaint was, that the said J. S. was, before he became administrator, himself indebted to the assets of the deceased J. Parker in the sum of £200 on foot of a judgment obtained by the administratrix, and that he had not repaid the sum though required to do so by an order in the cause by the Court of Chancery." To this the defendant pleaded, "And as to the second count, that the sum of £200 in said count mentioned was lent to said James Spillane by the said Teresa Parker, the administratrix, with the will annexed of the said testator, while she was such administratrix, and long before said J. Spillane became such administrator de bonis non, and long before the execution of said bond by defendant; and that said judgment was confessed to said Teresa Parker while she was such administratrix, and long before said J. Spillane became such administrator, and long before the execution of said bond by defendant; and that said sum of £200 did not come to the hands of said J. Spillane as administrator of said testator."*

*Dowse, Q.C., and Ryan contra.*—We want to raise the question, if the defendant is liable on the frame of this bond. [Monahan, C.J.—It would be better if the summons and plaint was amended by stating that this sum was portion of the assets, which can only be gathered from it. It would be better, either on the summons and plaint or on the defence, that it should appear that the origin of the debt was

a portion of the assets lent.] The two, i.e., the plaint and the defence, together amount to saying that. [Monahan, C.J.—But neither by itself does.] When a demurrer is taken to a plaint which does not set out all the facts, there is a great deal of embarrassment in arguing the demurrer. It might be said *non constat* but this was money lent by the testator in his lifetime, therefore it was considered advisable to get rid of any question of that sort, and to state the facts. Nobody can dispute that the facts of this case are what is put in this defence. We relieve the record from any embarrassment. The defence shows that this was money lent by the administratrix after the death to the person who afterwards became administrator de bonis non. We admit this was part of the assets.

*Walker in reply.*—There could be no issue taken on this plea as it stands. It would lead to a miscarriage. There is no point involved in this defence which would decide the case. The new point put in is, that it was not given to him as administrator, and would that decide the case? [Christian, J.—What would prevent you from pleading that the same was lent in the lifetime of the testator?] It is not the fact. [Christian, J.—They say the plaint leaves that in ambiguity.] They could demur to the plaint. [Monahan, C.J.—They say not, because it does not appear whether he was not indebted to the assets for money but by the party himself. The words of the plaint are consistent with the original foundation of the judgment, being money lent by the testator.]—*Early v. Smith*. (12 Ir. C. L. App. xxxix.) The issue would be an immaterial issue. [Christian, J.—It seems to me that the course would have been for the defendant to have applied to set aside the plaint for its ambiguity.] He has lapsed the time for doing that—*O'Hara v. Murray* (11 Ir. C. L. R. 7); *Caworth v. Phillips* (1 Ld. Ray. 605). We are satisfied if the last paragraph be struck out.

MONAHAN, C.J.—We think the motion should be refused, and that there is no embarrassment.

*Motion refused.*

POWER v. BEALE AND CLIFTON.—April 28, 1864.

*Duty in an attorney in respect to a mistake committed by the opposite party's attorney—Undertaking to appear and defend—Costs.*

*Heron, Q.C. (with him O'Brien), for the plaintiff,* moved that two rules entered on behalf of the defendant for payment of costs to him might be set aside, and that the plaintiff might be at liberty to amend the plaint by altering the name of one of the defendants. The defendants were sued in the first count as common carriers for non-delivery of butter, and in the second in trover. They were the trustees of the Cork Steamship Co., and George Cotter Beale was also secretary of another company also called the Cork Steamship Co. The question was, if the carrying company were justified in delivering the goods to John

Power instead of to the plaintiff, Anne Power, his daughter. We made application to the Cork Steam-ship Co. for the butter, and we received a letter dated "Cork Steam-ship Co. Cork," and signed "George Cotter Beale." That letter referred us to Adams & Julian. Julian wrote us this letter, "Dear sir,—We fear you will find yourself under a mistake. You can enclose any writ you may think fit to issue to us. If you desire to know the names of the trustees of the Cork Steam-ship Co, they are Macnamara, Pike," &c. We called on Julian and asked him to tell us frankly the proper parties of the carrying company to sue. Julian said he prepared the deed, and knew that Beale and Clifton belonged to it. By mistake the name of John Cotter Beale was put in the plaint. Julian never said there was any mistake in the name of Beale on a subsequent occasion. My client swears he was always under the impression John C. Beale was the person Julian undertook to appear for. There is a John, who is the brother of George, and who took defence. The mistake was discovered in the evening of 12th March last. John is a grocer carrying on business at Patrick-street. He is no way connected with either of the companies, and was never intended to be sued. Notice of trial was withdrawn on the 14th March in consequence of the mistake being discovered. Julian met us the day after, and we offered to amend; Julian refused, saying there was nothing to amend, and that John Cotter Beale was a real man. We called on John, and we were informed that he was the only man of that name in Cork, and that he was not defendant in any suit; and that Julian had mentioned in conversation the dispute about the butter, and he said he knew nothing further about the matter, and that he had not authorized Julian to act as attorney for him in this or any action, and that Julian had not authority to accept service for him. This is sworn in the affidavit of Blake, the plaintiff's attorney. There was a rule obtained staying our proceedings till we had paid the costs. If the undertaking had not been given by Julian the mistake would have been discovered. [*Monahan, C.J.*—The strength of your application seems to be, that Julian knowing that John Cotter Beale was not meant to be sued took defence in his name.] We got a letter from John Cotter Beale saying Julian now had authority from him. We wrote, reminding him of the interview we had with him, saying the conversation must be fresh in his recollection. We got no answer to that letter, upon which we told him we intended to apply to the Superior Courts. Julian is the only person who resists this motion. Either party might by notice point out the misnomer. [*Monahan, C.J.*—He might have appeared by the right name, describing himself as sued by the wrong name.] Julian says in his affidavit that the real question to be tried was, if the butter was the property of the father or daughter; that Blake, the plaintiff's attorney, threatened proceedings against the Cork S. S. Company to recover the butter, and with that view wrote a letter to the company, and that it was with regard to that he wrote the letter to Blake; that Blake called on deponent; that the Christian names of the carrying company were not mentioned (Blake swears the contrary); that he had several years be-

fore prepared the deed of the carrying company; that Blake called on him again, and said he had found out that Clifton and Beale were the only trustees of the carrying company; that he was not the attorney of either John or George at the time he undertook to accept service, but thought he would be able to do so, understanding it was to be against the company; that George C. Beale called on him upon other business, and deponent informed him of the service of the writ, and showed him the copy thereof, and said he had given the undertaking of which said Beale approved; that he prepared two authorities to be signed by the two defendants; that said George C. Beale did get them signed, and signed by John C. Beale. But he does not say *when* they were prepared and signed. [*Christian, J.*—Consistently with that, they might have been prepared and signed subsequently to the case going down to trial, and being withdrawn.] George Cotter Beale was apprised of this motion, and has made no affidavit. Julian says that Blake did not make any offer to have the defences amended; that he believes the plaintiff has no means whatsoever, and that he thought it highly disrespectful to deponent for Blake to go to his client behind his back after asking him to accept service.

*Clarke, Q.C., and O'Riordan contra.*—One attorney commits a deliberate mistake, which we were no parties to leading him into, and comes and asks to be indemnified from all the consequences of that mistake. It is the practice of the members of the junior bar, when a mistake is made, to come to the Court, and not to set the party right. The Cork S. S. Company is a company consisting of four or five eminent merchants in Cork. The following letter was directed to the secretary of the Cork S. S. Company—"Sir,—Miss O. P. has directed me to apply to you for, &c., for which she has paid; she would now be in a position to reship them. I will thank you to refer me to the names of your trustees, and refer me to your solicitor, who will accept service of the summons and plaint." This was written by Blake on the 5th of December, and directed to George Cotter Beale, not as a member of the Company, which he is not, but as secretary. Julian has the letter handed to him, and on same date gave this reply—"Mr. Beale has handed me your letter of this date. We fear you will find yourself under a mistake in the matter, but you will take your own course. You may enclose any writ to us, and we will give an undertaking to appear in due course. As you desire to know the names of the trustees, they are Macnamara, Pike," &c. Blake then has an interview with Julian, and asks for the names of the trustees of the carrying company, for he had found out that they were the proper parties to sue, and not the S. S. Company. Julian then says, "I prepared the deed, and I know so and so." Blake has said, I have been informed that George Cotter Beale and Clifton are the trustees. This is Blake's own account. If he be accurate he is informed by Julian, who was under no obligation to inform him that he was right. On the 15th February Blake comes back to Julian with a writ. [*Monahan, C.J.*—How is it that the writ is issued against them as Cork S. S. Company?] There are two companies carrying on under the same name of Cork S. S. Com-

pany, one of which carries nothing by water, but only from the ships to the parties, and of this company George C. Beale is a member. [Christian, J.—Is not Mr. Julian's undertaking to accept for the Cork S. S. Company? The plaintiff probably knew nothing of the subdivision of the companies.] George C. Beale is not the secretary of the sub-company. Blake issues a writ against John Cotter Beale and Clifton. A special defence is put in for Clifton, but a defence is put in for John C. Beale which ought to have called attention. It is a statement that none of the butter was delivered to the said John with the said Clifton as alleged. Clifton's defence has the same, and in addition a statement of the butter being the property of John Power. [Monahan, C. J.—It occurs to me that Julian was not bound to give information, but was bound to act fairly; he knew the Cork S. S. Company was intended to be sued, and had he any right to accept service and to file a plea for John Cotter Beale without the authority of John Cotter Beale?] The passage relating to the authorities is ambiguous. But Blake has nothing to complain of in that. He got the undertaking to appear for the wrong defendant. Was Julian bound to go and tell Blake this was the wrong name? If the parties thought it was a good service on George C. Beale, why did they not go on? Is it the duty of one professional man to tell another of a mistake he has made? This rule has never been applied to the members of the Bar. Power, the father, is really defending the action. The defendants would take no advantage of this. [Monahan, C. J.—Julian would swear at the trial that he appeared for John Cotter Beale.]

O'Brien in reply.—When we offered to proceed to trial to try the only question, Julian refused to do so. He ought to pay us the costs of the notice of trial, and of this motion.

MONAHAN, C. J.—The object of the motion is to set aside the rules to stay proceedings till the costs of the abortive trial were paid, and also for the costs of the abortive trial, and also for the costs of the motion. We have come to the conclusion that at the time Julian was handed the copy of the writ, he perfectly well knew that it was intended for George Cotter Beale, and that, knowing the party who was intended his virtual undertaking was to accept service for him, George, knowing that the plaintiff had no demand on John. Julian must pay the costs of the present motion. As to the costs of the abortive trial, Blake himself contributed to that, and, by some unaccountable mistake, put in the name of John C. Beale, and we do not think it right to make Julian pay the costs of that abortive trial, but we think they should be part of the plaintiff's costs in the cause. We rule that the plaintiff be at liberty to strike out the name of John C. Beale. The defendant, Clifton, is to bear his own costs of that abortive trial, and John C. Beale also. George may now appear and plead *de novo*, or adopt the pleading, and the costs of the abortive trial will be a portion of the plaintiff's costs in the cause.

*Rule accordingly.*

PAYNE v. FRENCH.—April 29, 1864.

Garnishee—Money due on a deposit receipt—Common Law Procedure Act, 1853, s. 67.

The plaintiff obtained a conditional order to attach a sum of money in the Provincial Bank due to the defendant on a deposit receipt, the conditions of which receipt were, that the depositor should deliver it up and give ten days' previous notice before being paid the money. Upon cause being shown, held—

1. That the Court had power to make absolute the order to attach. 2. That the Court had not power to make absolute the order to pay, the condition in the receipt requiring ten days' notice (Christian, J., dissentiente).

Quære—Whether the Bank would, under any circumstances, be liable to pay over the money without getting back their deposit receipt?

Rogers, Q.C. (with him M<sup>r</sup> Blain), showed cause against making absolute the garnishee order which had been obtained in this case to attach money due on a deposit receipt in the Provincial Bank—*Lynam v. Corp* (29 L.J. 243); *Potts v. Clegg* (16 M. & W. 321). [Christian, J.—Suppose a promissory note not payable for some days: could not that be attached?] A deposit receipt requires ten days' notice; and therefore the part of this order directing payment is erroneous. No doubt, a present debt *solvendum in futuro* can be attached. The question is, if this is a debt at all. The language of the deposit receipt is peculiar. The condition is—that interest is to be allowed as the directors think fit, and ten days' notice of withdrawal is to be given. [Monahan, C.J.—Your argument is—that you cannot be in a worse position with this man than with the man himself, and he could not get it without ten days' notice.]—Pothier on Contracts, 126, vol ii. [Keogh, J.—I think the passage in Pothier refers to a specific chattel and not a sum of money to be used, and for which interest would be paid.] [Christian, J.—Owing and accruing are the words used: what does accruing mean as distinguished from owing?] *Jones's case* (Ell. Bl. & Ell. 63) shows the meaning of accruing. No action could be brought to recover the money till the ten days elapse.

Heron, Q.C., and *Mecredy* contra.—This is a debt due by the bank to the defendant. [Ball, J.—You did not put in your affidavit anything about the condition.] We did not know anything about it. This is neither by the depositor nor anybody on his behalf, but in the nature of an execution *in invitum*. [Monahan, C.J.—The part most pressed against you is this: they say they are not bound to pay till they get up the receipt; that there must be ten days' notice and a readiness to give up the receipt. Ball, J.—Do you say the condition applies only to the depositor?] We do not go the length of saying the money must be paid before the ten days. But why should a *bona fide* creditor not be able to attach that debt? The case in 29 L. J. is not reported in the regular reports, and never will be, because what is there is in direct opposition to what has been ruled. It is decided that the relation of the bank to the customer is solely

that of creditor and debtor—*Swiss v. Bond* (5 B. & Ad. 385); *Debitum in presenti solvendum in futuro* can be attached. In *Sparks v. Young* (8 Ir. C. L. R. 251) all the authorities are reviewed. The question comes to the machinery by which we are to get the money. The bank say we are not to get it till after ten days' notice and the deposit receipt is given up. [*Keogh, J.*—Do you say the bank are bound to pay without getting the receipt?] The section says, "payment," &c. [*Monahan, C.J.*—That applies to the ordinary case, but can a third person alter the contract between the parties? is there any authority?] It is the first case on a deposit receipt. [*Keogh, J.*—Would the bank pay and be liable to an action afterwards and plead this order?] That would apply to every case of garnishee.

*M. Blain* in reply.—[*Keogh, J.*—You have no interest, representing the bank, to resist the order to attach.] *Sparks v. Young* only decided that a debt on a bond payable at a future day is attachable by a garnishee order. [*Monahan, C.J.*—Has any case decided that an order for payment shall be a prospective order? It is conceded that we cannot make an order for payment now; the only question is, can we make an order to attach? As at present advised we think we can, unless you can show anything beyond the doubt of Chief Baron Pollock.] The deposit receipt is a peculiar document.

*MONAHAN, C.J.*—We shall make absolute the order to attach the amount of the deposit receipt.

*CHRISTIAN, J.*—As to the two objections, the first is completely answered by the 67th section of the Act of Parliament; as to the other, the necessity of ten days' demand for payment, I am disposed to think the conditional order is itself a demand for payment. I do not see what principle there is to prevent the Court obviating the necessity of making another application.

*KEOGH, J.*—I entertain a very different opinion.

*MONAHAN, C.J.*—I thought it was conceded by Mr. Heron that there was no authority giving us the right to make the order to pay. It certainly was conceded that there was no case in the books. That being a conceded fact, I thought it was impossible the Court could now make an order to pay. I thought we took it for granted, and it was conceded by the counsel. I thought it was unnecessary to form an opinion, much less to express one, which would bind me hereafter, as to whether the bank at any time will or will not be liable to pay over the money till they get back their deposit receipt. I express no opinion on that, and I stopped the argument on it, because I thought the time for arguing that had not arrived.

*BALL, J.*, concurred with the majority of the Court.

*Rule absolute to attach.*

#### ALLEN v. WALMSLEY.—May 2.

*Judgment mortgage—Variance in affidavit.*

*The roll of the judgment stated that £2 2s. 8d. damages were recovered, together with £1 as and for costs of registration. The affidavit which regis-*

*tered this as a mortgage stated that £3 2s. 8d. costs were recovered. Held—that there was no variance. Edgworth's case (11 Ir. Chan. Rep. 293) followed.*

*Brooke, Q.C.* (with him *Irvine*) shewed cause against a conditional order to set aside the verdict in this case. The action was one of ejectment, and had been tried before *Fitzgerald, B.* The defendant's counsel at the trial insisted that there was a variance between the office copy of the affidavit registered in the office, which was given in evidence for the plaintiff, and the judgment which this affidavit purported to convert into a mortgage. The affidavit stated that £3 2s. 8d. were recovered; the judgment that £2 2s. 8d. were recovered for damages, and £1 for costs. The jury found for the plaintiff, and a conditional order to set aside the verdict had been obtained. In *Fitzgerald's case* (11 Ir. Chan. 278) £1 was added in the affidavit, and that was held to be such a variance as invalidated it. But in this affidavit the sums are lumped together—*Edgworth's case* (11 Ir. Chan. R. 293); Common Law Procedure Act, 1853, s. 125. [*Christian, J.*—Did not the Lord Chancellor base his judgment in *Fitzgerald's case* on this: that £2 2s. 8d. was given as costs when it ought to have been damages?] No. [*Christian, J.*—The conditional order was got upon the strength of a case which seems to have been overlooked.] It is distinguished. [*Christian, J.*—It is attempted to be distinguished.]

*Dowse, Q.C.*, and *J. Hamilton*, in support of the order.—*Edgworth's case* is a clear overruling of *Fitzgerald's case*. The tendency of modern decisions is to uphold these judgment mortgages. The Court of Chancery seems to have overruled *M'Dowell v. Wheatly*. [*Monahan, C.J.*—A case which has been very much misunderstood.] [*Christian, J.*—In *M'Dowell v. Wheatly* we followed cases in England on bills of sale.] The judgment here states that the party has recovered £200 debt; therefore it is considered he do recover his said debt and his damages, £2 2s. 8d., together with £1 as and for the costs of registration. The affidavit states that he has obtained a judgment for £200 debt, besides £3 2s. 8d. costs. That is a fatal variance. According to common sense, and judging it by its tendency to mislead, it is a very absurd one. But the Act of Parliament has directed the thing to be done. The words of the section in the Judgment Mortgage Act are not to be read—*reddendo singula singulis*. If the judgment gives debt, damages, and costs, they must be stated separately. [*Ball, J.*—Are not all these in the affidavit?] [*Keogh, J.*—Would it be right to say the party recovered judgment for £200, for £2 2s. 8d., and for £1, saying nothing of what they were?] It would leave the thing wide. If a man gets damages in a judgment he is not at liberty to reject that word, and call them costs. There is no judgment on the roll giving £3 2s. 8d. costs. [*Keogh, J.*—He leaves out the words "for registration." ] [*Monahan, C.J.*—If there were nothing said of debt, damages, or costs, it would be more in favour of the affidavit than this. *Christian, J.*—There is not only an exclusion of one but a misdescription of the other.] [*Keogh, J.*—The 7th section—the operative one—leaves out all about debt, damages, and costs, but

calls them money.] No doubt, they are all money, but that supposes such an affidavit as described. The Chief Justice in *M'Dowell v. Wheatly*, and the Court of Appeal in *Fitzgerald's case*, repudiated the argument that there was no misleading. This is not an accurate description of the judgment. [Monahan, C.J.—It is not worded in the Act, the debt, and damages, and costs, but the debt, damages, or costs or monies.] [Christian, J.—The Chancellor in *Fitzgerald's case* rests his decision on two grounds, the Lord Justice on only one.] A correct description is what the Legislature intended. The notion that it is a question of injury has been repudiated by all the courts on these cases in cases of bills of sale. The Act should be construed strictly.

*Irvine* was not called on.

MONAHAN, C.J.—We do not entertain any doubt. No attempt has been made to distinguish this from the last case in the Court of Chancery Appeal. It is said that the Court has overruled their previous decision. I think that Court is the best authority on that question. The same Court don't say they were wrong, but there is this marked distinction between the two that there was a variance in the amount of the sum recovered, and I think that was the ground of the decision. It was the only one the Lord Justice went on; and, in my humble judgment, the Chancellor, though he alludes to the other, makes the difference in the amount the reason. What it does state to be the amount of the judgment, I think, is the material point. It appears on the roll itself that £2 2s. 8d. is given for damages. There is no variance. The thing substantially required is, that the affidavit should state the amount. I think if the affidavit stated the judgment recovered was £3 3s. 8d. it would be right. I think *Edgeworth's case* was right, and that we should follow it.

CHRISTIAN, J.—I express no opinion on what our decision ought to be if this case were *res nova*, having regard to *M'Dowell v. Wheatly*. But I have no doubt we ought not to overrule a case in the Court of Chancery. It is unnecessary to consider whether that case overruled the previous one. If it did the former one is not law; if it distinguished the other it did not apply.

*Rule discharged.*

## Court of Exchequer.

Reported by John Monro and Valentine J. Coppinger, Esqrs., Barristers-at-Law.

[BEFORE PIGOT, C.B., FITZGERALD, HUGHES, AND DEASY, BB.]

ARNOLD v. THE DUBLIN AND MEATH RAILWAY CO.  
Jan. 7, 1865.

*Practice—Pleading—Diversion of water—Defence.*

*On an action for the diversion of a water course, where the defendant sought leave to plead, among other defences, that no sensible injury to the defen-*

*dant's right, uses, and enjoyment of the stream or water was occasioned by reason of the diversion of the waters, the Court considered that this issue was sufficiently raised by pleading that the defendants did not divert the stream in manner and form as in summons and plaint alleged.*

THE summons and plaint contained two counts, in the first of which the plaintiff complained that he was possessor of a mill, and by reason thereof was entitled to the flow of a stream for working the same, yet the defendant, while the plaintiff was so possessed as aforesaid, wrongfully and injuriously diverted and turned and caused to be diverted large quantities of the water of the said stream away from the said mill, and hindered and prevented a large part of the water of the said stream from flowing to the said mill, and from supplying the same with water for the necessary working thereof. In a second count he complained that while so possessed and entitled as aforesaid the defendants, by means of a certain pump erected and placed by them near to the said stream, wrongfully diverted the water away from the said mill.

P. Martin, for the defendants, now sought liberty to plead, among other defences, that the defendants were, at the time in the said counts mentioned, possessed of and entitled to a certain close of land, situate and being on the banks and next adjoining to and extending to the middle of the said stream; and that for their reasonable purposes they did divert the said stream so flowing by and over their said land and commit the grievances alleged; but they say that no sensible diminution in the natural flow of the said stream to the plaintiff's mill was caused by the said diversion of the said waters, or the commission by the defendants of the grievances therein alleged. And in a further defence they alleged that while they were so possessed as aforesaid they did commit the grievances in and where the said stream was flowing by and over their said land; but that no sensible injury to the defendant's right, uses, and enjoyment or means or extent of uses and enjoyment of the stream or waters in the plaint mentioned took place or was occasioned by reason of the diversion of the waters or commission by the defendants of the grievances in the count stated.

FITZGERALD, B.—Can't you raise this issue more simply by denying that you diverted the water in manner and form as alleged?

PIGOT, C.B.—If you did not divert the water sensibly or injuriously, then you did not divert it at all so as to give the plaintiff a right of action.

Martin.—Very well. I shall then take an order from your lordship for liberty to plead to the first and second counts,—first, that the defendants did not divert, or turn, or cause to be diverted, the water of the said stream, or hinder or prevent same from flowing to the plaintiff's mill, in manner and form as therein alleged; and secondly, that they did not divert the water of the said stream in manner and form as therein alleged.

*Order accordingly.*



GENTLEMAN v. SULLIVAN.—Jan. 27, 1865.

*Pleadings—Embarrassment—Joint justification—  
Effect of date.*

Where a summons and plaint contained two counts—one in trespass for breaking and entering, &c., and the other in trespass de bonis asportatis, and different dates were laid in each count, held—that the summons and plaint disclosed two different causes of action on different days, and hence that one plea, purporting to be pleaded to the two counts and stating as a justification that the plaintiff was the landlord of the premises, and that, a quarter year's rent being due, he entered the premises on a certain day (being a different date from either of the dates in the summons and plaint) and took the goods on the premises for a distress for the rent, "which are the trespasses complained of," was improper and embarrassing, because it did not show that the trespasses in the summons and plaint complained of and in the defence mentioned were one and the same transaction and took place on one and the same occasion; and because it attempted to restrict the plaintiff to trespasses committed on one day, although the plaintiff complained of different trespasses on different days.

O'Riordan, in this case, moved on the part of the plaintiff to set aside the defence on the ground that it was embarrassing and calculated to impede the fair trial of the case. The summons and plaint contained two counts—one in trespass, Q.C.F., and the other in trespass, D.B.A., as follows:—"That the defendant, to wit, on the 19th day of December, 1864, unlawfully broke and entered the plaintiff's premises, consisting of, &c., and unlawfully expelled plaintiff from the possession of same, to the plaintiff's damage, &c.;" and the second count complained, "that the defendant, to wit, on the 22nd day of December, 1864, unlawfully seized and took plaintiff's goods and chattels in and upon his, plaintiff's, premises, in, &c., of great value, &c., and converted same to defendant's own use, to plaintiff's damage," &c. To these two counts one defence was pleaded in the following terms: "That the plaintiff was tenant to the defendant of the premises in the first and second counts mentioned at the yearly rent of £36 sterling, payable by four quarterly payments; and that on the 16th day of December, 1864, the sum of £9 being one quarter of the said rent, became due and payable; and that on the 21st day of December, the said rent being in arrear and unpaid, the defendant did enter upon the said premises and distrain the goods in the second count mentioned as and for a distress for the said rent so in arrear, which are the trespasses complained of; and the defendant says that at the time of making the said distress, &c. &c., and therefore he defends the action."

O'Riordan.—The two counts in the writ of summons and plaint specifically complain of transactions occurring on two different days, and to those two causes of action but one plea of justification is put in, stating matters occurring on one and the same day. I

admit that as a general rule in pleading dates are not material, but I contend that when, as in the present case, two substantive causes of action are alleged to have arisen on two different days, the dates are material to this extent,—that they show that the alleged grievances are not one and the same transaction. The test of the matter is, that if we were to go to trial upon these pleadings as they stand we might be turned round and prevented from proving two essentially distinct grievances—confined, in fact, to one cause of action where we have two. The cases support this view—See 2nd Saund. p. 5 h, note b; *Edmonds v. Waller* (2 Chit. p. 291); and *Gale v. Dalrymple* (Moo. & R. p. 118). The case of *Taylor v. Cole* (3 T. R. p. 292) shows that expulsion is mere matter of aggravation. [*Hughes, B.*—Would you be satisfied if the same plea were repeated to the second count?] Yes; certainly. It is not averred that the causes of action in the two counts are the same; if it were, we might join issue upon the point.

G. Waters in support of the plea.—Mr. O'Riordan has entirely misunderstood the cases in Saunders. There are two counts in the summons and plaint, one in trespass and one in trover. I justify the breaking and entering, and I justify the trover—See *Walsh v. Shaw* (1 Alc. & Nap. 9) quoted in Saunders, vol. 2, p. 5 h, note b. [*Chief Baron.*—Your defence is imperfect in not alleging that the two transactions mentioned in the writ of summons and plaint are in fact one.] I did not intend to say that they were the same, but that they occurred on the same day—*Millar v. Walker* (2 Saund. p. 4) lays down the law upon the subject correctly, and I do not quarrel with it. [*Hughes, B.*—I have now read the pleadings, and am of opinion that the defence does not bear the meaning you put upon it, and that it must be amended.] It would seem a strange state of things if a plaintiff, by inserting false dates in the summons and plaint, can prevent me from pleading as I have done.

CHIEF BARON.—We are of opinion that the defences must be amended. You may plead to the first count that you entered to distrain; and to the second, that, upon the same occasion, you seized plaintiff's goods, which are the trespasses complained of in the second count.

The order of the Court is, that the defence shall be amended, plaintiff's costs to be costs in the cause.

[CORAM THE CHIEF BARON, FITZGERALD, B.,  
HUGHES, B., AND DEASY, B.]

ELLIS v. DUBLIN EXHIBITION PALACE AND WINTER  
GARDENS COMPANY.

*Production of documents—Discovery—Common Law  
Procedure Act, 1856, sec. 55.*

The affidavit upon which the motion is grounded must satisfy the Court that a certain document specifically described is in the possession or power of the opposite party, and that that document, if produced,



would help the plaintiff's case. This much is a condition precedent to the discovery of other documents. Therefore a mere statement that a specific document is likely to contain matter that would help the plaintiff's case is insufficient.

*Serjeant Armstrong (J. A. Phillips with him)* in this case moved, under the 55th\* section of the Common Law Procedure Act, 1856, for an order directing the defendants to lodge with the Master of the Court the deed of the 7th of April, 1862, made between the Earl of Clonmel and others and Benjamin L. Guinness, Esq., and the deed of the 24th of April, 1862, made between said Guinness and the defendants, and also for an order directing that the secretary or the trustees of the said company should set forth on affidavit the dates and particulars of every document (if any) in their possession or power relating to the matters in dispute in this action, and what they know as to the custody of any such documents as aforesaid which may not be in their possession or power, and whether they object to the production of such documents as are in their possession or power, and the grounds of such objection, or for such other order, &c., &c.

The action in this case was brought by Mr. Hercules Ellis, of 83 Stephen's-green, south, against the Dublin Exhibition Palace and Winter Gardens Company for the disturbance of an alleged right of way by building up the doorway opening into the fields, commonly known as the Coburg Gardens, at the rear of the garden behind his house. The cause of action was stated at length in five paragraphs of the writ of summons and plaint, but the substantial question at issue was whether or not any such right of way had ever existed or been created by user or otherwise. The plaintiff's affidavit stated that he believed himself entitled to the said easement; that the said deed of 7th of April, 1862, was a lease from the Earl of Clonmel, the proprietor of the Coburg Gardens, to B. L. Guinness, Esq., and that the deed of the 27th of April, 1862, was a conveyance from the said Guinness to the company; that he had *heard and believed* that pending the negotiation for the deed of 7th April, 1862, it was agreed that said Earl should close up the said doorway and give an undertaking to said Guinness that said doorway should be kept closed,

and should covenant to indemnify the said Guinness against all legal proceedings which might afterwards be brought against said Guinness or his assigns on account of said closing; that he *believed* that said agreement and covenant were contained in the said deed, and that the statements in the said deed amount to admissions of plaintiff's right of way; *believed* that said deed purports to convey the right of way possessed by plaintiff and others; *believed* that upon production and inspection of the said deed it would be found to contain recitals and matters to the purport and effect aforesaid; *believed* that said Earl speculated on his neglecting to take legal proceedings for twelve months. And as to the deed of 24th of April, *believed* that the recitals contain statements affirming plaintiff's said right of way; that he *has heard and believed* that said Guinness covenanted with the Company that they should hold and enjoy it "free from all rights of way, and that said gate should remain closed, and agreed and undertook to indemnify said company against all costs and charges arising from any action or suit respecting said rights of way;" *believed* that on production it would be found to contain an admission of the said right of way. Saith that he was informed prior to October, 1862, by Henry Parkinson, Esq., the secretary of the said company, that the "said company were made safe against all such actions, and that if deponent succeeded in such action the company would be indemnified by said Guinness by a reduction of their rent;" *believed* that the covenants and agreements in said deed of the 24th April amount to admissions of plaintiff's rights of way; *believed* that *there are other documents* bearing upon the case in the possession of the said company and Guinness, their trustees, &c. &c.

There were two answering affidavits,—one by said Henry Parkinson, and the other by F. Sutton, solicitor. Parkinson's affidavit stated that the deed of the 7th of April, 1862, is not, and never was, in the Company's possession; that he has, however, read a copy thereof; that it does not contain any admission of plaintiff's right of way, nor does it contain any clause, covenant, agreement, matter, or thing which either solely or together, or at all, amount to such admissions, or anything of the like purport or effect. Neither does the deed of 24th April, 1863 (incorrectly described by plaintiff as of 1862), contain any such admission; that the said two deeds are respectively evidence of the defendant's title; that the deed of 24th April, 1863, does not show any right, title, or easement in the plaintiff, nor does the deed of 7th April, 1862; that on the part of the defendants he "objects to the production of said deeds or either of them, and for that reason he does not by this affidavit make any further answer to the statements or charges contained in" plaintiff's affidavit; submits that they are introduced merely for fishing purposes. Saith that "he is advised and believes that the other statements contained in the said affidavit are irrelevant for the purposes of the present motion." The affidavit of Frederick Hutton, Esq., stated that he, as solicitor of said B. L. Guinness, prepared the deed of 7th April, 1862, and that it contained no statement or admission whatever of the plaintiff's alleged right of way or easement, the subject of this action.

\* The 19 & 20 Vict. c. 118, s. 55 (analogous to 17 & 18 Vict. c. 125, s. 50, English), extending the provisions of 14 & 15 Vict. c. 99, s. 6 (Evidence Act), and of 16 & 17 Vict. c. 113, s. 64, the Common Law Procedure Act, 1853, is as follows:—Upon the application of either party to any action, suit, or other civil proceeding in any of the Superior Courts, upon an affidavit by such party of his belief that any document, to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession or power of the opposite party, it shall be lawful for the court or judge to order that the party against whom such application is made, or if such party is a body corporate that some officer to be named of such body corporate, shall answer on affidavit stating what documents he or they has or have in his or their possession or power relating to the matters in dispute, or what he knows as to the custody they or any of them are in, and whether he or they objects or object (and if so, on what grounds) to the production of such as are in his or their possession or power; and upon such affidavit being made the court or judge may make such further order thereon as shall be just.

*Serjeant Armstrong.*—It is necessary, as a foundation for this application, that we should satisfy the Court that we have a good cause of action. The 55th section of the Common Law Procedure Act, 1856, (analogous to 17 & 18 Vict. c. 125, section 50, English) is that on which we rely. [*Fitzgerald, B.*—The section refers to the belief of the character of the document, and also to the belief of its being in the possession of the opposite party. *Hughes, B.*—It seems to me that you must establish three things—first, the existence of a particular document; secondly, your right in equity to a discovery of it; and thirdly, your belief that it is in the possession or power of the opposite party.] See *Flight v. Robinson* (8 Beav. p. 33). [*Fitzgerald, B.*—Is it to be said that the opposite party is to be obliged to produce a document for the purpose of showing you whether or not it helps your case? How do you connect Mr. Guinness with the case?] See *Mansel v. Feeny* (2 Johns. & Hem. p. 323). The real question is how far the document would help the case. [*Fitzgerald, B.*—Suppose that you had stated only that it contained a clause of indemnification, would you be entitled to its production?]

*Whitside Q.C.*, (with him *Dowse, Q.C.*, and *Palles*) contra.—By the Act it is clear that the party must particularise the document, the production of which he demands. As to the limitation of the meaning of the word "document," see *Poole v. Griffith* (7 Ir. Jur. N.S. p. 259); *Hewett v. Webb* (2 Jur. N.S. p. 1189); *Woolley v. Pole* (14 C. B., N. S., 538). As to conclusive character of the denial that the document has any bearing upon the question in dispute, see *Adams v. Lloyd* (3 H. & N. p. 350).

*Dowse, Q.C.*—The man who makes a title deed, is properly the judge of whether or not it contains anything showing a right of easement. [The Court here called upon the other side to reply.]

*Philips* in reply.—We seek a discovery of a particular document, and require that the opposite party should swear whether or not they have any documents in their possession or power referring to the case. We are entitled by the words of the Act to an affidavit "stating what documents," &c., and this provision was added for the purpose of extending to Law Courts those large powers of discovery which equity before possessed. We have, I think, laid the foundation for our claim. Nor can it be said that the relief should be confined to the production of original documents.

[*Hughes, B.*—It strikes me that if the company admitted that they had the deed in their possession, they could not be obliged to produce what was not their own.] Mr. Guinness is stated, on affidavit, to be the trustee and vice-chairman of the company. I also submit that, the other side not having made the point, it is not open to the Court to make it for them. [*Hughes, B.*—It is only where the production of documents is refused, that the Court, for its own information, requires a discovery. *Pigot, C. B.*—I do not see how a covenant to indemnify against a claim to a right of way can be a scintilla of evidence for the plaintiff. A covenant against a right would seem rather a presumption against it. Again, can it be contended that because a title deed may contain something useful to his adversary, that he is entitled to a discovery of it?"] See cases of *Mansel v. Feeny* (2 Johns. & Hem.

p. 323); *Riccard v. Inclosure Commissioners* (4 E. & B. p. 329); *Hewett v. Webb* (2 Jur., N.S., p. 1189); *Thompson v. Robson* (2 H. & N., p. 412).

*Pigot, C. B.*, now delivered the judgment of the Court.—I have no doubt but that this motion is made with perfect sincerity on the part of the plaintiff. The question, however, for us is, whether or not a case has been made for the exercise of our jurisdiction, and I admit that I am not prepared to go the length that some of the English judges have gone to, in giving effect to the analogous section of the English Act. The application here is for an order to obtain the inspection of the defendant's title deeds. The one is clearly a title deed—the other is the lease from Mr. Guinness to the company, who are the defendants in this action. They are, in fact, their muniments of title. In saying this, I do not wish to be understood as holding that in no case whatever can an admission be proved by such means. In one of the cases cited, this seems actually to have been done. Before, however, any discovery can be made by a Court of Law, it must be shown clearly that if the instrument were produced, it would be found to contain matter of importance to the plaintiff's case. We have nothing here but the belief of a person that the deeds contain a contract of indemnity against such actions as the present, and a statement that if the instrument were produced, it would be found to contain matter that would help the plaintiff's case. There is also this strange statement, that Lord Clonmel not only conveyed the fee in the lands, but also that very right whose existence in him the deed is said to have negatived. I think that there must have been some mistake here. We then come to the covenant of indemnity, and upon this portion of the case we find it stated in the affidavit that it would upon production be found to contain matter amounting to an admission of the right. Who makes that statement? The plaintiff. And yet it is not stated that he ever saw the deed, and no other evidence is given to show that the instrument contains anything that would assist the plaintiff's case. As far as I can see, the covenant, if anything, tends to negative the plaintiff's right, and affords a presumption against it. It is also suggested that the recitals contained a disproof of the grantor's title. It is scarcely possible that any conveyancer would be so insane; but is it to be said that because it is just possible that such unlikely matter should be introduced, that we are to act upon such a presumption? It is, on the whole, about as weakly sustained an application as it is possible to conceive. There is then another statement, that defendants are in possession of some other documents, which would be found to bear upon the case. Now, it may be contended that when an instrument is distinctly pointed at in the possession or power of the adverse party, and it is shown that there are probably in the possession of that party, other papers bearing upon the case, that the Court should extend its order so as to include the latter, but then in order to found the right to such a discovery, there must be a specific statement that that party is in the actual or potential possession of a specifically described document. Without this, it would seem that the 55th section of our own, or

the 50th section of the English Act, are powerless to help one to reach other instruments of a german nature. On these grounds, we must refuse the motion with costs.

## Court of Probate.

Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law

CASEY v. CASEY.—Jan. 14, 1865.

### Abatement—Practice.

*Where a defendant dies after pleading, a suggestion may be filed by the plaintiff, who desires to proceed, stating the death of the defendant and the grant of administration to his goods.*

C. Palles moved that a suggestion should be filed to revive the suit. The defendant had pleaded several pleas, and had afterwards died. His widow had taken out letters of administration to him, and she consented to withdraw the pleas and allow the will propounded by the plaintiff to be established. In the Common Law and Chancery Courts this was done by suggestion on the record.

Keatinge, J., made the order.

NOTE.—See *Staines v. Stewart*, 2 S. & T., 320.

DOYLE v. LEARY.

### Pleading—Several wills.

*Where a will is propounded by one party which the other party impeaches, the latter cannot plead, in addition to the pleas objecting to the validity of the last will, a further plea propounding a former will though intended only to be used in case any intervenor should propound an intermediate will.*

In this case there were three wills forthcoming of the deceased, dated respectively the 21st, 23rd, and 24th days of May, 1864. The plaintiff had propounded the last, and had cited all persons interested under the other two to see proceedings; and some had intervened, and one had pleaded undue execution and want of capacity, but no one had alleged the intermediate will. The defendant had pleaded undue execution, want of capacity, and undue influence, and also propounded the first will in which he was a legatee.

Dr. Townsend now applied that the last plea should be struck out. The only will which could be put in issue in this suit was the last will.

Dr. Ball, Q.C. (with him T. P. Lynch).—We pleaded that plea merely on the expectation that some one would have intervened and have propounded the intermediate will.

KEATINGE, J.—I will not strike it out, but I will direct that no proceedings be had with reference to it without further order.

DOYLE v. LEARY.—Jan. 26.

### Costs—Legatee in former will—Next of kin.

*A legatee in a former will, though a next of kin, impeaching, as such legatee, a later will, on the ground of want of capacity or undue influence and failing is, as a general rule, liable to costs. Next of kin are more favored as regards costs; and in case of three wills written within four days differing from each other, they got costs, though the last will was established.*

In this case the testator, Thomas O'Donnell, had died on the 25th May last; and three wills were produced after his death,—one dated the 21st May, 1864, under which the defendant, Mrs. Leary, otherwise Jackson, claimed as a legatee; another of the 22nd May, 1864, which omitted her name as a legatee; and the third of the 24th May, 1864, leaving all the property to the widow of the deceased, and in which the plaintiff was executor. The first and second will left the widow only a small provision. The assets were about £1,900. All the parties interested in the first two wills had been cited, but no one propounded the second will; and the issue was confined as to the validity of the last will. The defendant, Mrs. Leary, was a next of kin, but had appeared as a legatee in the first will and had pleaded undue execution of the last will, want of capacity, and by amendment with leave of the Court, undue influence. One of the next of kin intervened, and also appeared and pleaded want of capacity and undue execution, and was represented by counsel at the hearing, but he did not interfere either by cross-examination or otherwise in the case. The jury found that the will alleged by the plaintiff was the last will of the deceased. The cause was set down for final hearing.

Dr. Ball, Q.C., now applied that his client, the defendant, should be excused from the payment of costs. Besides being a legatee in the first will she was one of the next of kin. She got by that will a legacy of £100, and the deceased first said he intended to leave all he had to her. She was removed from that will in a peculiar way. Mrs. O'Donnell asked him to take the defendant's name out of his will and substitute her own name, as she would apply the money in Masses and in charity, which the former being a stranger, would not do. The defendant lived in Limerick, and had nothing to do with the transaction. There was a sudden change of intention on the testator's part, and his name was written by him to the first will alone, the other two being executed by him by his mark.

Whiteside Q.C., and Dr. Townsend contra.—The deceased did not even know the name of the defendant, as he called her "One of the Jacksons." There was no evidence of undue influence; and the defendant appeared and pleaded as a legatee, and not as a next of kin; and as the executors did not appear, and the defendant had no means, she was manifestly put forward to fight their battle so that they might escape costs. A legatee opposing a will and failing, does so at the peril of costs—*Urquhart v. Fricker*. (3 Add. 56).

KEATINGE, J.—The defendant's object is to establish the first will; by the second what was given to her on the first was taken away; and the second was the first instrument which showed a change of intention; but that was a fraudulent transaction, and the effect is to restore the first will; but then we have a third will, which is established by the verdict as the last will. The suit was a very expensive one, but I do not see how I can refuse to award costs against the defendant unless I am prepared in every case to do so. I cannot go into minute circumstances, nor have I any right to interfere on account of the defendant's want of means. As a general rule, every person pleading in a cause is liable to costs if he fail. There are exceptions to that rule, but this is not one.

W. C. Smith, for the intervenient, O'Donnell, asked for costs out of the estate. He was justified in appearing as next of kin, three wills having been made within four days. Before the trial, and up to the hearing, the case, as to all the wills, was very suspicious. The intervenient had not pleaded undue influence—only undue execution and want of capacity, and he did not cross-examine the witnesses or go into any special case.

Whitely, Q.C., and Dr. Townsend contra.—By a notice in the cause we had called on the parties to consolidate their pleas, and the Court, on that motion, reserved the question of the costs of the intervenient appearing at the hearing.

KEATINGE, J.—I think the next of kin who intervened is entitled to his costs. The fact only of the capacity being questioned by him and of three wills having been written within four days, differing materially, would of itself justify the next of kin in appearing and seeing whether anyone was entitled to probate.

*Decree establishing the will of the 24th May, 1864, as the last will, the defendant to pay the plaintiff his costs, the intervenient to get his costs out of the estate.*

## Court of Bankruptcy & Insolvency.

[Reported by John Levy, Esq., Barrister-at-Law.]

[BEFORE LYNCH, J.]

RE PETER CURRAN.

*Mortgage of ships—Bill of sale—Reputed ownership—Fraudulent preference—Right of assignees to stand as specific creditors for sums paid to mortgagee—Costs.*

*Where a trader makes an absolute bill of sale of two ships in payment of advances made him by the party to whom he assigns, and who raises this money on bill discounted in a bank; and it appears that it was at the instance of the bank manager the bill of sale was effected, such transaction will not*

*be held to be a fraudulent preference; and although the ships still remain in possession of the assignee, they will not come under the reputed ownership clause. Assignees will not be allowed to stand as specific creditors instead of a mortgagee in respect of sums advanced to pay off the mortgage. Although a party may establish his claim, costs will not be given where private transactions demand investigation.*

This matter came before the Court upon a special case wherein the parties submitted to leave the questions in dispute to the decision of the Court. The question at issue was the validity of a bill of sale of two ships belonging to the bankrupt, and consequently whether a fraudulent preference had been given by him to the party to whom the assignment or bill of sale had been given. The facts fully appear in the judgment.

Heron, Q.C., with Purcell, were for the assignees.

Kernan, Q.C., was for the assignee under the bill of sale.

LYNCH, J.—This case is now before me, by the submission of Mr. Carpenter to the jurisdiction of this Court, on the charge of assignees and the discharge thereto of Mr. Carpenter. The case is one involving a considerable amount of property, and I have therefore given it the attention called for by a case so circumstanced. The question at issue between the parties is, 1st, as to the validity of the bill of sale of two vessels, "The Raymond" and "The Mountaineer;" and secondly, as to the right of the assignees to be declared entitled to stand as specific creditors against these vessels for the sums paid to Mr. O'Connor on foot of his mortgage after the execution of the bill of sale. The first question—as to the validity of the bill of sale—arises out of the circumstances attending the sale from which the assignees charge that the assignment was a fraudulent preference, and as such void under the bankrupt law, or that the transaction was fraudulent and avoidable. It seems to me the best course for me to take is shortly to state the facts as I find them to be, so as on these facts so found by me I may intelligibly state my conviction in point of law. Mr. Carpenter is the father-in-law of the bankrupt, and was, before June, 1863, largely in advance to him; and several of these advances having been made in respect of these vessels, the bankrupt promised to charge them as security for the loans. There is no doubt as to the advance of the money; there is no question as to the reality of the debt, to secure which the assignment was made. It appears that the advances made were by accommodation paper, for the bankrupt discounted on Carpenter's credit by the Hibernian Bank, through their manager in Drogheda, Mr. Dillon; and it appears that the application for the bill of sale in July, 1863, was made by Mr. Carpenter at the instance of Mr. Dillon, Mr. Dillon, no doubt, conceiving that he strengthened the security for the bank by inducing Carpenter to procure this security for himself. Now, there seems to me not a shadow of doubt that all these proceedings were *bona fide*; that the money was due; that the assignment was made and procured to secure Carpenter; and

that it originated in the request of Carpenter, induced to make it by Mr. Dillon. There is no evidence before me that even the bankrupt knew he was insolvent at that time, though as a matter of fact his accounts now show that he was then insolvent; and there is clear and distinct evidence uncontradicted, that Carpenter did not know or believe that he was insolvent. In the state of facts as so far explained by me, it is impossible to argue this question—as upon a fraudulent preference within the bankrupt law, and indeed the case was not pressed in this view—but counsel argue that the whole transaction was fraudulent, and they argue this from the contemporaneous and subsequent dealings as to the vessels. It is proved that immediate possession was not given; that the bankrupt continued in possession of and trading with these vessels, and was the ostensible owner of them the same, to the world, as before this arrangement. I may here remark that no case of visible ownership is relied on as giving title here under the Bankrupt Act. It appears in evidence that when Mr. Carpenter applied for the assignment of these vessels the bankrupt offered him a mortgage of them; but Mr. Carpenter acting on the instructions given him by Dillon, insisted on the unconditional bill of sale, and the bankrupt yielded to this request. It appears, then, that there was an agreement between Carpenter and the bankrupt as to the further possession of these vessels; and this is the only part of the case with respect to which any doubt really arises—that is, as to what precisely was the agreement. To query 126 the bankrupt says, “He told me I should pay every one twenty shillings in the pound until I had them paid, and then I was to pay him.” To query 130, “I was to pay them (the creditors), and then commence to pay him off, but he was not to press me until I paid everybody.” To query 197, which is very objectionably leading, he says, “He trusted me so far,” the so-called question being—“You were to pay the creditors twenty shillings in the pound; and if you could pay Mr. Carpenter his £5,000, you were to have the ships again.” The evidence here is more the evidence of counsel than of the witness. To query 340, put by the Court, he says, “He called on me to show what they (the ships) were doing, and he told me I might continue to work them and pay every one twenty shillings in the pound, and then to commence and pay him off.” These answers are those chiefly showing the dealings with these vessels after the arrangement, as represented by the bankrupt. Mr. Carpenter’s evidence is, in answer to query 277, “I had a conversation with the bankrupt about the mortgage on the vessel; I requested him to pay off the mortgage of the vessel.” To queries 281 282, “He told me that as soon as the vessels would earn that amount he would pay the mortgage of the “Raymond.” I did not ask him for an account; I thought he was paying off the debts.” In his affidavit Carpenter says, “I say that, acting on the advice of the said Michael Dillon, which I then communicated to the bankrupt I required him to execute bills of sale of said ships, so that I would be absolute owner thereof, which he did accordingly, as stated in my discharge, and I thereupon verbally authorised him to manage said ships for me and for my benefit, and

to pay any debts due thereon out of their earnings, and particularly the mortgage for £900 then affecting the ship Raymond, and due to Mr. V. O’B. O’Connor.” My conclusion from this evidence is, that the contract of assignment was complete, and intended to be complete as a security for Carpenter, or more truly for the bank to whom in truth the money was due, and that, independently, Carpenter agreed to leave the management of the vessels with the bankrupt, he discharging out of their receipts all liabilities of the management, then paying off the debts and charges, and the mortgage to O’Connor, and then, if he could, paying the debt to Carpenter, so as to relieve him of any responsibility to the bank, and then that Carpenter would give him back the ships as his own again. In my opinion this was all *bona fide* done, with no fraudulent view entertained by Carpenter, but simply to secure himself; and yet, being willing to forego his legal title of ownership, if the bankrupt could make him square as to the transactions in which he had involved himself. The question raised here is, is this assignment fraudulent? It is not argued as a point of law, that this agreement, as to possession of the vessels, renders the assignment void; it is only argued that, as a matter of fact, I ought to find it fraudulent. The law on this subject is now clear enough. Buller’s observation in *Edwards v. Harben* is now judicially expounded not to mean an absolute avoidance, but that it is evidence of fraud. In *Martindale v. Booth*, (3 B. & Ad. 505), Parke, J., says, “I think the want of delivery of possession does not make a deed of sale of chattels absolutely void. The dictum of Buller, J., in *Edwards v. Harben*, has not been generally considered in subsequent cases to have that import. The want of delivery is only evidence that the transfer was colourable. In *Barton v. Thornhill*, it was said, in argument that want of possession was not only evidence of fraud, but constituted it: but Gibbs, C.J., dissented, and although the vendor, after executing a bill of sale, was allowed to remain in possession, Gibbs, C.J., at the trial, left it to the jury to say, ‘whether, under all the circumstances, the bill of sale was fraudulent or not.’” In *Lindon v. Sharpe*, (6 M. & G. at 898), Tindal, C.J., says, “The modern doctrine is, that it must be left to the jury to say whether the continuance in possession is fraudulent or not. It is a strong fact, but not conclusive. The more modern cases now universally assume this rule; and it rests therefore, with me, as a juror to answer whether this assignment was fraudulent. I asked what fraud was I to find? And the only answer I got was that I was to find the whole transaction to be colourable, and never intended to operate as it purported on the face of it to do. In my judgment, no jury would affirm that proposition—I believe it was a real transaction, *bona fide*, intended to operate as a security in its very terms—and that the contemporaneous dealing was *bona fide*, and intended to be in furtherance of this. The possession left with the bankrupt was a premium for Carpenter, and for his use in clearing the vessel and discharging the debt which was the consideration of the assignment—and though he expressed his readiness, if all these claims were discharged, to allow the bankrupt to get back the vessel—yet, in

my judgment this does not import that the whole transaction was colourable and conceived with any sinister view. This is no question on the bankrupt law or any special equities arising out of it, and I think myself bound, as a matter of fact, to find that this assignment was not fraudulent. A further question then arises as to payments made to Mr. O'Connor in discharge of his mortgage on the Raymond, and I am asked to declare the securities, as now in equity, subsisting for the assignees, to the extent of the payments so made to O'Connor. Now, it certainly has not been explained how, exactly, this claim is to be made out. The bankrupt, before his bankruptcy, never advanced this claim; no contract for such a purpose was ever made between the bankrupt and Carpenter; and no act was ever done by Carpenter to keep alive such a claim. The bankrupt continued in management of these vessels, under a contract to pay off this charge out of the earnings of these vessels. He had to pay a large sum to O'Connor, not out of the earnings of the vessels, but out of the proceeds of some specific property sold by him, but he raised no claim by reason thereof against Carpenter, but continued his management of the vessels as before. Could the bankrupt, if bankruptcy had not intervened, have raised this claim against Carpenter? On what ground, I would ask. No contract to that effect existed? He had no equitable title to show for said relief, and it seems to me impossible to make out for him out of their dealings such a claim. Then can I for the assignees undo their by-gone transactions, and create for them an equity that did not exist for the bankrupt? It seems to me that Carpenter fairly puts the case when he asks only to stand as mortgagee in respect of his claim, and seeks no greater right in himself than belongs to him by the very terms of the parol agreement made at the time of the assignment. Therefore, in both points I rule this case for Mr. Carpenter, but, though I rule both points for him, and by the ordinary rule of this Court I should give him the costs of his discharge, still, in this case, I think I am bound not to operate the estate with the costs of this discharge. The transaction was one which called for investigation. Private transactions like these which leave a trader in visible ownership of vessels while in truth he is but an agent, and with no title to credit thereby, if they are eventually to be sustained on the facts being, fully disclosed yet have in their very nature an aspect that demands investigation, and those who are parties to such transactions are very well off if they get the fruits of such dealings, and have themselves to blame for so conducting their dealings as to render their explanation essential for justice. I therefore allow the discharge without costs, and the assignees to have their costs against the estate.

## Court of Appeal in Chancery.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

ELLIS v. THE LORD PRIMATE.—Nov. 16, 1864.

*Lease—Exceptions therout—Mistake of conveyancer.*

*Demise of the whole territory or precinct of land commonly called Termon, containing in itself by estimation 40 poles of land, save and except 2 poles of Gortaquil, situate and being in the manor, &c. Held (affirming the order of the Master of the Rolls), that the exception of said 2 poles is good. A mere mistake of the conveyancer shall not entitle a party to relief in equity.*

THIS case came before the Court on appeal from the Master of the Rolls:—The facts as stated in the petition of appeal are shortly as follows:—The cause petition was filed 16th October, 1863, praying for a specific performance of the *toties quoties* covenant for a renewal in a lease of the lands of Gortaquil, dated 27th October, 1748, and that petitioner should be declared entitled to have a renewed lease of said lands in pursuance thereof, and that it should be declared that the said lands of Gortaquil were effectually demised by the head lease of 1843 herein-after mentioned, and the subsequent renewals of same, notwithstanding the attempted exception of such lands of Gortaquil in said renewals, and that the respondent, David Fielding Jones should be directed to execute a renewal of said sub-lease of Gortaquil, or otherwise that the separate lease of Gortaquil should be declared to be bound by the said covenant for renewal, and that any estate created by the separate lease of Gortaquil, made on the 24th September, 1862, should be declared to be a graft on the separate lease of same lands made on the 20th May, 1844. The petition stated that previous to the year 1748, John Jones was possessed of church lands, situate in the County Cavan, being in all 40 poles of land (and amongst others the two poles of Gortaquil herein-after mentioned), as lessee under one head-lease of said 40 poles for 21 years, made by the Bishop of Kilmore. That said lease was kept on foot by renewals of same up to the year 1841, and that from said renewals it appears that the demise of said 40 poles of land, and the exceptions out of same, were expressed in the original head lease and renewals as follows, viz.—“Hath demised, set, and to farm let, and by these presents doth for himself and his successors, Bishops of Kilmore, demise, set, and to farm let, unto the lessee, John Jones, his executors, administrators, and assigns, All That and Those the several parcels herein-after mentioned, that is to say,” setting forth nominatim a number of parcels, “in all 40 poles of land.” The petition then stated that said John Jones being so possessed of said 40 poles of land did by indenture of lease bearing date the 27th October, 1748, sub-demise unto one William Newburgh all the said 2 poles of Gortaquil in as full and ample a manner as the same were held by Brockhill Perrott therein described, to hold the same for the

term of 20 years from the 25th March, 1746, at the yearly rent of £46, together with 10d. in the pound receiver's fees, late Irish currency, and which lease was a renewal of a former lease of said lands made to said Brockhill Perrott. That in said indenture of sublease was contained the following covenants, "And the said John Jones doth for himself, his executors, administrators, and assigns, further covenant, promise, grant, and agree to and with the said William Newburgh, his executors, administrators, and assigns, as follow:—<sup>a</sup> That he the said John Jones, his executors, administrators, and assigns, shall and will, at the expiration of the first seven years of the term hereby granted, at the request, costs, and charges of the said William Newburgh, his executors, administrators, and assigns, make and perfect unto him and them a new lease of the premises hereby demised for the term of 20 years, to commence from the expiration of the said first seven years; provided he, the said John Jones, his executors, administrators, or assigns, shall have so many years to come out of his lease from the See of Kilmore, under the like rent and receiver's fees, covenants, conditions, and agreements herein contained, he, the said William Newburgh, his executors, administrators, or assigns, first paying, or causing to be paid, unto the said John Jones, his executors, administrators, or assigns, at the expiration of the first seven years, the sum of £11 10s. sterling, over and above the annual rent and receiver's fees therein-before reserved, and sealing and delivering a counterpart of such new lease unto the said John Jones, his executor, administrators, and assigns; and in like manner from time to time at the expiration of every seven years, so long as he, the said John Jones, his executors, administrators, or assigns, shall continue tenant to the See of Kilmore, at the like request, cost, and charges of the said William Newburgh, his executors, administrators, or assigns, and upon the like payment of the sum of £11 10s. over and above the annual rent and receiver's fees herein-before reserved, and sealing and perfecting a counterpart of such new lease as aforesaid, he, the said John Jones, his executors, administrators, and assigns, successively shall and will make and perfect unto the said William Newburgh, his executors, administrators, and assigns, a new lease of the premises hereby demised for the term of 20 years, to commence from the expiration of the preceding seven years, provided he, the said John Jones, his executors, administrators, or assigns, shall have so many years then to come of his lease of the said premises from the See of Kilmore as aforesaid, under the like rent, receiver's fees, covenants, and agreements as are contained in these presents."

That said head lease and also said sub-lease respectively were several times renewed; and on or about the 5th day of February, 1840, all the estate of the said William Newburgh in the said two poles of Gortaquil, under said sub-lease and the several renewals thereof, became vested in the respondent, John Stewart, in trust for petitioner, and that on the 20th September, 1840, a renewal of said sub-lease for 19 years, from the 25th day of March, 1840, was duly executed to said John Stewart as such trustee, by John Copeland Jones, in whom the said estate of the said John Jones in said 40 poles of land under said head lease, and

the renewals thereof, was at said last mentioned date vested. That said renewal of said sub-lease, made on the 20th of September, 1840, contained the covenant for renewal thereof above set out, and was on the 24th day of September, 1862, unsurrendered and unforfeited, and that said sub lease and the right of renewal thereof was, at the date last mentioned, vested in said John Stewart, in trust for petitioner. That the said John Copeland Jones took out a renewal of the said head lease of said 40 poles of land in the year 1841 for a term of 21 years, from the 29th day of September, 1841, and that in said last-mentioned renewal the demise and exceptions thereout were expressed to the effect herein-before in that behalf mentioned. That after the taking out of the said renewal of the said head lease in the year 1841, and before the taking out of any subsequent renewal, the said John Copeland Jones called upon petitioner to pay a certain sum of money as an aid to the renewal fine of the said head lease of the entire 40 poles of land, which sum petitioner refused to pay to said Jones, believing said demand of said Jones in that regard to be exorbitant and unjust; but petitioner offered to pay as such aid a sum of money in proportion to the value of his said lands of Gortaquil.

A difference having thus arisen between Jones the immediate lessee, and Ellis, the sub-lessee, as to the contribution which Ellis should pay towards the renewal fines payable by Jones to the bishop, Jones then obtained a renewal of "*the whole territory, or precinct of land commonly called, &c., being in all 40 poles of land, save and except all that two poles of Gortaquil*" in as full and ample a manner as the same were formerly held and enjoyed by Brockhill Perrott, and now or later in the possession of John Stewart or his under-tenants, situate, lying, and being in the manor of Drumlam and County of Cavan aforesaid." This lease bore date the 20th of May, 1843, for the term of 21 years, from the 29th day of September, 1842. The two poles being thus excepted in the head lease of 20th May, 1843, on the 20th May, 1844, the Bishop of Kilmore executed to said J. C. Jones what purported to be a lease to him of the two poles of Gortaquil, separately, for a term of 19 years from the 29th day of September, 1843, and the petitioner alleged that said separate lease was a contrivance to deprive petitioner of the right to purchase a perpetuity in said lands, which petitioner would have enjoyed if said separate lease had been made for the term of 21 years, being the term for which all the former renewals of said head lease of forty poles had been made. That in the year 1859 the respondent, David Fielding Jones, in whom the estate of said John Copeland Jones in said forty poles of land had at said last-mentioned date become vested, refused to renew petitioner's sub-lease of Gortaquil, and brought an ejectment against petitioner, for the purpose of evicting petitioner's estate in said lands under said sub-lease, whereupon petitioner allowed judgment in said ejectment to be entered against him, and filed a petition in Chancery against said respondent Jones, praying that the said judgment in ejectment should be set aside, and that a renewal of said sub-lease should be directed by said Court. On the 24th day of September, 1862, the said Primate being



then Bishop of Kilmore, made a lease of said two poles of Gortaquil for 21 years to George De La Poer Beresford his son, and George Henry L'Estrange, his agent, in trust for himself; that the said Bishop of Kilmore was promoted to the See of Armagh in the following month of October.

The Master of the Rolls held that the above exception of the two poles out of the grant was a good exception, and from that decision the present appeal was brought. The following, amongst others, were the reasons upon which the petitioner insisted the order of the Master of the Rolls was wrong:—Because the said head lease of 1843 expressly grants forty poles of land—*nomine et numero*—and amongst others the two poles of Gortaquil, and said exception of said two poles of Gortaquil out of said forty poles of land is an attempt to except that which was expressly granted before by said demise of 1843; and said exception crosses said grant of forty poles, and is repugnant to the terms of said grant, and attempts to reduce said grant of forty poles to thirty-eight poles, and thereby to prevent the said head lease of 1843 from satisfying said grant of forty poles of land; and for said reasons said exception is invalid.

Serjeant Sullivan (with Phillips) now appeared in support of the appeal.—The narrow question for the Court to consider was, whether the exception of the two poles in the renewal of the lease of 1843 (which exception was made by the then Bishop of Kilmore, the now Primate) was a good exception; if the exception was bad, as we submit it was, then though the bishop endeavoured to grant but 38 poles, yet the grant being once made of a number of poles, an exception thereout is repugnant to the grant, and therefore the two poles of Gortaquil passed, and the exception is void. [*The Lord Chancellor* inquired what was meant by a pole of land—it could not mean the modern pole or perch? Serjeant Sullivan.—Sir James Ware, in the 2nd volume of his *Irish Antiquities*, p. 227, says, “A polle of land in the County of Cavan is a portion of land containing 60 acres, or thereabouts,” about 100 English acres to the pole.] This case must be decided upon the strict rules of law. An exception “out of twenty acres, one” is bad.—Co Lit. 47, a. This doctrine is also laid down in the *Touchstone*, 7th edition, p. 78. There, in the 6th rule as to what shall be said to be a good exception or not, Mr. Shepherd says, “It must be a particular thing out of a general, and not a particular thing out of a particular thing; you cannot grant twenty manors, twenty houses, and twenty trees, excepting one of them, for in this instance the exception negatives the right to one of those things particularly described or comprehended by the numbers for nineteen houses are not twenty houses.” Applying those authorities to the case now under consideration, it will appear that the exception is bad, and the grant of the 40 poles is good. In the above positions, 4 Com Dig., tit. *tail*, p. 164, concurs, citing 2 Rolle, 454, tit. *Reservation*. Lastly, the words of the exception must be taken most strongly against the grantor. [*The Lord Chancellor*.—The grant in the original lease of 1748 does not convey a number of poles exactly—the words are, “containing by estimation.”] That does not alter in the least the number of poles—it

means as near as mathematical calculation can approximate to 40 poles. In *Horneby v. Clifton* (3 Dyer, 264), it is said if a man demise a house and shop, excepting the shop, the exception is void.—*Stukeley v. Butler* (Hob. 161).

Brewster, Q.C. (with Ball, Q.C.)—The exception here of the two poles excepted by the bishop in the lease of 20th May, 1843, is a good exception. It is plain the bishop meant to except the two poles, and had he in the instrument granted merely 38 poles, no question could arise, so that really it was if anything but a slip of the conveyancer; but as a matter of law such an exception is good. No doubt if I grant all Dorset street, except Numbers 9 and 10, that exception is good; but if I grant Numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, except Numbers 9 and 10, that is a bad exception. If the whole territory be taken as a general description, a particular may be excepted out of it—Co Lit. 47, a, which says, “Out of a general a part may be excepted, as out of a manor an acre, *ex verbo generali aliquid excipitur*.” A great deal of learning on exceptions and reservations is to be found in 4 Jarman, 3rd ed., by Sweet, 315, 316.

THE LORD CHANCELLOR.—There can be no doubt that where there is a grant of the whole territory of those lands, excepting two poles, that that exception is good. Now, this is a cause petition filed for the specific performance of a covenant, and at best the only thing that is relied upon by the petitioner is, what beyond a doubt was, a mere mistake of the conveyancers when dealing among the parties. Had a bill been filed by the Bishop of Kilmore to reform the lease, and to carry out the intention of the parties, on the ground of a mistake of the conveyancers, relief would have been granted. The petition is founded upon the assumption that Mr. Jones was tenant to the lands in question. The covenant by Jones was to renew so long as he continued tenant to the See of Kilmore. This case was argued at considerable length before the Master of the Rolls, and he dismissed the petition, and it appears to me that His Honor took the proper view of this case. It is very true you cannot grant and reserve the same object of grant in the same instrument. This is the first time I ever heard of a petition founded on a mistake. Had the petitioner gone into a Court of Law, I should have stopped him. Can you make a mistake the basis of a suit in Equity? I never heard such a proposition. Affirm the order of the Master of the Rolls.

THE LORD JUSTICE OF APPEAL concurred.

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

BRENNAN v. BOYNE.—Nov. 23–24, 1864; Jan. 23; Feb. 13, 1865.

*Words of inheritance in a deed not necessary to pass the absolute interest in an estate pur autre vie.*

*P. W., who was seised for an estate for lives remoy-*



*able for ever in the lands of Derreen, had two daughters, E. and C. Upon the marriage of C. with B. a settlement was executed whereby the said father, P. W., granted said lands to trustees upon trust, after the decease of C., in case there should be any issue of the said intended marriage, to pay and apply all and singular said full moiety or one-half of said estates and properties amongst said children (without adding any words of limitation.) The deed then provided that if C. died without issue, then the trustees, their heirs, &c. shall stand seised and possessed of all and singular the moiety of the lands of Derreen "for the sole exclusive use and benefit of the said P. W., his heirs," &c. C. had one child, K. Held (reversing the decision of the Master of the Rolls), that in a deed words of limitation are not necessary to pass the entire estate in a lease for lives renewable for ever, and that K. took an absolute estate in said lands, and not an estate for life merely.*

THIS case came before the Court on appeal from the Master of the Rolls. The question for the consideration of the Court in this case was, whether words of limitation are necessary to pass the entire estate in a lease of lives renewable for ever, whether the estate conveyed be legal or equitable? The facts of the case are as follows:—On the 14th of December, 1810, Joseph Tibbeando being seised in fee-simple of the lands of Derreen, demised 190 acres thereof to Patrick Wyer and his heirs for three lives—namely, George III.—the Prince of Wales—and Duke of York. Patrick Wyer died in 1817, leaving two daughters, Ellen and Catherine. On the 31st May, 1813, Ellen the eldest, since deceased, married the late Patrick Boyne, whose son, Joseph Wyer Boyne, is the present respondent.—Catherine, since deceased, the second daughter of said Patrick Wyer, married a widower named James Brennan, and by him she had issue one daughter, viz., Kate Brennan, who married Thomas Mark Lyster (both since deceased). The said James Brennan left by his first marriage one son, Michael Brennan, who is heir-at-law to his said half-sister, Kate Brennan, otherwise Lyster, deceased; said Michael Brennan is the present petitioner. On the 1st January, 1816, said Catherine Wyer married James Brennan, upon which day a deed was executed (previous to the marriage) between said Patrick Wyer and said Catherine, his said daughter, of the first part, said James Brennan of the second part, and T. Dowling and J. Dunn (trustees) of the third part, whereby it was witnessed "that the said Patrick granted, bargained, sold, &c. to the said trustees the said lands of Derreen upon trust, to secure to the said Catherine Wyer the said annuity of £100 a year during the lifetime of her father, the said Patrick Wyer; and upon further trust after the decease of said Patrick Wyer that the said estates, town, and lands of Derreen should, subject as therein to certain annuities be divided into two equal moieties or half-shares, and that the trustees should stand seised and possessed of one moiety of all the afore-mentioned estate, town and lands of Derreen, in trust to permit said Catherine Wyer to receive the rents and profits thereof for her life, and after her death, in case there

should be any issue of the marriage, to pay and apply all and singular said full moiety, or one-half of said estates and properties amongst said children, share and share alike, the yearly rents, issues, and profits, and the interest and produce thereof, to be paid to and amongst them until the youngest of said children should attain the age of twenty-one years, and then to divide all and singular said moiety, or one-half of said estate and property, and principal sum and sums of money equally between and amongst them; and in case said Catherine should die without issue living at the time of her death, then to hand, pay, and apply all and singular said moiety or one-half part of said estate and properties to the said James Brennan and his assigns during his life, and after his death as to all and singular said moiety of said lands of Derreen, and the rents, issues and profits, interest and produce thereof, to the use of Ellen Boyne, otherwise Wyer, and her heirs; and in case the said Catherine Wyer and Ellen Boyne should die without issue living at the time of their deaths respectively, that the said trustees should stand seised and possessed of all and singular the aforesaid moiety of the said lands of Derreen after the death of James Brennan, for the use of Patrick Wyer, his heirs and assigns." And it was by said deed also agreed upon "that the heir or heirs of Patrick Wyer, or of his daughters, Catherine and Ellen, or of any of them, or such person or persons as by virtue of the said deed should be seised of the said lands of Derreen, or any other estates or properties of which said Patrick should die seised, should not make any lease of any part thereof for a longer term than thirty-one years or three lives, and that no fine should be taken, and the best rent reserved. And further, the said Patrick Wyer, for himself, his heirs and executors, covenanted, granted, and agreed with said Thomas Dowling and John Dunne, their heirs and executors, that all and singular the estate and lands of Derreen, or any leases for ever, whereof said Patrick should die seised or entitled, should be subject and liable to all and singular the trusts of the settlement, and that the same should remain and continue and be vested in the said trustees for and upon no other use, trust, or purpose whatsoever, and also there was a covenant to do any further act whereby the trusts of the deed might be carried out."

The principal question in the case arose upon this deed. There was an only child of this marriage—namely, Kate, married to Thomas Mark Lyster, both deceased, without issue. Said Patrick Wyer died in the year 1818, leaving his said two daughters him surviving. Catherine Brennan died 3rd May, 1818, leaving her husband, James Brennan, surviving, and said Kate, afterwards Lyster. The petitioner, who was heir-at-law of said Kate Lyster, insisted that she was entitled to an estate in *quasi* fee in one half of the lands of Derreen, the subject of the settlement, although there were no words of limitation in the clause, and that petitioner was entitled to his moiety as her heir-at-law. There was a partition of Derreen lands in 1819. There were two renewals of the lease of 1818—one to Patrick Boyne, and the other to Patrick Boyne and Thomas Mark Lyster. Lyster being dead, the legal title under those renewals was vested in the respondent, Joseph Wyer Boyne. The petition stated a settlement made before

the marriage of said Thomas M. Lyster with said Kate Brennan in 1843, whereby, after giving successive life estates to Thomas Mark Lyster and said Kate Lyster, and after limitations to the children of the marriage in *quasi* tail, there was an ultimate limitation to Kate and her heirs for ever. Kate Lyster died without issue on the 20th December, 1859, and without having made any appointment of the lands of Derreen, or exercised any of her powers under the marriage settlement of 24th February, 1843. Thomas Mark Lyster died 19th April, 1862, having entered, upon the death of his wife, under the settlement of 1843. He made a will devising said half of the lands of Derreen to Joseph Wyer Boyne and his heirs.—Such being the facts of the case, the prayer of the petitioner was, that the respondent, Joseph Wyer Boyne, as the heir of the lessee in the last renewal of 1840, might be declared to hold the portion of the land thereby demised, which, by the deed of partition was allotted for the share of the said Kate Lyster, or other, the moiety of Kate Lyster, in trust for the petitioner and his heirs absolutely.—The contention of the petitioner both now and at the hearing below was—that Kate Lyster was, under the settlement of 1816, entitled to the absolute interest in the moiety, the subject of this settlement, and that he, as the half brother, and heir-at-law of her, is now entitled to the same interest under the limitation in the settlement of 1843. The respondent, on the other hand, submitted that Kate Lyster was not a purchaser of the said lands, within the meaning of the late Inheritance Act, and that the heirship should be traced, not from Kate Lyster, but Patrick Wyer, or his daughter, Catherine Brennan.

The question upon which the opinion of the Court of Appeal was sought by the petitioner was, “Whether Kate Lyster, under her mother’s marriage settlement (that of 1816), took the absolute interest, or only a life estate?” The Master of the Rolls declared the petitioner entitled only to half a moiety of the lands of Derreen, on the grounds that there were no words of inheritance in the limitation of the beneficial interests to the children of the marriage in the deed of 1816; and that, therefore, Kate Lyster, took merely a life estate in the moiety given to her mother, and that the reversion in *quasi* fee of said moiety upon Kate’s death resulted back to said Patrick Wyer; therefore his heirs now became entitled thereto—*id est*, Joseph Wyer Boyne as to one half of said moiety, in right of his mother, Ellen Boyne otherwise Wyer; and as to the other half of said moiety, that it descended to the heir of Kate Lyster, namely, the present petitioner.

The Solicitor-General (Lawson), Ball, Q.C., and Byrne, now appeared for the appellant, Brennan.—The appellant is clearly entitled to have so much of the Master of the Rolls’ judgment, as declares that Kate Lyster only took a life estate in the one moiety, reversed. We submit that she took an estate in *quasi* fee-simple under the deed of 1816, and if that be so, then the petitioner below the present appellant is entitled, not to half the moiety of Derreen, but to the whole moiety, as heir-at-law to Kate Lyster, who took said moiety under said deed. The question now for the Court to consider was, Whether it makes any

difference that the property is not fee-simple, but an estate *pur autre vie*? a question already discussed in *Doe dem. Jeff v. Robinson* (8 Barn. & Cross., p. 296). The following is the marginal note in that case:—“Where the tenant of lands granted to him and his heirs *pur autre vie* devised them to A B, without saying more, and A B died, living *cestui que vie*—held, that the heir of the devisor was entitled to the land as special occupant.” This, it is true, was a question that arose on a will, and not on a deed, as in the present case—*Crozier v. Crozier* (3 Dr. & Warr. 382). The respondents, in order to establish their view of this case, press that Kate Lyster only took a life estate, and that the fee resulted back to Wyer. This, however, is treating an estate *pur autre vie*, as if it were an estate in fee-simple. It is perfectly true that if it were in fee it would have resulted; but there is no resulting use in an estate *pur autre vie*, and it was so decided by the Court of Exchequer, in *Keegan v. Mowlds* (8 Ir. Jur., N.S. 172). *McClintock v. Irvine* (10 Ir. Ch. 480) was where lands held for lives renewable for ever were conveyed for all the estate of the tenant, to trustees, their heirs and assigns, for the lives in the lease, and the deed contained a declaration that the names of the trustees were made use of as trustees for J. W. B., and that the grants therein contained were for his sole use and benefit, and for no other use, intent, or purpose; nevertheless it was held that J. W. B. took the entire equitable interest in *quasi* fee. This case was decided so late as 1860; *vide* also Co. Lit., 41-b:—“So if a tenant for his own life grant over his estate to another, if the grantee dieth there shall be an occupant,” which shows that there is no resulting use to the grantor after the death of the grantee—*Williams v. Jekyl* (2 Ves. Sen. 681); *Pickersgill v. Geary* (30 Beav. 359), 1 Shap. Touch. 87-107; *Doe v. Cassidy* (1 H. & Br. 222); *Montgomery v. Montgomery* (8 L. E. R. 740); *Keats v. Hewer* (10 Jur. N.S. 1040).

*Sergeant Sullivan* (and *Beytagh*) were for the respondents.—The view the Master of the Rolls took of this case was correct. Kate Lyster only took a life estate. There is a uniformity in modes of limitation of estates in fee and *quasi* fee. *Dawson v. Dawson* (13 Ir. Law. Rep. 472) was a case which was argued in the Court of Queen’s Bench in this country in the year 1850, when the present Lord Justice of Appeal was Chief Justice of that Court, and his Lordship is now called upon to reverse his own judgment, delivered by himself. The marginal note in that case was as follows:—“By a deed executed in 1794, F. D. granted certain lands (which were held under lease for lives renewable for ever) to trustees, to permit F. D. to receive the rents for his life, and after his death that the lands should go and become the property of W. D. and his issue male, lawfully begotten; and for want of such issue, to F. D. and his heirs for ever. The plaintiff, in an ejectment brought to recover these lands, claimed under the limitation to T. D. as his heir; the defendant claimed as devisee of W. D., insisting that W. D. took an estate *quasi* in fee, or *quasi* in tail, which he had barred. Held, that W. D. did not take an absolute interest under the deed, nor an estate *quasi* in

tail, but only an estate for life." Nothing can be better settled than that words of inheritance are essentially requisite to pass the whole estate in a lease *pur autre vie*. It would be tedious to go through a long uniform chain of decisions on that point.—*Barron v. Barron* (10 Ir. Ch. 120—Dr. temp. Napier, 384). There a marriage settlement conveyed renewable freeholds to trustees and their heirs, upon trust, to permit and suffer the said lands to be enjoyed for ever by the issue male of said marriage, and it was held that the sons of the marriage took only estates for life.—*Nun v. Donovan* (1 H. & Br. 222, note); *Lamphier v. Drapes* (14 Ir. Ch. 37).

THE LORD CHANCELLOR.—This is a case of considerable importance—[reads the statement as given above]. The question in this case arises upon the settlement of 1816. Now, what estate did Kate Lyster, otherwise Brennan, take under that deed of 1816? The Master of the Rolls has decided that she only took an estate for life, on the grounds that no estate could pass without words of limitation. The Master of the Rolls' judgment goes the length of making words of inheritance necessary in all cases, whether the estate granted was that of a fee or a *quasi* fee. No doubt there have been cases, from the peculiarity of their circumstances, where it was held that no more passed than an estate for the life of the grantee; but to appreciate those cases we must look to the nature of those estates *pur autre vie*. I adhere in every particular to the judgment given in *McClintock v. Irvine* (10 Ir. Ch. 482 to 487). With respect to those estates, the doctrine of the common law from the earliest times was very simple and clear. As it is said in Bacon's Abridgment, vol. III., p. 185, "If a man lease to J. S., and J. S. dies, the land returns to the lessor, because the life being spent for which the land was granted, it must necessarily come back to the old proprietor. But if the lease had been made to J. S. during the life of A., and the lessee had died living the *cestui que vie*; or if, in the former case, J. S. had granted over his estate to B., and B. had died, in these cases he that first took possession of the land was lawfully the tenant, for the reversioner could not claim in either case, because he had parted with it during the life of A. in the one case, and of J. S., in the other; and J. S. cannot have any right, for that were to act contrary to his own grant." This paragraph goes to show that there is no resulting use to the reversioner at all in a grant *pur autre vie*, and it is laid down in Co. Lit. 41, b.: "It were good to prevent the uncertainty of the estate of the occupant to add these words, to have and to hold to him and his heirs during the life of the *cestui que vie*." It is clear then that the whole interest passed from the grantor to the grantee without words of inheritance, and upon the death of the tenant for life the first occupant would have been the rightful owner. By the Statute of Frauds, 7 Wm. III., c. 12, sec. 9, estates *pur autre vie* were made devisable; and if no such devise were made of the said estate *pur autre vie*, the same became chargeable "in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent, as in the case of lands in fee simple, and in case there shall be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall

be assets in their hands." The character of an estate *pur autre vie* is explained in *Duke of Devonshire v. Kenton* (2 Vernon, 719), either to be personal or real, as it was limited to heirs or executors. In the old books are many cases as to the persons who might be tenants by occupancy, and what species of property was open to general occupancy, all of which can be found in Bac. Ab. to which I have referred. Title by occupancy has now fallen into disuse. 2 Jarman on Wills, 55, thus disposes of this question, he says, speaking of freeholds *pur autre vie*—"This species of estate stands distinguished from all other interest, freehold or chattel; by this peculiar quality, that it is capable of being rendered transmissible to either real or personal representatives, according to the terms of the instrument creating the estate." (In the case before us the instrument or lease was by Joseph Tibeaud to Patrick Wyer and his heirs). "It seems now to be admitted that the devolution of the estate is regulated by the words of limitation contained in the last conveyance." Having thus seen that this description of estate differs from all others, I proceed to examine what language is necessary to pass the entire estate of the grantee: it is said in Sheppard's Touch. 106, "if a lessee for life grant all his estate, hereby his estate for life doth pass, for this is as much as he can lawfully grant." And Co. Lit., 41, b.: "If tenant for his own life grant over his estate to another, if the grantee dyeth there shall be an occupant." In *Doe v. Cassidy* (Hudson and Br. 224, note), it was laid down by Chief Justice Downes, that in a deed it was not necessary to have any peculiar form of words to pass the entire interest in an estate *pur autre vie*.—*William v. Jekell* (2 Ves. sen., 681)—marginal note—"Lease of three lives to her executors, &c., A. assigns all right to the use of B. for life, and afterwards of his issue; and for want of such issue, to the use of B. her executors, &c. The whole vests in the issue of B., and 'issue' means children; and A.'s executor, who was a special occupant, cannot claim against it." [His lordship reads Lord Hardwicke's judgment in this last case].—*Campbell v. Sandys* (1 Sch. and Lef., 281). In that case, by articles relating to leases *pur autre vie*, it was agreed that said leases should be conveyed to trustees in trust after a life estate to J. C. "to the issue of J. and A. C., in such shares and proportions as J. should appoint, and for want of such appointment, to go to such children equally, share and share alike, and for default of such issue, to the heirs, executors, and administrators of said J." Well, it was there held that the word "issue" should be construed children, and that the children of J. and A. took a *quasi fee* in the freehold property. I then am of opinion that Kate Lyster took under the deed of 1816 the entire estate which Patrick Dwyer enjoyed. I have not found a single case antagonistic to the view I have taken, and I have found no authority to show that the entire estate will not pass by this limitation—but it appears in *Doe v. Robinson* (8 Barn and Cres., 296), that where a tenant of lands granted to him and his heirs *pur autre vie*, devised them to "A. B. without saying more, and A. B. died, living *cestui que vie*—it was held that the heir of the devisor was entitled to the lands as special occupant." In that case it will be seen that the devisor devised merely the lands—

mere words of local description—but he did not use the words “property” or “estate.” No words of inheritance then are necessary to pass the absolute interest in this estate in a deed, if an intention to that effect sufficiently appears in the deed itself.—*Crozier v. Crozier* (3 Dr. and War., 373). In *Lamphier v. Drapes* (14 Ir. Ch. 37), I merely held that the entire interest would not pass, on the grounds that I could not collect from the deed a sufficient *intention* to give the lands for the entire interest of the grantee.—*Dawson v. Dawson* (13 J. L. 477) has been much relied upon by Sergeant Sullivan: there it was held that William Dawson did not take an absolute interest under the deed, nor an estate *quasi* in tail, but only an estate for life; but that case turned upon the *intention* of the grantor. To use the very words of Judge Moore in that case, it would be “against the *intention* of the deed” to have construed the word “property” into its largest sense. *Barron v. Barron* (10 Ir. Ch. 120), heard on appeal before the late Lord Chancellor (Napier), the Lord Justice of Appeal, and Ball, J., was where the decree in the Court below was affirmed, but it was on the ground that the appellant had been bound by the proceedings in the Court of Exchequer; and Mr. Justice Ball there expressed a doubt that words of inheritance were necessary for passing by deed the entire interest in a renewable leasehold: this case in the Court of Chancery is reported in 8 Ir. Ch. 366, Cases in Ch. temp. Napier, 384; and *vide* also as to the proceedings in the Exchequer, 2 Jones, 798. In *Philpots v. James* (3 Doug. 425) there was a lease *pur autre vie*, to T. P. and his heirs, of a rectory, tithes, and premises. T. P. died, living *cestui que vie*, and by his will devised the premises to M. H. J., his heir-at-law, without saying his “heirs,” with a direction to renew the lease. M. H. J. died, having devised the premises by will. Held—that the heir-at-law of M. H. J. was entitled to the estate *pur autre vie*. Aglan, also the word heirs was not used in a devise of lands *pur autre vie* in *Bradshaw v. Bradshaw* (5 Ir. Eq. 310), and the devisee was held to have taken an absolute interest in the lands. [His Lordship referred to the cases of *Wall v. Byrne* (2 Jones & Lat. 118), *Pickersgill v. Grey* (30 Beav. 352), *Keats v. Hewer* (10 Jur., N.S., 1040).] The question we have now to consider is, What does Patrick Wyer, the grantor in the deed of 1816, part with? The grantee takes whatever he parted with. The ultimate limitation is of great assistance in reading this deed. The ultimate limitation is to Patrick Wyer. The trustees were to stand seised and possessed of the lands of Derreen upon this further trust, “that in case the said Catherine Wyer and Ellen Boyne, otherwise Wyer, should die without issue living at the time of their deaths respectively (an event which did not take place), that the said T. Dowling and John Dunne, the trustees, or the survivor of them, the heirs, &c., of such survivor shall stand seised and possessed of all and singular the aforesaid moiety of Derreen, after the decease of the said James Brennan, for the sole use, behoof, and benefit of the said Patrick Wyer, his heirs, executors, administrators, and assigns, for ever.” Now this ultimate limitation throws great light on the whole deed. It is plain that Patrick Wyer was not to get back any estate, unless upon a failure of

issue of both daughters; and yet we have here the respondent claiming half the estate, although Catherine died leaving her daughter Kate Brennan surviving her. I think, then, that it cannot be contended that words of limitation are necessary. Upon those grounds I am of opinion that the decision of the Master of the Rolls ought to be reversed.

THE LORD JUSTICE OF APPEAL.—I concur with my Lord Chancellor, who has removed a great deal of the difficulties that have clouded this case. The observations I shall offer are merely upon the expressions of the deed. The petitioner claims half the estate of Kate Lyster; and the question is, whether Kate Lyster took the absolute interest in those lands, which entirely depends on the deed of 1816. The Master of the Rolls says she only took an estate for life, on the grounds that estates *pur autre vie* are analogous to estates in fee. I see no analogy between estates in fee-simple and estates *pur autre vie*. An estate *pur autre vie* may be created with or without words of limitation. The deed of January, 1816, after reciting the title of Patrick Wyer, conveys the lands to trustees upon the trusts of the settlement. My impression is, that all that was conveyed to the trustees should, in their execution of the trusts, be conveyed to the child of Catherine, if there was such child, which, in fact, was Kate Lyster. I, then, agree with the Lord Chancellor, that the decree of the Master of the Rolls be reversed.

## Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

GRAHAM, APPELLANT; FORDE, RESPONDENT.—Nov. 14, 1864.

*Tippling beer*—Case stated—Construction of 27 & 28 Vic. c. 35, ss. 6, 8.

*The appellant was summoned to answer a complaint that, he being a person licensed to sell beer by retail to be consumed off the premises, persons were found harboured in his house and place of business who appeared to be, or to have been, recently drinking or tippling beer therein, contrary to 27 & 28 Vic. c. 35. It being proved that persons were found upon the appellant's premises under the circumstances charged, and that the person who usually attended the shop was present, though the appellant himself was not, the Dublin divisional magistrates convicted the appellant. Upon a case being stated for the opinion of the Court, Held that the conviction was right, the words of the 6th section of 27 & 28 Vic. c. 35, including the case of harbouring persons tippling beer.*

THE following case was stated for the opinion of this Court:—The appellant was summoned to appear before said justices on the 22nd day of September last, to answer the complaint of John Forde, inspector in the Dublin police, charging that he, the appellant,

being a person licensed to sell beer by retail to be consumed off the premises where sold, at 109 Bride-street, within said district, between the hours of seven and eight o'clock in the afternoon of the 12th of September, 1864, divers persons, to wit, one man and one woman were then and there harboured in his, the appellant's, said house and place of sale at 109 Bride-street, who appeared to be, or to have been, recently drinking or tipping beer therein contrary to the statute 27 & 28 Vic. cap. 35. The following evidence was given upon oath before us by John Forde, the respondent, namely:—"I visited the house of George Graham, spirit grocer and wholesale and retail beer dealer, he then being licensed for the sale of whiskey, and also being duly licensed as a wholesale and retail beer dealer, on the 12th of September, 1864, between the hours of seven and eight o'clock in the evening I saw a man and a woman, who gave their names as James Bruce and Maria Bruce, sitting down in a room in front of the bar, having a drinking measure and a glass containing porter. The measure was on a bench convenient to where they were sitting, and the glass was on the chimney-piece; both contained porter. Both of them drank the porter, and both of them appeared to be under the influence of drink; and the person who usually attended the shop was present. I told him I would make an application for a summons. I will not say positively that both drank the porter in the glass." Being of opinion that the foregoing evidence disclosed an offence within the meaning of the 27 & 28 Vic. cap. 35, s. 6, we duly convicted the appellant for said offence, and imposed a fine of ten shillings upon him. On the part of the appellant it was contended that upon the facts disclosed in evidence no offence had been committed against the provisions of said statute; and we were called upon by him to state a case for this Court pursuant to the provisions of the statute in that behalf provided.

G. WYSE, } J.P.  
WILLIAM ALLEN, }

*Sidney, Q.C.* (with him *Curran*) for the appellant. —Under 8 & 9 Vic. c. 64, if any person licensed to sell to be consumed off the premises sold to be consumed on the premises, he was liable to a penalty of £50. That statute gave the police authorities for the first time power to prosecute; it recites 6 Geo. IV. and its second section. That Act had a graft added to it by 17 & 18 Vic. c. 89, s. 12. Down to that statute the offences of this character were confined to those committed by spirit dealers in harbouring persons tipping. In consequence of the decision in this Court\* the parties have got 27 & 28 Vic. c. 35 passed. Down to this the law stood that a spirit dealer harbouring a person tipping on his premises was liable to a penalty, but that did not extend to beer dealers. The effect of the section is first to say that the law which before only applied to the houses of licensed dealers shall now extend to licensed beer dealers; and it goes on to say the penalties shall extend to persons licensed to sell beer. And if it stopped there, a beer dealer would be liable under that Act no more than a spirit dealer. He would be liable under the statute

of Geo. IV. These offences are—the selling of spirits, the tipping of spirits, and the harbouring of persons tipping, or who have been tipping. All the old offences in relation to spirits have been transferred over to another subject; but the Act does not say this shall also extend to harbouring a person tipping beer. A new class of individuals were affected by the earlier statute. [*Monahan, C.J.*—And therefore to create an offence under this Act there must be either selling beer or harbouring a person who has drunk whiskey?] Yes. The summons states that divers persons were then and there harboured in the house, without saying by whom. Whereas if the statute did apply, it would only apply to the person harbouring. Harbouring in the criminal code imports an actual interference almost amounting to personal interference—section 2. There must be evidence to show a harbouring by the appellant in the house. The evidence does not go beyond the summons. The policeman only saw a man who appeared to attend. He told him he would apply for a summons. [*Christian, J.*—Is not that a question of fact for the justices? Your objection is two-fold: first, that it ought to be said the man harboured; and secondly, that there was no evidence of being harboured. Was not the latter a matter of fact for the justices?] If there was any evidence at all it would be but where there is none. [*Christian, J.*—They were found in his house.] Harbouring must be more than a person being found in the house, for any member of his family could not in that case be there from the morning till 11½ P.M. In Archbold's Criminal Pleading, 827–828, instances are given of what would and what would not be harbouring. It must be proved the party has done some act to assist the felon personally. [*Monahan, C.J.*—Harbouring a felon means assisting him to escape from justice; it would be hard to give it this meaning here.] *Reg. v. Chapple* (9 C. & P. 355.) This is a criminal offence, because there is imprisonment if the penalty be not paid. Therefore the question of agency arises,—if a person allows another to sell to those who have a right to do everything but sit down and tipple, is he responsible for their doing this?—*Cooper v. Slade* (6 H. of L. 746). Lord Wensleydale, in his judgment, p. 793, says—"Then comes the more important question if this can be carried to Slade or his agent, as it is illegal to offer money to another for voting. I take it he cannot be held responsible unless he has given authority," &c. Here is a man licensed to sell beer to be consumed off the premises, who may have a servant to do this for him. If a man is employed to do a lawful act and he acts unlawfully, much more is required to show an intention on his part. The defendant was not present. It may be contended that the Act may be paralyzed if a man of straw be put forward to do this; but if so, let the Beer Act be amended. But in this very statute the Legislature have shown by section 5 that they have classified the offences and distinguished the owners. In a certain class of offences against the revenue laws where the agent acted the principal was convicted; but in all these cases the offence was committed by the goods being found on the premises of the trader. That was an act, and the agent might be fairly held the agent for the unlawful act.

\* See *Quin v. Murray* (8 Ir. Jur. N.S.)

*J. E. Walsh, Q.C., and Beytagh contra.*—The argument that it is not stated by whom the persons were harboured is not open. If it is, this is a summons and not an information—Levinge's Justice of the Peace. The magistrates state that preliminaries were performed, and that question is not open; if it be the summons may be amended. A parol information would suffice—*R. v. Miller* (1 Crown Cases Reserved, 116); 8 & 9 Vic. c. 64. These things are all *ejusdem generis*, all which may happen in the house of the licensed retailer. The other side put in beer in every other place in the statute except where it presses. They say it does not apply in the concluding clause. They admit that if a man licensed to sell beer has people tipping spirits he would be liable. No doubt, it would be more correct if it were added in the section, "or harbouring persons tipping beer;" but there is no difficulty in concluding the fact of a person tipping beer at an unreasonable hour. [*Christian, J.*—You say that the Act creates a new offence. The appellant says the Act only applies to the old offence of persons tipping spirits. It would appear a strange thing if it was enacted that persons should not harbour persons tipping spirits who were already prevented from selling spirits.] [*Monahan, C.J.*—As I understand, the harbouring was introduced to get over the difficulty of proving an actual sale. No one can doubt but that the person who prepared the Act intended to include this case.] The 8th section makes it penal in the persons found there. The word "tipping" is not capable of legal definition, neither is the word "harbouring;" it is for the justices to say what it is. It is too much to say that we are to prove legal harbouring, and that a person may stay away and leave a waiter, and then that we are to prove an authority in the waiter. The point of agency was not made in the Court below. This is not the case of principal and agent, it is the case of master and servant. The law could never be carried out against housekeepers if it were held otherwise. The intention was to incorporate everything, and apply to the sale of beer what was law as to the sale of spirits. [*Christian, J.*—The difficulty is to find any words applying to harbouring persons tipping beer. There was only before the offence of harbouring persons tipping spirits.] The Act refers not merely to the sale but to the person selling. [*Monahan, C.J.*—It is admitted on the other side that if a person was found selling beer it would be within the Act.] The words of this Act are—"As if this were repeated and specially enacted," *i.e. reddendo singula singulis*. The Act must have a reasonable construction. The 8th section would make the person tipping liable to a penalty, and could it be that notwithstanding this the party harbouring is not liable? [*Christian, J.*—It is beyond doubt that they intended to include this case.] [*Monahan, C.J.*—No doubt our decision gave rise to this new Act, and, no doubt, it has provided for the thing we then decided; but still we have here to decide if relating to the sale includes harbouring.]

*Curran in reply.*—It is contrary to the principles of law that an offence is to be created and punishment attached by intendment. The Act should expressly set forth the offence. It is not to be spelt out from its terms, or from the intention of the Legislature.

Three sorts of offences are here. 1. With respect to the hours to which persons licensed to sell for consumption elsewhere shall keep open; and in that there is the omission of the word "not," which nullifies that portion of the section. 2. With respect to 8 & 9 Vic. c. 64, and all the authorities, &c. what were these? To enter a house and punish the parties, &c. In reference to the offences therein, *i.e.*, in the sections respectively set forth, *i.e.*, transferring to the houses of beer sellers the same offences therein set forth; but this does not set forth any new offence. It is not repeating spirits to call it beer. [*Keogh, J.*—What are "such persons?"] The persons licensed to sell to be drunk not on the premises. As to harbouring, the word is not to get an extensive meaning the first time it appears in an Act. It may mean concealing the party from the police, and in that sense it ought to be taken and not against the subject. Unless the servant act within the scope of his authority the master is not liable—*Smith's Master and Servant*. There is nothing here to warrant the conclusion that the waiter had any authority to harbour persons tipping beer. The appellant ought to succeed; 1stly, on the construction of the 6th section; 2ndly, on the construction of the word "harbouring."

*MONAHAN, C.J.*—We are of opinion that this conviction is quite right; that having regard to the 6th and 8th sections persons found recently tipping are certainly within the Act. Therefore there is no doubt it was in the contemplation of the Legislature to render the tipping, or being found recently tipping, an act for which the party would incur the penalty. The only question then is if the words of the 6th section are sufficient. Are there words creating the offence? The words are, that all the provisions in the former Act shall apply to the sale of beer by persons licensed. We think the intention to be found in that section was to extend to the sellers of beer all the penalties, and that every act done in relation and in connection with the sale is equally an offence. We think that the actual sale is one; that the harbouring of a person supposed to be after the sale is another; that the harbouring persons recently tipping beer is an act provided for by the 6th section. The only other question is as to the meaning of "harbouring." It is not the same as in the case of a felon; it is permitting persons to remain in the house who are tipping, or who have the appearance of having been tipping. It would be impossible to say the master would not be responsible for the act of the servant.

*CHRISTIAN, J.*—I felt some doubt if there were sufficient words in the 6th section to carry out what the eighth section rendered perfectly plain. I think the words are afforded by the concluding words of the 6th section, in which the sale is spoken of. "And in respect of the sale of beer," *i.e.*, what was previously the law as to the sale of spirits shall be of the sale of beer, including the harbouring.

*Conviction affirmed. No costs were given.*

ARCHBOLD v. EARL OF HOWTH.—Nov. 9, 10, 11, 22, 1864.

*Demurrer—Replication—Estoppel—Averment of readiness and willingness.*

*The first count of the summons and plaint complained of the breach of an agreement by the defendant to let a farm to the plaintiff, and of his having demised it to another person, and contained an averment that the plaintiff was always ready and willing, &c. The subsequent counts were for fraudulent misrepresentation and concealment of the existence of this agreement. The defendant's third plea to the first count traversed the plaintiff's readiness and willingness. To this the plaintiff replied that the defendant ought not to be permitted to aver the want of readiness and willingness on the part of the plaintiff, as it arose from the false and fraudulent representation and concealment, on the defendant's part, set forth in the subsequent counts of the summons and plaint. Held—upon demurrer by the defendant, that the replication was bad.*

THE first count of the summons and plaint complained that the defendant agreed to demise, and the plaintiff to take a certain farm, of which the plaintiff had previously been tenant from year to year, at a certain rent, for a certain term of twenty-one years, containing clauses usual in the defendant's leases; and the plaintiff averred that he had been always ready and willing, &c., and that all conditions were performed, all things happened, and all times elapsed necessary to entitle the plaintiff, &c.; yet the defendant did not perform the said agreement, but refused to do so, and ejected and expelled the plaintiff from the said farm, and demised the said farm to one W. Arthur, whereby, &c. The second count complained that before the time of making the false representation herein-after complained of, the plaintiff was tenant from year to year of the defendant, and was then entitled to the benefit of the said executory contract, and that the defendant duly determined the said yearly tenancy by notice to quit, and brought an ejectment, and recovered judgment by default, and expelled and evicted the plaintiff from the possession of the said farm, and that then the said executory contract was in full force, of the existence of which the plaintiff was wholly ignorant, as the defendant, during all the time aforesaid, well knew; yet the defendant, to enable him to demise to a party other than the plaintiff, represented to the plaintiff and caused him to believe that no such agreement existed, by reason of which the plaintiff was prevented from taking measures to enforce the said agreement. The third count was substantially the same as the second, except that it stated that the representation took place prior to the ejectment and eviction. The fourth count complained that before and at the time, &c., the plaintiff was a tenant from year to year of the defendant, and was entitled to the benefit of the said executory contract, of which benefit and contract the plaintiff was wholly ignorant, as the defendant at all times knew; and the defendant served a notice to quit, to determine

the said tenancy; and that the defendant, knowing the plaintiff's ignorance, and that the plaintiff was acting under it, in order that the plaintiff should not resist any proceedings to recover possession of the said lands, wilfully and fraudulently concealed from the plaintiff the existence of the said contract, and did wilfully and fraudulently permit the plaintiff to act in such ignorance, whereby the plaintiff was prevented, &c.; and the defendant demised to W. Arthur, &c. The fifth count was in trover, and the sixth in trespass. To the first count the defendant, by leave of the Court, pleaded—1. A traverse of the alleged agreement. 2. That it was mutually agreed that the said agreement should be, and the same was wholly rescinded and abandoned. 3. That the plaintiff was not always ready and willing to perform the said contract on his part, previous to the demise to W. Arthur. 4. A plea of an unperformed condition precedent, which, together with the replications pleaded to it, was afterwards struck out by consent. 5. That the defendant did not refuse, as alleged. 6. A plea in the nature of an estoppel, that the acts and conduct of the plaintiff were such that he should be prevented from seeking the benefit of the said contract. To the second count the defendant pleaded—1. That he did not make the representations alleged. 2. That he did make such representations, but not falsely or fraudulently. 3. That he did not cause the plaintiff to believe that no such agreement existed in fact. 4. That at the time the plaintiff well knew of such executory contract. 5. That he (the defendant) had not knowledge of the existence of the executory contract, and did not know that the plaintiff was in ignorance of it. 6. That the contract was not in full force when the representation was made. To the third paragraph the defendant pleaded the same defences, *mutatis mutandis*. To the fourth count the defendant pleaded with other pleas—4. A traverse of the fraudulent concealment. 5. That the concealment was not wilful and fraudulent. 6. That the plaintiff well knew, &c. The defendant also, by leave subsequently obtained from the Court, pleaded the Statute of Limitations to the count in contract. See *Archbold v. Earl of Howth* (9 Ir. Jur., N.S. 247.) To the third defence to the first count the plaintiff pleaded the following replication:—The plaintiff for replication to the said third defence says, that the defendant ought not to be permitted to aver that plaintiff was not up to the making of said demise, in said first count mentioned, ready and willing to perform said contract on his part, as a bar to the cause of action in said first count alleged; because plaintiff says that the plaintiff's not being ready and willing in that behalf arose from and was occasioned by the circumstances of false and fraudulent representation and concealment on the defendant's part, and of ignorance of the said agreement, and his rights thereunder, on the plaintiff's part, as particularly set forth in said second, third and fourth counts of said plaint. To this replication the defendant demurred—1. That the said replication is a departure in pleading from the first count of the plaint, inasmuch as the plaintiff in the first count of the plaint avers that he has been always ready and willing to perform the said contract, and by the said replication avers that he was not always ready and



willing to perform the said contract. 2. That the plaint contains a distinct and positive averment that the plaintiff has always been ready and willing to perform the said contract; and the replication admitting that the plaintiff had not always been ready and willing seeks to excuse the absence of such readiness and willingness. 3. That the first count of the summons and plaint being in contract, the replication seeks to convert the case into an action of tort. 4. That the said replication discloses no legal ground, why the defendant ought not to be permitted to aver that the plaintiff was not up to the demise in the first count mentioned, ready and willing to perform said contract, as a bar to the cause of action in the first count, inasmuch as it does not appear that the defendant, ever either by words, or acts, or conduct, represented that the plaintiff was in fact ready and willing.

*Monahan* (with him *Maedonogh*, Q.C.) in support of the demurrer.—The defence is pointed only to the first count of the plaint, but the replication points to and incorporates the first four counts of the plaint. The first count has the ordinary averment of readiness and willingness. We traverse that. Then comes the replication. We have already taken issue on all the plaintiff's allegations of fraud. The replication is a departure in pleading from the plaint. If so, it is bad on general demurrer. The allegation in the plaint is, "I was ready and willing," that means ready and willing when I was bound to be ready and willing. This is absurd as an estoppel. It is by way of excuse, and being such it is a departure. All the authorities as to what an estoppel means are collected in *Sweeney v. Promoter Assurance Company* (14 Ir. C. L. R. 476). The rule is laid down as in *Pickard v. Sears*. A man may be estopped by a deed or by a record to which he is a party, or by acts *in pais*. In logic, estoppel is a mode of proof—it is an *argumentum ad hominem*. Apply that to this replication. We should expect to find somewhere that we did aver the plaintiff was ready and willing. [*Christian, J.*—The great difficulty in *Sweeney v. Promoter Assurance Company* was that it was by parol. The Court got over it by considering the parol contract *ab ante* altogether, and that when the policy was sued on it was a breach of the previous contract by parol to set up this, and the Court held it was a good equitable replication. To prevent circuitry, as an action could have been brought, the Court treated it in that way. *Monahan, C. J.*—The plaintiff does not want to prove the truth of the representations made by Lord Howth here as there, but the falsehood of them.] Where have we hinted that the plaintiff was ready and willing? Taking it not as an estoppel, and not minding the form of it, it is a departure. [*Christian, J.*—As I understand, the argument will be that you should not be listened to when saying this man was not ready and willing, because it was by your fraud he was not. *Monahan, C. J.*—The case does not resemble *Pickard v. Sears* and *Sweeney v. Promoter Assurance Co.*, because in all these cases the representation was of a particular state of things. It does not come within the rule of that case.] What Lord Howth says is, that both he and the plaintiff are discharged from the contract if there ever was one. If Lord Howth brought an action against the plaintiff for non-performance of the

agreement, then this would be a good estoppel. But here it is said, we are estopped, because we represented there was no agreement in fact. If estoppel be laid aside altogether, this may or may not be excuse in point of law; but it is bad as a replication, because it is elementary law that a matter of excuse cannot be pleaded as a replication.—Co. Lit. 304, a. Where the plaint avers performance, and it is traversed, a replication by excuse is a departure. In 1 Chitty on Pleading, 683, the general rule regarding departure is stated as in Coke. "In an action of debt on bond, if the defendant plead performance, the defendant cannot rejoin any matter of excuse."—2 Wms. Saunders, 188, quoted in Stephens on Pleading, 327.—*Cutler v. Sothorn* (1 Saunders, 116). In *Byrne v. Great Western Railway Company* (2 B. & Smith, 402), it was ruled that a departure was ground of demurrer, and the test of departure is stated at p. 410. Would the same evidence support this replication as would support the declaration? In the latter the plaintiff avers he was ready and willing; in the replication that he was not, but that that was caused by our wrongful act. The evidence would be not only different, but opposite. That illustrates the ground of the decision in *Sweeney v. Promoter Assurance Company*. Would the same evidence there have supported the two pleadings? Indubitably it would. An estoppel is a particular mode of proof. [*Christian, J.*—It is dispensing with the necessity of proving what the other party has admitted.] It is more than that. It amounts to a proof that the matters existed. If it had never been pleaded in *Sweeney v. Promoter Assurance Co.*, the parties would have been entitled to show the facts, and rely on the estoppel. Estoppel by record must be pleaded, and so of estoppel by deed, but estoppel by acts *in pais* need not. [*Monahan, C. J.*—The agent stating what he did in *Sweeney v. Promoter Assurance Company* would have been evidence; the only question is, would it have been coercive evidence? [*Christian, J.*—I think the principle is, that if there be an opportunity for pleading the estoppel, it must be pleaded.] Estoppel *in pais* need not. This will show that *Sweeney v. Promoter Assurance Company* is no authority in this case. [*Christian, J.*—Suppose it was, because on a certain occasion the defendant undertook that he would not say hereafter the plaintiff was not ready and willing, that would have been identical with *Sweeney v. Promoter Assurance Co.* The question appears to me to be if this be estoppel or excuse.] In *Freeman v. Cooke*, and all those cases, the representation made was made so as to amount to a contract. *Burtlett's case* and *De Roo v. Foster*, referred to in *Sweeney v. Promoter Assurance Co.*, illustrate the nature of estoppel. These cases show that changing the nature of the action from contract to tort is ground of demurrer. If this be not a departure, there is no such thing as departure. What sort of issue could a jury try on this? The plaintiff has served a notice on us saying he intends to say our defence is bad. Was it necessary for the plaintiff to aver that he was ready and willing? for if it was we have traversed it. In 2 Smith's Leading Cases, 14, it is said, "It is proper to add that the plaintiff must aver in his declaration that he was ready and willing." *De*



*Medina v. Norman* (9 M. & W. 820) was the converse case of this. It was assumed that they were concurrent acts. There was no suggestion that when a man agrees to let, and another to take a house, they were not concurrent acts. Therefore it will hardly be argued that readiness and willingness was not necessary to be averred.—*Screagh v. Russell* (1 El. & El., 888). Suppose there was a contract, and we evicted the plaintiff, and refused to give him a lease, and the narrative stops there, and he brings his action, and we say, you have disentitled yourself to get a lease. That would be the issue before the demise was made to Arthur. How could our making the demise to Arthur make a difference? [*Monahan, C. J.*—Suppose there was a want of readiness on his part for a year or two years, but no actual rescission of the contract, and he then tendered the lease, and was willing to execute it, could you get rid of the effect of that tender by showing that for two years he was not ready and willing?] That would be the very issue raised. [*Christian, J.*—In that state of facts it occurs to me that the defence should be a relinquishment of the contract, and then the issue for the jury would be, was there such want of readiness and willingness as amounted to a relinquishment?] The plaintiff's averment is, "I was always ready and willing." If he had failed to be so at any moment before he brought the action, he could not succeed. [*Monahan, C. J.*—Is there any authority for this, that the averment of readiness and willingness must be of a continuous readiness from the beginning to the time of bringing the action?] That is the meaning of it. If we succeeded in getting a verdict before the demise to Arthur, on the ground that the plaintiff was not ready and willing, it would be impossible to say that Lord Howth's acting on that unwillingness, and making a demise, revived the cause of action. *Cort v. Ambergate Railway Co.* (17 Q. B. 127) shows the meaning of this issue, was the plaintiff ready and willing, is, was it the plaintiff's fault that the contract was not performed? If we could have said that before the demise to Arthur, it would be strange if we could not say it now. If Lord Howth were bound to give a lease whenever the plaintiff chose to take it, it would be different, but that was not it. Neither party could sue without this allegation of readiness and willingness.

*Palles* (with him *Serjeant Armstrong*) for the plaintiff.—The third defence is bad. If not, the replication is a good answer. The frame of the first count is unusual. It states a contract which is admitted by the plea, admitted to be a subsisting, unrescinded contract at the time of the demise by Lord Howth, and a fact is stated which shows it is impossible for Lord Howth ever to perform the contract. The traverse of readiness and willingness is wholly unavailable here. It is in general an argumentative traverse. The statement put in the plaint rendered it unnecessary to put in readiness and willingness at least from the time of the demise to Arthur.—*O'Dell v. Parsons* (10 East. 359); [*Christian, J.*—Are you contending that the averment of readiness and willingness in the plaint is immaterial?] Yes. What is the value of it? Either it was such as to give Lord Howth a right to rescind the contract, or it could have no operation whatever. It is not a

condition precedent; it is an act concurrent. The contract is subsisting. The defence is, that we were not ready and willing to do what? To do what we could not do, a concurrent act, because Lord Howth could not perform the contract. The only mode in which it could be taken advantage of was this, to show circumstances which entitled Lord Howth to rescind the contract, and that he acted on the rescission. [*Monahan, C. J.*—Your argument is this—your declaration would be good striking out this: is the breach you rely on the making of the lease to Arthur, or the refusal to comply with your request?] The refusal coupled with the making of the lease. It is stated in the summons and plaint, "yet the defendant did not," &c. [*Monahan, C. J.*—If it stopped there would it be a good count?] It would. [*Monahan, C. J.*—It would have required the averment of readiness and willingness.] It would. The words, "and demised the said farm to one W. A.," whether taken technically as a portion of the breach or the statement of a material fact, which makes it unnecessary to allege readiness and willingness, the Court must look at. This is identical with the pleading in *O'Dell v. Parsons*. There the declaration contained an averment of request (as here of readiness and willingness), but the Court held that the subsequent statement, whether part of the breach or not rendered unnecessary the previous averment of request. Archbold and Lord Howth enter into a contract. Archbold is not ready and willing. That would give Lord Howth a right to rescind, but he cannot act on it till he has given notice to rescind. He cannot keep it as a binding contract over Archbold, but must give notice in such a way as to shield Archbold in case he brought an action against him.—*Eyre v. Spere* (3 Ex. 158). [*Monahan, C. J.*—Supposing this summons and plaint did not contain the averment of the demise, you having averred you were ready and willing, and nothing was said to show Lord Howth had rescinded the contract, could the defendant in that event traverse the readiness and willingness? and would that have been sustained by showing that from the beginning there had been unwillingness on your part, or would it be necessary to show that at the last moment of bringing the action you were not ready and willing?] As long as the contract is open, readiness and willingness at any time is sufficient upon a traverse of this nature. [*Monahan, C. J.*—If you be right, though there had been an unreadiness and unwillingness, and you were ready a few days before you commenced your action, you would succeed by showing you were ready in the last moment.] Yes; I have not been able to get any case laying it down. [*Christian, J.*—Is this it, that when the admitted contract became incapable of performance, if Lord Howth seeks to justify himself from performing it, it is not enough to allege that before he did that act the plaintiff was not ready and willing, but he must go on to show he was so for such a time?] *Keogh, J.*—Does not that beg the question that Lord Howth admitted it was a binding agreement until the demise to Arthur?] That is admitted in the pleadings. [*Monahan, C. J.*—The question is, whether the meaning of the plea is or is not that the defendant pleads the non-readiness as the reason, and then

the question is, should it be something that amounts to rescission?] *Withers v. Reynolds* (2 B. & Ad. 882). Suppose the want of readiness and willingness amounted to what would be a rescission, then that ought to be pleaded as a rescission. A contract once subsisting must be presumed to continue till the contrary is shown. [*Monahan, C. J.*—In the common case where there is a default of readiness and willingness, it has not been usual to do more than aver it. Is there any case where the non readiness is obliged to be shown up to the commencement of the action? Do you argue that non-readiness and unwillingness would not be sustained unless Lord Howth pleaded it as a rescission of the contract, and that you got rid of your previous laches by tendering the lease the day before the action? *Christian, J.*—In the common case suppose the defendant simply traversed the readiness and willingness, would it be sustained by showing readiness and willingness the day before the action, although there was unreadiness and unwillingness before?] Where there is a subsisting contract, the performance of which can be called for at different times, readiness and willingness at any one time is sufficient on the part of the plaintiff. We must look for the terms of the contract to find the *terminus a quo*. It is not stated in the plaint when the lease was to be executed. Therefore, we could only be entitled on request, or a reasonable time after request. Suppose as a fact the demise was made to Arthur before the time when we could be called on to take out this lease. Unreadiness and unwillingness previous would be no answer.—*Philpot v. McClure* (5 M. & W. 475) followed in *Ripley v. McClure* (4 Ex. 345). It is a question for the jury whether the refusal amounts to a rescission. The plea here should have averred that after the request made by Lord Howth the plaintiff was not ready and willing. In other words, it should have put the demise to Arthur subsequent to the alleged want of readiness and willingness. As to the replication, to know if it be good, we must know in what sense the plea is an answer to the action. The plea is no answer except in the sense of a rescission or abandonment, a new contract, whether it be called rescission or abandonment on which Lord Howth might act. As to estoppel.—[*Christian, J.*—In the cases prior to *Sweeny v. Promoter Assurance Co.*, the party estopped was some third person, and not the person a party to the very matter itself.] Here the defendant comes into Court to take advantage of his own wrong. [*Monahan, C. J.*—Supposing Lord Howth pleaded that this contract was mutually rescinded, I suppose it would be a good replication to plead that that was null and void, having been obtained by fraud.] No one will be allowed to take advantage of his own wrong, or a *fortiori* of his own fraud.—*Broom*, 289. The result was to induce the plaintiff to alter his position. The defendant is estopped not merely from stating the truth, but from taking advantage of his own act. The replication is good by way of excuse. Since the Common Law Procedure Act, 1853, this has not received any serious attention. Formerly, where the performance of conditions precedent should be specifically excused, this replication would have been a departure. But why? Because you were obliged to state something

which would be denied, and then you would admit that, and show something to excuse. But now it is only necessary to aver generally that all conditions have been performed—s. 66. What is in this replication is comprehended in the general averment of the plaint. Therefore, if readiness and willingness were struck out, the summons and plaint would be consistent with our not being ready and willing at a certain time, we being excused from being so. Bullen and Leake are wrong. There is no departure because of the general averment in the summons and plaint, which includes the very things in the replication. The defendant might have said that a summons and plaint without the averment would be hard to plead to. Then he might apply to the Court to set it aside. The defence is bad. The replication is good as an estoppel: if not, it is good as an excuse, and is not a departure. Once a contract is entered into, there are but four ways of dealing with it—1. Accord and satisfaction. 2. Release. 3. Mutual rescission. 4. Such acts on the part of one party as entitled the other to treat at them as a rescission. The jury may find such facts as entitled Lord Howth to rescind the contract, but this cannot be done by such nice distinctions as are made in this traverse of readiness and willingness, which is consistent with a momentary unreadiness and unwillingness. On the issue taken on this defence it would be impossible for Lord Howth to go into such facts as would show a rescission; and if the defence be not a rescission, then the averment of want of readiness and willingness is no answer to this action. [*Monahan, C. J.*—Would the summons and plaint be good without the averment of readiness and willingness?] It would. There is nothing in this defence to show the contract was at end. Let it be stated in the defence that the plaintiff absolutely refused to take out the lease.—*Sugden on Vendors*, 11th ed. 260, 261.

*Macdonogh, Q.C.*, in reply.—The meaning of estoppel is proof: it is a species of proof. I prove matters *prima facie*. I prove them conclusively when I prove them by estoppel. Estoppel does not mean the wild equitable doctrine suggested. There is a contract mutually binding to give and to take a lease. When the contract is executory, the plaintiff must aver readiness and willingness. The passage quoted from *Sugden* proves that. It is laid down that performance of concurrent acts must be averred—*i. e.*, that readiness and willingness must be averred. That the plaintiff was always ready and willing, was included in the general averment of conditions precedent, and we might have traversed it, but the pleader was uncertain, and so he added this. This is not a plea of rescission. Rescission means that the parties mutually and before the breach rescinded. That is our case upon other pleadings, but not upon this. The argument on the other side admits that there is no authority to show that an estoppel is not confirmatory of the statement. This replication is a departure. Estoppel is ranked under the head of evidence in *Taylor on Evidence*, section 76; 2 *Smith's L. O.*, 656, 670, note. The whole doctrine in reference to the meaning of this word estoppel in the law and this class of evidence is fully illustrated by the matters of record, such as in the case of an action of trespass for meane rates. In

the note a reference is made to the civil law, and in page 678 it is said, "with the rule of the civil law *res judicata pro veritate*, &c.—the law generally agrees." The estoppel must be confirmatory of the declaration. The second ground taken is worse than the other. Section 66 of C. L. P. Act altered the old rule as to alleging performance of conditions precedent. It has given a compendious form. If the party has matter of excuse he must still aver it. The argument on the other side is this—since we need not aver the conditions in detail, if there were matter of excuse it is involved in the declaration. Averment of performance can never imply that the conditions were not performed, but the party had an excuse (Bullen & Leake, 125, note). The C. L. P. Act has not altered the principles of pleading. Unless this be an estoppel, it is a departure—and it is a departure, not only on the ground I have mentioned, but because it converts contract into a tort. In *Sweeny v. Promoter Insurance Company* the party says—I will prove it, not against the world, but against you, because you led me to believe this. Why did the plaintiff not omit the statement of the readiness and willingness? It would have been a strange plea that said all the conditions were performed but readiness and willingness. We are told now it is superfluous. There is no precedent for such a pleading as would omit the averment. It is suggested that there would be difficulty at the trial. It is said, suppose a man had refused, and was afterwards ready and willing. If the plaintiff had gone away, and afterwards, within a reasonable time, hastened to the office of the agent, it would be for the jury to say if he was ready and willing.—*Screagh v. Russell* (1 El. & El. 889.)

*Cur. adv. vult.*

*Nov. 22nd.*—MOMAHAN, C.J.—The first count set out the cause of action, which was in substance as follows:—That the defendant agreed to let, and the plaintiff agreed to take, certain premises, for a term of twenty-one years, and went on to aver that the plaintiff was always ready and willing to perform his part of the contract—that all conditions were performed, all times had elapsed, and all things had been done, &c. Breach—that the defendant, disregarding his promises, did not perform this agreement, but, on the contrary, ejected the plaintiff, and demised the land to a person named William Arthur. The second, third, and fourth counts were framed in case, stating that the defendant, Lord Howth, concealed the existence of the contract, and alleged that, owing to such fraudulent concealment, the plaintiff suffered damage. The third plea to the first count traversed the readiness and willingness of the plaintiff to perform his part of the contract. To that plea the plaintiff replied that the defendant ought not to be allowed to plead that the plaintiff was not ready and willing to perform the contract, because his not being ready and willing so to do arose from his ignorance of the agreement, as set forth in the second, third, and fourth counts. A great portion of the plaintiff's argument was that the averment of readiness and willingness was unnecessary, and therefore was not traversable, so as to make it a bar. The law on this part of the case is quite

elementary. If a contract require the performance of certain material acts, then either party suing must allege that he was ready and willing to perform his part of the contract. The bringing of the action may be considered as a readiness or willingness on the part of the plaintiff, because the action is brought in consequence of the default of the defendant in the performance of his part of such contract. The meaning is, before you refused, I was ready and willing, and you having refused, I have a right to maintain the action; but there being an allegation that the defendant leased to another person, and disabled himself from performance of his agreement, the plaintiff need not aver his readiness and willingness to perform his part. If the opposite party put it out of your power to perform the conditions, you need not go out of your way so to do; because the refusal to perform the agreement is the substantial cause of action; therefore the allegation of readiness and willingness is a substantial allegation which the opposite party is at liberty to traverse. Sergeant Armstrong argued that the words were too precise and the traverse too narrow. I agree with him, if the meaning of the issue to be tried thereon was that attributed thereto by him. The meaning of it is, that there must have been on the part of the person suing a present readiness and willingness to perform the contract. In *Coughlan v. Ambergate*, (17 Q. B. 127) the transaction was similar to the present. It was held there that the meaning of the allegation of readiness and willingness on the part of the plaintiff was, that there is a readiness and willingness, and present ability on his part, if the defendant would perform his. Therefore we are of opinion that the question at the trial will be, whose fault was the non-completion of the contract, and was such without the default of the plaintiff? I am of opinion that the traverse is a good one. The second question is, is that traverse answered by the replication in the form of an estoppel? No case of estoppel was cited in the argument similar to this. The only point raised in the argument was that it is a general rule of law that no person can take advantage of his own wrong. That is quite true; but the other counts of the declaration raise the very question, and it would be a very strange opinion to hold that the argument from estoppel applied to this case. CHRISTIAN, J.—I concur with the Lord Chief Justice in holding that the matter of the replication is not an estoppel to conclude the defendant from traversing the count in the summons and plea. It follows, from the judgment already pronounced, that on the trial of the issue the judge should direct the jury that the question for them to determine will be whether the plaintiff was guilty of such substantial default that the defendant was entitled to rescind the contract, and that if they be of opinion that such arose from the misconduct of the defendant, they would be bound to find for the plaintiff. It is not necessary to consider whether the replication is open to the objection of departure.

*Demurrer allowed.*

DAWSON v. COLEMAN.—Nov. 2, 1864.

*Costs—Common Law Procedure Act, 1856, s. 97—  
Meaning of plaintiff's residence.*

*The plaintiff, in an action brought to recover the sum of £66 2s., the rent of a mill situate in the East Riding of the county of Cork, recovered the sum of £1 18s. 8d. The defendant resided within the East Riding of the county of Cork. The plaintiff, who was the Clerk of Appearances and Writs in the Court of Chancery, resided for the greater part of the year in Pembroke place, Dublin, but had a residence within the East Riding of the county of Cork to which he resorted in the long vacation. Upon appeal from the decision of the taxing master, Held, that the plaintiff was entitled to half costs. Moffatt v. M'Ternan (6 Ir. Jur. 177) followed.*

J. D. Robinson (with him Heron, Q.C.) for the defendant in this case, moved that in accordance with the 97th section of the Common Law Procedure Act, 1856, the taxing master do review his taxation of the plaintiff's costs in this cause, and that the plaintiff be disallowed all costs incurred in this action, on the ground that before and at the time of the commencement of this action, both the plaintiff and the defendant resided, and still reside, within the East Riding of the County of Cork, and within the jurisdiction of the Assistant-Barrister of that Riding, and that pending such review execution of the writ of *fi. fa.* issued by the plaintiff, and directed to the sheriff of the county of the city of Cork for recovery of the amount of said costs as taxed and certified, be stayed, or in case the amount of said writ had been already levied, then that said sheriff, or the plaintiff (if the amount had been paid over to him) do bring in and lodge with the proper officer of this honourable Court to the credit of this cause, so much of the sum so levied as may be equal to the amount of said costs. The motion had been made before O'Brien, J., in Chamber, who directed it to stand over for the consideration of the full Court. The action was brought for the recovery of an alleged arrear of rent of a mill, situate at Millfield in the County of Cork, and the plaintiff obtained a verdict for £1 18s. 8d. The defendant's affidavit stated that the cause of action stated in the writ of summons and plaint in this cause was wholly within the jurisdiction of the Assistant-Barrister of the East Riding of the County of Cork, and that before and at the time of the commencement of this action, both the plaintiff and this deponent resided, and still reside, within that Riding. That the plaintiff claimed in this action the sum of £66 2s., but that at the trial, which took place at the last assizes for the County of Cork, he obtained a verdict for only £1 18s. 8d. That for the past three years at least plaintiff has had, and still has, a residence at Bellevue, near the town of Mallow in said County of Cork, and that plaintiff has spent from four to five months of each of said three years at his said residence at Bellevue aforesaid. That the taxing master, on referring to the summons and plaint in this cause, wherein plaintiff's residence is stated to be at Pembroke-place in the County of Dublin, taxed and

certified said costs, allowing plaintiff half costs under the Common Law Procedure Amendment Act, 1853. The plaintiff's affidavit stated that his fixed and permanent residence is now and for upwards of thirty-six years last past has been in the neighbourhood of the city of Dublin, where this deponent is obliged to reside, holding, as he does, the office of Clerk of Appearances and Writs of her Majesty's High Court of Chancery in Ireland. That for upwards of twenty years last past, this deponent's fixed and permanent residence has been and still is, at No. 30 Pembroke-place in the county of Dublin, where, and not in Bellevue, as stated, deponent was resident on the 30th day of May last, being the date of issue of the summons and plaint in this cause, and up to the month of July following. That he admits that he has a house at Bellevue, near Mallow, within the Civil Bill jurisdiction of the Chairman of the East Riding of the County of Cork, within which jurisdiction said defendant resides, but that such is not deponent's general or usual residence, inasmuch as he resorts to it only during a short period of the year in the long vacation, from July to October, when relieved from the pressure of his office business in Dublin, and that on deponent's return to Dublin in each year the said house at Bellevue is locked up, and the furniture therein stowed away, no one residing in it, not even a servant in charge, the place being left in the care of the lodge keeper and gardener. *Bailey v. Bryant* (1 El. & El. 340) is an authority on what is a residence. *Davy v. Hastings* (10 Ir. C. L. R. App. 24) was decided in this Court. *Butler v. Alberwhite* (6 C.B., N.S., 740,) decided upon a section of the County Courts Act, refused to follow *Bailey v. Bryant*, but the words "at the time of action brought" are not in *Bailey v. Bryant*. [*Monahan, C.J.*—Your argument must be, that a man may have two or four residences, and that the jurisdiction of any Civil Bill Court in which one of them is may attach.] Yes. The case which appears hostile is *Moffatt v. M'Ternan* (6 Ir. Jur. 177). The Chief Baron, in giving judgment, held that residence meant usual residence, the place where the person stopped most of the year. That was decided on a section which is almost re-enacted. The mischief of which the Chief Baron speaks could not happen here. The Court will exercise an independent jurisdiction. The present Civil Bill Act goes further than the old one, because it includes the offices, &c. [*Monahan, C.J.*—As I understand, the Chief Baron acted on analogy, but upon the Act which is similar to this. The decision of a co-ordinate Court is not binding in an interlocutory matter, as in one which is put on the record, but you want us to overrule that decision. The question is if the true construction of that Act contemplates a person having one residence, and if so, of course it follows that the principal residence is meant, which would be Dublin here.]

*Watters and Serjeant Sullivan contra.*—This case is closed by authority in every part. In the Civil Bill Act, 14 & 15 Vic., the essential words in s. 40 are the same. That section has been the subject of consideration in this court. *Davy v. Hastings* was twice argued; and *Monahan, C.J.*, says, "We do not entertain any doubt as to the present case," &c. [*Monahan, C.J.*—We decided that if the party have a

place of business, though his principal residence be elsewhere, he must sue in the Civil Bill Court.] The ground the Court went on in *Davy v. Hastings* was, that the words being almost the same as those in section 40, the section was enacted in the same spirit. In *Butler v. Corcoran* (7 Ir. C. L. R. 276), Greene, B. decided that it was also to be read with the 65th section. Taking the 40th section with the 65th and the 69th, the residence must be the usual residence. [Monahan, C.J.—How does it follow from that that a plaintiff who has a residence in both places is at liberty to choose whether he will sue in a superior court or not?] *Butler v. Corcoran* decides it is to be construed by the 69th section. That and the 65th show it is the usual residence. [Monahan, C.J.—To give jurisdiction to sue a defendant it must be his usual residence; but does it follow that a plaintiff is to be disallowed his costs?] If the 69th section means the usual residence then the 97th does. In *Moffatt v. M'Ternan* the Chief Baron says, "True it is that the person may have many residences, but it is impossible he could have more than one usual residence." That case is the same as this, and unless the Court overrule that they cannot decide this against us. *Bailey v. Bryant* was decided in 1858. *Butler v. Alberwhite* is a distinct authority the other way. The words of the two acts, the London Small Debts Act and the County Courts Act, are the same, though a distinction has been attempted to be taken. "At the time of action brought" refers to the defendant's residence not the plaintiff's, as is sought to be made out. The judgment in *Bailey v. Bryant* is only three lines in length, and is erroneous. Cockburn, C.J. says, "We find ourselves compelled to arrive at a different conclusion."—29 L. J. N. S. Q. B. 70. [Monahan, C.J.—It is impossible to distinguish *Moffatt v. M'Ternan*.] The reporter's note to *Bryant v. Bailey* shows it is not law. Can a man who has a shooting lodge in the country, and goes to it in the autumn, be said to reside there?

*Heron, Q.C.*—It is hard to reconcile all the cases. The words of section 97 are negative depriving the plaintiff of his costs. In the English cases the words are affirmative, giving him his costs in certain cases. In *Moffatt v. M'Ternan* the reason given by the Chief Baron cannot be supported. He says, "If the construction contended for be the true one, it might happen that a party might be sued in thirty-two different jurisdictions." [Monahan, C.J.—So he might, because he might have sporting residences in thirty-two counties. All that is necessary is in reference to the residence, not that the cause of action arose within the jurisdiction; and the Chief Baron says that a man might be sued in all those different counties where he had a sporting residence.] *Butler v. Corcoran* is the decision of Greene, B., sitting alone; it is merely the expression of an opinion which was not necessary to the case before him. If there be a series of sections *in pari materia*, they must be construed together. But this Civil Bill Act is an Act in negative words, depriving of costs; and if the plaintiff here resided within the jurisdiction, he should be disentitled to costs, notwithstanding *Moffatt v. M'Ternan*. The action is for the rent of a mill. The defendant has a residence in the jurisdiction out of which

he is rated as an occupant, and for some portion of the year he actually lives there. He resides there, irrespective of *Butler v. Corcoran*, which only refers to the residence of a defendant under the Civil Bill Act. The English authorities are all in our aid, because the words in the English Act are affirmative, in ours they are negative. [Monahan, C.J.—The question is, if we should overrule or follow *Moffatt v. M'Ternan*. It is a serious question. The policy of the Act may be to lead parties to sue in the inferior courts.] [Keogh, J.—Would you say the words "have a residence" are the same as "reside?"] Yes. [Keogh, J.—Because many men have residences in counties of Ireland into which they never enter.]—Rogers on Elections. What is the use here of the English cases, one of which overrules the other? [Monahan, C.J.—In a motion of this kind in which there is no appeal, we are bound to respect the decision of the Court of Exchequer, unless we seriously think they were wrong.] This very seriously affects the cases on circuit. *Moffatt v. M'Ternan* appears to have been the first decision, and is of date 1854. [Monahan, C.J.—But it has been acted on ever since; and, no doubt, Mr. Colles acted on it in this case.] The rule of construction of sections in the same Act ought to be different from that which holds when the sections are not in the same Act. We have an independent section, and *Moffatt v. M'Ternan* ought not to be held to apply.

*Cur. adv. vult.*

Nov. 22.—MONAHAN, C. J.—The case is concluded by authority, because *Moffatt v. M'Ternan* is an authority in point, and we know the facts in that case to be as they are represented. *Moffatt's* usual residence was in Talbot-street, where he resided nine months in the year. He had a residence in Sligo, which he occupied for the other three months. The Court of Exchequer with some difficulty held that it was the same as if he was a defendant, and that Sligo was not his usual residence, and that Dublin was, and that he was entitled to half costs. There could be no appeal from that decision, nor would there be from this which we are going to make, and therefore we would not be bound to follow it if we thought it wrong, but we will follow it—it has not been questioned for so many years. This motion must be refused with costs.

*Motion refused.*

FLEMING v. GREENE.—Nov. 15, 16, 1864.

*Bond to secure interest payable upon mortgage debt—Construction of condition—Latent ambiguity—Admissibility of evidence.*

By indenture of mortgage of September 1, 1847, between A. and B. of the first part, C. and D. of the second part, and E. of the third part, A. and B. conveyed certain lands to E. in consideration of a loan of £2,000. The mortgage contained covenants on the part of A. and B. to repay the loan, and recited a collateral bond executed by them, and

also recited a bond executed by C. and D. to secure the payment of the interest on the principal sum. In the latter bond, which was of even date with the mortgage, the personal covenants in the mortgage were not recited, nor the collateral bond executed by A. and B., but the loan and conveyance were recited, and the bond proceeded in these terms, "Whereas C. and D. agreed to secure the punctual payment of the interest thereon, so long as the said sum of £2,000 shall remain outstanding. Now, the condition, &c., is, that if C. and D., &c., do and shall, so long as the said principal sum of £2,000 sterling, or any part thereof, shall be permitted to remain upon the said security, pay interest for the said sum of £2,000, then the foregoing obligation to be void," &c. A. subsequently filed a petition in the Incumbered Estates Court to sell the lands assigned to E. and on being sold they proved insufficient to pay E. the principal. An action having been brought by E. against C. and D. to recover the interest due. Held—1. That there was not a latent ambiguity in the bond which would render evidence admissible to explain it. 2. That C. and D. were liable.

Chatterton, Q.C., (with him *Falkiner*) showed cause against a conditional order to turn the verdict for the plaintiff into a verdict for the defendant, or set it aside on the ground of rejection of evidence which should have been received. The action had been tried before Monahan, C.J., and resulted in a verdict for the plaintiff for £174 5s. A mortgage of date 1847, between W. H. Greene and his son of first part, Hugh Greene and Godfrey Greene of second part, and plaintiff of third part, recites that W. H. Greene and W. W. H. Greene have applied to Fleming for £2,000, to be secured by mortgage as therein expressed, and by bond with warrant of attorney for payment of £2,000. It recites the collateral bond for £2,000, which is not the subject here, and then proceeds to the bond, the subject of this action, which is as follows—"1st September, 1847. Know all men by these presents, that we, Hugh Greene of Sarum, in the County of Waterford, and Godfrey Greene of Sion in the County of Kilkenny, Esquires, are held and firmly bound unto Arthur Smith Fleming of Greenville, in the County of Kilkenny, Esq., in the penal sum of £2,000 good and lawful money, &c. Whereas by indenture bearing equal date herewith, made between W. H. Greene, of Sarum House, in the County of Kilkenny, esquire, and W. W. Hastings Greene, esquire, his eldest son, of the first part, the above bounden Hugh Greene and Godfrey Greene of the second part, and the said A. S. Fleming of the third part, in consideration of the sum of £2,000 sterling to the said W. H. Greene and W. W. H. Greene, lent and advanced by the said A. Smith Fleming at or immediately before the sealing thereof, they, the said W. H. Greene and W. W. H. Greene, according to their respective estates and interest therein granted, &c., unto the said A. S. Fleming (in his actual possession, &c.), and to his heirs all that and those the towns and lands of Danganspody, Upper and Lower, and Ballydare, together with all messuages, &c., situate in the barony of Iverk and County of Kilkenny, with the appurtenances, to hold to the

said A. S. Fleming, his executors, administrators, and assigns, for and during the natural life and lives of the *cestui que vies* in being in the last renewal of the therein-before recited lease under which said lands are held, and the survivors and survivor of them, and for and during the life and lives of all and every such person and persons as should from thenceforth for ever thereafter be added, &c., subject to the proviso for redemption of the said premises thereafter contained, and whereas on the treaty for the said loan the above bounden Hugh Greene and Godfrey Greene agreed to secure the punctual payment of the interest thereon, so long as the said sum of £2,000 shall remain outstanding. Now, the condition of the foregoing obligation is such, that if the above bounden Hugh Greene and Godfrey Greene, their heirs, executors or administrators, or some other person or persons, on behalf of them, or some of them, do and shall so long as the said principal sum of £2,000 sterling, or any part thereof, shall be permitted to remain upon the said security, well and truly pay, or cause to be paid, unto the said A. S. Fleming, his executors, administrators, and assigns, interest for the said sum of £2,000 sterling, after the date and on the gale days, and according to the provisions of said recited indenture of mortgage, of equal date therewith, then the foregoing obligation to be null and void, otherwise to remain in full force and effect in law." We say that "the said security" means both the mortgage and the collateral bond. The defendant's counsel say it means the mortgage only. There is a proviso in the mortgage for not calling in the money for five years, provided the interest is paid. The sureties bond, guaranteeing the payment of the interest, is of the same date as the mortgage. It does not recite the mortgagors' bond. The sureties are themselves parties to the mortgage, and executed it. They were made parties to it solely for the purpose of showing that the recital was to form a portion of it. The senior mortgagor, W. H. Greene, presented a petition to the Incumbered Estates Court, as owner and petitioner, to sell. An order was made to sell, and under that order a sale took place. The lands were insufficient to pay the debts, and there was no sum to pay Fleming. The mortgage, therefore is not outstanding on the lands. But there are personal engagements. [*Christian, J.*—That comes to this very much, that the sureties' bond was to be binding so long as it was not wanted.] So far as we were concerned, we had allowed the money to remain on the security. We showed that at the trial. [*Christian, J.*—You might contend, going to verbal nicety, that even on their showing the words are not "remain," but "be permitted to remain," and so it is, the proceeding having been *in invitum*.] The defendants' counsel contended at the trial that he was entitled to go into parol evidence, that the words of the condition of the bond were ambiguous. He proposed to prove that the defendant and his co-surety had agreed to secure only so long as the lands were unsold or the money remained on their security; that there never was any agreement that they were to secure beyond the time mentioned. He offered to prove this by documents, and the evidence of the professional man who was employed. But this is a matter of construction, appearing within

the four corners of the instrument. *Newenham v. Smith* was cited, but had no reference. Also *Street v. Lee* (3 Man. and Gr., 452); and the case in 16 Q.B. 69).

*Serjeant Sullivan, and Ezham, Q.C.*, in support of the rule. The bond is not a common and ordinary one. If a mortgagee wants some extra security, he will ask for it for payment of the principal as well as the interest. A mortgage may be executed without any personal covenants; but there may be other securities, viz., a personal covenant on the part of the mortgagor, or securities. The Greens are respectively tenant for life and tenant in tail. What the mortgagee wanted was to get some additional security for the payment of the interest, it being evident that he thought the land sufficient security. We offered evidence to prove the proposal for the loan, to show what was the negotiation, and in what it resulted. [*Christian, J.*—I believe the rule is that evidence may be given to enable the Court to be put in the position the parties were in when the negotiation was entered into; but that evidence is not receivable as to the negotiation itself.] The father and son were both to join in bonds for payment of both principal and interest, and judgments were entered on them. If the security the defendants were called on to give was collateral with all the securities, the argument would be intelligible, but the bond recites the mortgage proper only and nothing else. There is nothing said of the collateral judgment. There may be a mortgage in which there is not a covenant: if a party thinks lands are of ample value. The lease has not been permitted to be outstanding, because a Court of competent jurisdiction sold the lands. [*Ball, J.*—The moving party in the sale was the mortgagor.] Suppose the mortgagee had filed a petition to sell in Chancery. There is nothing mentioned in the bond as to covenants in the mortgage, and what is not in the condition cannot be imported into it. If there be ambiguity, we are at liberty to give evidence of what took place prior to the negotiation. The life estate is pledged for three times, suppose, its value. No man would lend money on that. But he knows if the inheritance is pledged, he has ample security, and in the meantime *aliunde*, he wants security for payment of the interest. Personally the son was not worth a shilling. [*Monahan, C. J.*—I think you would have to go to the other side of the hall.] [*Christian, J.*—Have you any authority that if you had such a document you could produce it?] Because of the ambiguity in the instrument. [*Christian, J.*—The ambiguity is *ambiguus patens*, which the Court are bound to construe.] [*Monahan, C. J.*—I do not doubt that the Greens thought the lands were ample security, and that all they need pay was the interest, and that the principal would be paid when the lands were sold.] Not only the Greens, but the mortgagee thought that. The fall in the value of lands led to this. [*Monahan, C. J.*—If we thought your construction was right, parol evidence would be equally inadmissible, for we should rule for you.] But if the language be ambiguous in *M. Donald v. Longbottom* (1 El. & El. 977) the question was, what was the meaning of "your wool?" and the Court held there was ambiguity, and that evidence might be given. [*Christian, J.*—That is a

clear case of *ambiguus latens*, raised by parol evidence, and removable by parol evidence.] If in a declaration we could set out all the facts, and an averment that the money was not permitted to remain on the said security, all these circumstances would be allowed in to show the meaning of the said security. We contended we were at liberty to show, in *Newenham v. Smith*, what were the circumstances under which Bourne, the rector, gave the document. We ought to have been at liberty to go into the facts, to enable the Court to say with what meaning the parties used the words "shall be permitted to remain upon the said security." They may mean one thing under one set of circumstances, and another under another. They might mean, "until the lands were sold," it being the opinion of all parties then that the lands were sufficient. This is a stronger case, for the words "permitted to remain" are more doubtful. The guaranty was, "in consideration of your having advanced, we jointly undertake," &c. That would imply, in the first instance, that the money had been advanced; but the Court held it was sufficiently ambiguous to allow evidence to show the advance was made concurrently.

*Falkiner* was not called on.

*MONAHAN, C. J.*—We have heard everything which can be said, and there is no need of further consideration. The facts have been stated, so that I need not repeat them. The parties knew that the mortgage deed contained an express covenant for payment, and also that it should be further secured by the bond of the sureties, who are parties to the mortgage deed, in order to identify them. It is true the bond only recites the portion of the deed whereby the lands are conveyed; but it recites that deed, and then the condition is, "shall be permitted to remain upon the said security." The question is, was this permitted to remain? What does this mortgage contain?—A conveyance and personal covenants to pay. The Incumbered Estates Court have sold the property, and the lands were not sufficient to pay; but the money is still due, and the Greens are liable to an action on their covenants. This is not a case of ambiguity, but, if anything, it is one where there may be a little difficulty of construction. If there be an ambiguity, it is a patent one which the Court must construe. With respect to the construction, we are all of opinion that my view at the trial was the right one. I am very glad I saved the point, because the interest amounts to £2,000, and it was quite right that the parties should take the opinion of this Court or another Court; but I must say I saved the point, not having any doubt, but because the sum was considerable, and the parties were so advised.

*Rule discharged.*

## Court of Exchequer.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

ENRIGHT v. KAVANAGH.—Nov. 3, 23, 1864.

*Costs*—Civil Bill jurisdiction—Place where cause of action arises—Common Law Procedure Amendment Act (Ireland), 1856, sec. 97.

*Plaintiff sold and delivered goods to the defendant in*



one civil bill jurisdiction—namely, that of the city of Dublin, and applied for payment and was refused in another jurisdiction, viz., that of the county of Dublin, in which latter county both parties in fact resided.—Plaintiff thereupon brought an action in the superior courts, and obtained a verdict for a sum under £20. On taxation of costs the taxing master, having regard to the 97th section of the Common Law Procedure Amendment Act, 1856, declined to allow the plaintiff any costs whatsoever on the ground that the cause of action, to wit, the refusing to pay, arose in the same civil bill jurisdiction in which both parties resided, the Court, however, held—that the cause of action arose at the time of the sale and delivery of the goods, and that same was in a jurisdiction different from where the parties resided, and that the plaintiff was entitled to half costs.

THIS was an application by the plaintiff to the Court in the terms of the notice, “That Master Colles do review his taxation or rulings by him made in reference to certifying the plaintiff’s bill of costs of record and judgment on postea in this cause, and that said taxing master do forthwith certify the plaintiff’s costs already paid and taxed in this cause.” The plaintiff insisted that he was entitled to half costs pursuant to the statute. The action was tried at the Consolidated Nisi Prius Sittings during Trinity Term, 1864, when the plaintiff obtained a verdict for a sum under £20. It was insisted, on the other hand, by the defendant, that the plaintiff was entitled to no costs whatever, inasmuch as the parties, plaintiff and defendant, resided in the same civil bill jurisdiction—namely, in the county of Dublin. The question of residence was not an element in the present case. The summons and plaint was for £10 4s., balance due of a larger sum upon account of money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant, and upon account stated. It appeared from the affidavits of both parties that it was proved in evidence upon the trial of the issue in this case that a quantity of bricks was sold and delivered by the plaintiff to the defendant on the banks of the Grand Canal, in the city of Dublin. Defendants’ affidavit stated “That application was made by letter addressed to defendant at Carrickmines, applying for payment, and that defendant did not comply with said request; and that that non-compliance was the breach of contract complained of, which breach occurred in the same civil bill jurisdiction” in which the parties resided.

*O’Driscoll*, in support of the motion.—This is an application under the 97th section of the Common Law Procedure Act 1856. That section provides that “if in any action of contract brought after the commencement of this Act in the superior courts (save for breach of promise of marriage), when the parties reside within the jurisdiction of the Civil Bill Court of the county in which the cause of action has arisen, the plaintiff shall recover, exclusive of costs, a sum less than twenty pounds, &c, the plaintiff in any such action shall not be entitled to any costs unless at the trial of such cause the judge shall certify on the back of the record that the case was not one that could be tried in the Civil Bill Court,” &c. The

question frequently arises as to the residence of the parties, but here it is as to where the cause of action had arisen? The defendant is mistaken in the proposition that the cause of action in this case arose within the jurisdiction of the same Civil Bill Court in which the plaintiff and defendant reside. Three things must concur to deprive the plaintiff of his costs in an action of contract when the sum recovered is under £20. First—The plaintiff must reside within the civil bill jurisdiction of the Court in which the action is brought; second—the plaintiff and defendant must reside within the same jurisdiction; and third—the cause of action must have arisen within such jurisdiction. The defendant relies on the admitted fact, that the plaintiff and defendant reside both in the county of Dublin; and he insists that the refusal to pay was the cause of action, which it is said, forsooth took place in the same civil bill jurisdiction. But the cause of action clearly arose where the goods were sold and delivered. Push the proposition made on the other side to its farthest, and see the absurdity that will arise. A trader sells and delivers his goods to a party who, perhaps, goes to reside in Constantinople; he writes for payment, and breach is made by not complying with the request: can anyone say that that cause of action has not arisen in this country?

*Curtis contra*.—The taxing master was right in holding that the refusing to pay was the cause of action; in pleading, the ordinary mode of declaring in such a case must contain an averment that the defendant was requested to pay and refused; and the request and non-compliance here were in the county of Dublin, where both parties resided.

*Fitzgerald, B.*—This was an appeal from the decision of Master Colles on the question of costs. The action was brought for the recovery of the price of bricks sold and delivered by the plaintiff to the defendant, which sale and delivery the defendant traversed, and there was a verdict against him for a sum under £20. And the question then arose before the taxing master as to what costs, if any, the plaintiff was entitled to. It appeared that both the plaintiff and defendant resided in the county of Dublin, so the controversy now arises as to where the cause of action arose. The plaintiff contends that it arose in the city of Dublin, where the goods were sold and delivered; the defendant, on the other hand, insists that the cause of action arose not in the city of Dublin, which would be a different civil bill jurisdiction, but in the same civil bill jurisdiction in which both parties resided—namely, in the county of Dublin where payment of the price of the goods was demanded and not complied with, which non-compliance was the breach which was, he says, the cause of action.—The taxing master has concurred in this view, and accordingly has declined to certify the plaintiff’s costs. We, however, are of opinion that the cause of action accrued where the goods were sold and delivered, which was, in fact, in the city of Dublin; and as that was in a different civil bill jurisdiction from where the plaintiff resides, we overrule the decision of the taxing master, and we decide that the plaintiff is entitled to his costs—to such costs as he is entitled to under the Common Law Procedure Act of 1856. This is the unanimous opinion of the Bench.



## Court of Probate.

Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law

IN THE GOODS OF MACKAY.—Feb. 18.

**Confirmation and Probate Act, 1858 (Scotland)—  
Memorandum of domicile of deceased.**

*A memorandum that the domicile of the deceased was Ireland at his death, may, under 21 & 22 Vic. c. 56, s. 14, be written on the grant of probate after it has issued, where assets have been discovered since in Scotland.*

*R. Seeds* applied in this case for an order directing the proper officer to put on the probate, which had issued to the executors on the 25th March, 1862, a memorandum that the deceased had died domiciled in Ireland. The application was grounded on affidavit, showing that since the grant of probate some assets had been discovered in Scotland to which the testator was entitled, and as to which therefore it would be necessary to obtain confirmation from the Commissary Clerk of the Commissary Court in Scotland. A difficulty arose on account of two contradictory decisions, one by the late Sir C. Cresswell (*In the goods of Muir*, 28 L.J. N.S. Pr. 49), where he decided that the memorandum could not be written on the probate after it had issued; the other of Sir J. P. Wilde (*In the goods of Alison*, 34 L.J. N.S. Pr. 20), in which he held that it could, holding that the words in the 14th section "written thereon" were intended for that and no other purpose.

KEATINGE, J. agreed with Sir J. P. Wilde in his view of the Act and made the order.

*Order accordingly.*

**NOTE.**—The section is as follows:—"From and after the date aforesaid (Nov. 12, 1858) where any probate or letters of administration to be granted by the Court of Probate in England to the executor or administrator of a person who shall be therein or by any note or memorandum written thereon, signed by the proper officer, stated to have died domiciled in England, or by the Court of Probate in Ireland, to the executor or administrator of a person who shall in like manner be stated to have died domiciled in Ireland, shall be produced in the Commissary Court of the County of Edinburgh, and a copy thereof deposited with the Commissary Clerk of the said Court, the Commissary Clerk shall endorse or write on the back or face of such grant a certificate in the form, as near as may be, of the schedule F. hereunto annexed, and such probate or letters of administration being duly stamped shall be of like force and effect, and have the same operation in Scotland as if a confirmation had been granted by the said Court."

## Court of Bankruptcy & Insolvency.

[Reported by John Levy, Esq., Barrister-at-Law.]

RE SHEIL AND LYONS.

**Bond with warrant of Attorney to confess judgment—Filing of warrant—Seizure and sale—Operation of the 334th section of the Irish Bankruptcy Act, 1857.**

*A and B traders on the first of March, executed to C their bond with warrant of attorney to confess*

*judgment thereon. The warrant was not filed until the 30th of March following, when judgment was marked thereon, and on same day duly registered in the judgment office. There was no affidavit filed verifying the date of the execution of such bond and warrant. A and B were adjudicated bankrupts on the 16th April, following. C, prior to such bankruptcy levied by seizure and sale a considerable amount of his judgment debt, which by consent of the parties was lodged in the Bankrupt Court, subject to their rights. Held, that the warrant of attorney was a warrant to confess judgment in a personal action, within the meaning of the 334th section of the Bankruptcy and Insolvency Act, 1857, and not having been filed or its execution verified in manner provided by that Act, the judgment entered thereon was null and void as against the assignees, and that they were entitled to money levied thereunder.*

THE facts of this case sufficiently appear in the judgment.

LYNCH, J.—The question in this case arises upon the charge of the assignees and the discharge of Patrick Sheil. The facts are all admitted, and they are very few and simple, and as follows: The bankrupt, on the 1st March, 1864, gave to Patrick Sheil his bond with a warrant of attorney to enter judgment to secure to him the principal sum of £200, in which amount he stood in debt to him. This warrant of attorney was not filed twenty-one days after its execution, nor were any steps whatsoever taken thereon until the 30th March, when judgment was entered pursuant to the warrant, and on the same day execution was issued, and a levy thereunder was made on the 6th April; and, while the money levied still remained in the hands of the Sheriff, an adjudication in bankruptcy took place on the 16th April. The money so levied is now in this Court, and the case is now before the Court to determine as to the right of the respective parties—the assignees who are chargeants, and Mr. Patrick Sheil, who is dischargeant—to this sum. The only question argued before me, is whether this warrant of attorney is one within the 334th section of the Bankruptcy Act, 20 & 21 Vic., c. 60, because, if it is, admittedly the warrant, or any copy thereof, was not filed within twenty-one days after its execution, nor was any judgment entered pursuant thereto within twenty-one days, and by express terms of the section then this warrant is null and void to all intents and purposes whatsoever. On the part of the dischargeant Mr. Patrick Sheil, Mr. Sidney contended that this is not the warrant of attorney contemplated by this section, and he has argued the point with great subtlety and ability, and has, perhaps, succeeded in showing that there is some loose and inconsistent phraseology in the statute, if applied to such a warrant of attorney as this. It is said on both sides that there is no decision in the books on this point. I will accept this statement now, although I have some memory of being engaged in a case brought against Mr. Going, the Sheriff of Tipperary, (*Lyndsay v. Going*, I think, was the cause), in which this very point was raised, and which case went to the Court of Error. But I have not been able to find any report of the case, and my memory of it is not suffi-

ciously distinct to enable me to say with certainty that this point was raised in it. But although this point was never decided in any case, it is admitted that a course of practice has existed over twenty years, treating warrants of attorney like the present as being within Pigot's Act, 3 & 4 Vic., c. 105, and dealing with them as such; and there are cases in many of which this point could have been raised, but which, treating them as warrants within the statute, other questions were raised, on the admission that they were so; and the last case with such admission is the case of *Murphy v. Keefe* (9 Ir. Jur., N.S., 123), only just decided, and in which this point, if raised and sustained, must have been decisive. Mr. Sidney, however, has a right to say here, that the practice has been founded on a mistake, that no case has decided the point, and that I am bound to give him the benefit of the law if he can convince me that this warrant is not within the statute. The proposition contended for, if I rightly appreciate it, is that the warrant contemplated by Pigot's Act and by the Bankrupt Act is not merely a warrant of attorney to authorise a proceeding, but must be a warrant that is *per se*, and in itself a security for money, itself creating the right—and he instances the well-known rent security—the Kerry bond—as an example of his meaning. This proposition he deduces from the language of the Acts, and from what he alleges to have been the English practice at the time of the passing of the 3 Geo. IV., c. 39, from which the sections in Pigot's Act is taken. No attempt is made to show any reason for this proposition, or to show that the warrant of attorney now before Court would not lead to all the mischief intended to be remedied by these Acts; it is simply an argument upon the grammatical structure of the enactment and upon the force of certain language used in the Acts. In truth, it seems to me that the argument amounts to this: that to be a warrant of letting within the statute it must be something else besides, and be itself the present creation of a debt. The statute names warrants of attorneys to confess judgment; but Mr. Sidney contends that it means more than that, for it means an instrument creating a debt as well as being the warrant of attorney described. The language of the 12th section of Pigot's Act is relied on, where it says in the recital to the section—"and whereas injustice is frequently done to creditors by secret warrants of attorney to confess judgments for securing the payment of money," &c. Now in this language I see nothing whatever to sustain Mr. Sidney's argument, or to show that the warrant is to be the creation of a debt. This warrant before me is a secret warrant, as defined, for confessing judgment to secure the payment of money announcing expressly every term of this description, and quite the same whether the debt be created by writing on the same paper as the warrant, or created, as here, by a bond given on another piece of paper and referred to in the warrant. The identity of paper on which the two instruments are written cannot, in my judgment, be the criterion whether the instruments are within the meaning of the Act. A warrant of attorney to confess judgment is a specific legal instrument, accurately so described, it infers a proceeding in which

the final step may be taken, and no torture of words can convert it to a meaning of being itself the creation of a debt. I may add that the exception out of sec. 10 of warrants of attorney to confess judgment in actions upon bonds or writings, obligatory recited therein, or collateral therewith, is plainly a declaration sued even within the provision of the Act, and exempted thereby from the formalities imposed by that section. This reliance is placed on the language "unless judgment shall have been signed or execution issued on such warrant of attorney." And it is said that you cannot have judgment on such a warrant as this, but neither can you on any warrant in the restricted sense of the word assumed in the argument—a judgment or execution on a warrant of attorney, expounding "on," as argued, is nonsense, but the language is still right enough, and the legitimate meaning of the word "on," viz., by virtue of, consequent upon, leaves the meaning sensible and grammatical, and the Schedule B. relied on seems to me to be quite as applicable to this case as to the case to which only it is said to apply. These minute criticisms on the words may raise some little doubt as to the felicity of the language used, and may show the ingenuity of counsel; but their mistake is, that they are, in truth, quite as inappropriate to the case supposed as intended, as to the warrant now before me. Precedents in England are relied on, and part of the argument seems to be this—that the English Act, 3 George IV., was applied to the English practice existing, that this legislation was assumed in terms into the Irish Act, and, therefore, is to be expounded here as referring to the same practice. I need hardly say that such an argument, if it was intended, is totally unsound, unless the language of the statute is such as only to be applicable to the existing practice in England. But I have not seen the proof of this matter, and I certainly have failed altogether to see that in England a warrant of attorney to confess judgment, to secure money, means, not a warrant of attorney to confess judgment, but also must be an instrument creating a debt—that is, be a warrant of attorney and something more. Now, even if doubts were created in my mind by this verbal disturbance of Pigot's Act, it would be worth while remarking that section 334 of our Act is not a declaratory Act, or even simply re-enactive, but is a distinct enactment in itself as to warrants of attorney to confess judgment in any personal action; and Pigot's Act is only referred to as to the manner and form of filing it. If, therefore, there was any force in the argument of the practice of England being a mode of expounding the 3rd George IV. by similar reason, the practice in Ireland would be a mode of expounding the present statute in section 334. The judgment of Mr. Justice Hayes has been referred to, as expounding this section in the sense contended for by Mr. Sidney. I have read that judgment over since, and I do not find one word in it whereupon to attribute to Judge Hayes this view, so subversive of our practice in Ireland, and never raised for so many years. These warrants are plainly within the description of warrants mentioned within the Act. They are plainly within the mischief intended to be remedied by the Act, and in my judgment the case be-

fore me is ruled by section 334. I have thought it right to consider this case, not because of any doubt created in my mind, but because of the care bestowed by counsel in raising it, and because it was announced that it is thought of so much importance as necessarily to lead to an appeal from my decision. At present my opinion is very clearly formed, subject to correction if I am wrong, and I declare this charge proved, and that the costs be paid by the respondent.

Counsel for the assignees, Mr. Heron, Q.C. and Cartan.

Counsel for the execution creditor, Mr. Sidney, Q.C.

## Court of Appeal in Chancery.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

IN RE PARKINSON'S ESTATE.—January 27.

*Power of Attorney—Equitable mortgage—Insolvency.*

*W.R.P. being seised under a lease of lives renewable for ever of certain premises in the city of Dublin, and being indebted to petitioner, E. F., in the sum of £448, in order to secure the repayment thereof executed a power of attorney, whereby he authorized said E. F. to mortgage, &c., said premises, and which power of attorney he declared to be "irrevocable until the said E. F. should have received the whole of his account against the said W. R. P., or payment of any bill, promissory notes, or bills of exchange for which W. R. P., is now, or shall become liable to or on behalf of E. F." Held (reversing the order of Judge Dobbs), that the said power of attorney constituted an equitable mortgage of the said premises.*

THIS was an appeal brought by the petitioner, Edward Few, from an order of Judge Dobbs, one of the judges of the Landed Estates Court:—The petition of appeal stated that "William Robert Parkinson, of Uys Dorns, in the Colony of Natal, merchant, being seised under a lease for lives renewable for ever of a shop, dwelling-house and premises, now Numbered 63, and formerly No. 55, Great Britain-street, in the Parish of St. Mary, and City of Dublin, and being indebted to the petitioner in the sum of £448 7s., in order to secure the payment to the petitioner of the said sum, and of such further sums as should be advanced to him by the petitioner, executed to the petitioner on the 17th day of February, 1864, a power of attorney in the words and figures following:—

'Be it hereby made known, that on this the Seventeenth day of February, One Thousand Eight Hundred and Sixty-four, before me, Arthur Walker, of Pietermaritzburgh, Natal, Notary Public, by the

authority of Government duly sworn and admitted, and in the presence of the subscribed witnesses, personally came and appeared W. R. Parkinson, of Uys Dorns, Natal, who declared to have nominated, constituted, and appointed, as by these presents he doth nominate, constitute, and appoint Edward Few, of Derby, England, to be his lawful attorney and agent, for him, and in his name to sell, let, lease, mortgage, or pledge certain houses or house left or bequeathed to the said W. R. Parkinson, by Major Colville, late of the 97th Regiment, and of whose will the executors were James Colville, the late W. H. Parkinson, M.D. (father of the aforesaid W. R. Parkinson), and J. A. Parkinson, Esq., 28, College-green, Dublin; said house or premises being situated in Great Britain-st., Dublin, and should the same have been sold, then to ask, demand, sue for, and recover of and from all persons whomsoever and wheresoever in whose hands the same may be, with power to said attorney to sign, execute and deliver for said appearer, all necessary vouchers, receipts, discharges, or deeds in or about the premises, and generally with power for him, the appearer, to manage and transact all matters and things in connection with the said business as fully and effectually to all intents and purposes as he the said appearer could do if personally present, and acting therein, and giving to the said agent or attorney full power to substitute one or more persons in his place or stead; and the said appearer, the said W. R. Parkinson, having given this power of attorney for good and valuable considerations advanced to him by the said Edward Few, the receipt of which he the said appearer doth hereby acknowledge; and he hereby declares that his power of attorney to said Edward to be irrevocable until the said Edward Few shall have received the whole of his account against the said appearer, or payment of any bills or promissory notes, or bills of exchange for which the appearer is now or become liable to or on behalf of the said Edward Few. This done and passed at Pietermaritzburgh, the day, month, and year aforesaid. In presence of the witnesses. Signed, W. R. Parkinson.

"Witnesses { S. FRED. POOLE.  
S. JAMES BORKE.

'A true copy from my Protocol.

A. WALKER, Not. Pub. [Seal.]'

The premises mentioned in the said power of attorney are the premises hereinbefore already described. Petitioner submits that the said power of attorney operated in equity as a charge upon the said premises, to secure the amount then due by the said William Robert Parkinson to the petitioner, and any future advances to be made by the petitioner to the said William Robert Parkinson, and the said William Robert Parkinson has such an estate in the said premises as enabled him so to charge the said premises. The said sum of £448 7s. is still due to petitioner by the said William Robert Parkinson. The said William Robert Parkinson was, by an adjudication of the Court of Bankruptcy and Insolvency of the colony of Natal, adjudicated a bankrupt on or about the 22nd day of April, 1864. The petitioner on the 11th July, 1864, filed his petition in the Landed Estates Court, stating the several matters above set forth, and

praying a sale of the said premises, or a competent part thereof, for the discharge of the incumbrances affecting the same. By an order of the Honorable Judge Dobbs dated the 7th day of November, 1864, it was declared that the Court made no rule on said petition, inasmuch as it was of opinion that the power of attorney in said petition and above mentioned, did not create a charge on the lands in the schedule to said petition specified, (being the premises hereinbefore described) there being no words in said power directing any sum of money to be paid out of said lands or the rents and profits thereof; and the Court by said order reserved liberty to the petitioner to amend said petition by making the owner the petitioner, and stating the said power of attorney as the authority to present the petition. Appellant submits that the said order is erroneous and ought to be reversed, and that instead thereof a conditional order for the sale of the said premises ought to be made upon the said petition for, amongst others, the following reasons:—First—Because it appears from the said power of attorney that it was the intention of the said William Robert Parkinson thereby to secure the repayment of the debt then due to, and all future advances to be made by, the petitioner upon the premises hereinbefore mentioned. Second—Because the said power of attorney operated as an equitable mortgage of the said premises."

The following is the answer of John Shurmer, of Pietermaritzburgh, Natal, sole Trustee for the administration of the estate of said William Robert Parkinson, an insolvent debtor:—That he has been served by petitioner with notice of the petition of appeal in this matter. That the said William Robert Parkinson was adjudicated an insolvent, by the Supreme Court of Natal, on or about the 22nd of April, 1864. That said John Shurmer was duly elected sole trustee for the due administration of the estate of the said insolvent, and his election was duly confirmed by the supreme Court at Natal, as appears by the certificate of such appointment, to which respondent refers. That thereupon all the estate and interest of the insolvent in the premises in said petition mentioned became vested in said John Shurmer, and respondent is now in receipt of the rents and profits of the said lands and premises. That respondent, as such owner, presented his petition for the sale of said lands and premises to the Landed Estates Court, Ireland, on the 30th day of September, 1864, as appears by an attested copy of said petition, to which respondent refers. Respondent submits that the prayer of said petition of appeal ought not to be granted: Because the said power of attorney did not create any equitable charge on the said lands: and the power was revoked by the insolvency.

Woodlock appeared in support of the appeal.—Judge Dobbs was wrong in holding that this power of attorney did not create a charge on the lands. It is submitted that this power of attorney constituted an equitable mortgage of the lands, and that the appellants, the petitioners, ought to be declared entitled to have the premises sold to pay the sum of £448 7s., being the amount due to the petitioner. This is purely an abstract question. The case is governed by *Abbot v. Stratton* (3 Jones &

Lat. 603). There, "upon an advance of a sum of money by William Knox to Alice Stratton, the latter executed to said Wm. Knox, a power of attorney, dated the 10th of April, 1843, appointing him to receive the rents of her estates. To this power of attorney there was a memorandum attached, stating that the letter of attorney was given for the repayment of the money borrowed, and that she agreed not to revoke it until the sum borrowed should be repaid with interest; and authorized Knox to apply the rents as therein directed, and also upon repayment of the interest of said £500, and it was held that this constituted an equitable mortgage of the lands." This then being an equitable mortgage, the assignees of the insolvent only take such interest as the mortgagor had at the time of his bankruptcy. The 27th section of the 20th and 21st Vic., c. 60, the Irish Insolvent Act, gives priority to mortgages made prior to the commencement of the imprisonment of the prisoner. The mortgagor then, the donor of the power of attorney, cannot revoke this power, and so it was decided in the above cited case of *Abbot v. Stratton* (3 Jones & Lat. 613). Lord Kenyon in *Walsh v. Whitcomb* (2 Esp. 565), says, that there is a difference in cases of powers of attorney: in general they are revocable from their nature, but there are exceptions, as where a power of attorney is part of a security for money there it is not revocable. So in *Gausson v. Moreton* (10 B. & C. 731). The marginal note in *Bromley v. Holland* (6 Ves. Jur. 28), states that a power of attorney in ordinary cases is revocable. "But when executed for valuable consideration this Court would not permit it to be revoked." A number of cases on the point of the irrevocability of powers of attorney, when granted for valuable consideration, are collected in a note to *Smart v. Sanders* (5 Man. Gran. & Scott, 917). Stokes on Powers of Attorney, p. 35.

The Solicitor General (Lawson), Kernan, Q.C., and Vereker, said that he was instructed to appear in support of the decision arrived at by Judge Dobbs; however, having considered the case of *Abbot v. Stratton*, and the cases cited on the other side, he would not consume the public time in arguing in support of a decision which could not stand.

The LORD CHANCELLOR said that the decision of the Court below must be reversed. This was a power of attorney for valuable consideration, and it is therefore irrevocable so long as the moneys advanced by Few are unpaid. This is undoubtedly an equitable mortgage; no question about it.

The LORD JUSTICE OF APPEAL concurred.

*Order of Judge Dobbs reversed.*

IN RE O'DONEL'S ESTATE.—Nov. 29, 1864.

*Will—Codicil—Construction.*

Testator by will, bearing date 4th July, 1828, having devised certain freehold estates in lands to his sons, M. and T., share and share alike, thus proceeded, "I leave and bequeath to my two daughters, Julia and Mary, £1000 each. . . . And I charge and"

*incumber all my said lands with the payment of my said daughters' fortunes." This will being made before the Wills Amendment Act, was duly attested by three credible witnesses. By codicil, unattested, the testator having recited that by his will he had charged said two legacies upon all his property, real and personal, with payment of said sums thus proceeded: "I do hereby, by way of codicil to my last will, order and direct that said sums of £2000 shall, in the first instance, be paid out of whatever money I now have or may have in bank at the time of my decease, as also out of whatever sums of money as may be due to me by bond or otherwise, as far as same will go towards making up said two sums of £1000, with interest thereon from the day of my decease until fully paid; and in case said sums so remaining in bank and so due to me, when called in, shall appear inadequate to the payment of said two sums of £2000, with interest as aforesaid, I order and direct that the deficiency may be made up from the produce of the sale of my stock of cattle, as by my said will is directed." Held—That the freehold estates which were charged with said legacies by the will were not exonerated by the codicil.*

THIS was an appeal by Timothy O'Donel, the owner of the estate in question, from an order of Judge Longfield, one of the judges of the Landed Estates Court.

The petition for the sale of the appellant's estate, (consisting of houses and premises in Upper Sackville-street, in the city of Dublin, numbered respectively, 32 and 36 in said street), was presented on the 26th November, 1862, by Martin Cogan, solicitor. The said houses were held under leases of lives renewable for ever. The petition for sale stated, that Martin Cogan was the owner of two legacies of £1000 each, charged upon said premises, under the will of Anthony O'Donel, deceased, and upon that will and codicil thereto the principal questions for the consideration of the court now arose.

The appellant's father, Anthony O'Donel, was seized among other property, of said two dwelling-houses in Up. Sackville-street, Dublin, and at his death, on or about the 21st November, 1830, he left two sons and two daughters, him surviving, namely, Michael, who died unmarried, 1836, Timothy (appellant), Mary died unmarried, 1839, and Julia married to Edward Howley Cogan, the brother of Martin Cogan, the petitioner for the sale of said premises. Previous to his death, the said Anthony O'Donel, appellant's father, made and published his will, of date the 4th June, 1828, duly attested by three creditable witnesses, whereby he devised said premises to his two sons, to Michael, and to the appellant Timothy, share and share alike, whereby also he provided for his said two daughters as follows:—"I leave and bequeath to my two daughters, Julia and Mary O'Donel, £1000 each, to be paid to them respectively on attaining the age of 21 years, or days of marriage, the interest thereof to be appropriated towards their education and support, and I charge and incumber all my said lands with the payment of my said daughter's fortunes and my said wife's jointure." And in a subsequent part of said will is contained the following clause:—"My

will further is, and I hereby direct that in case of the death of either of my said sons without issue lawfully begotten, that then and in such case his part of the property hereby devised and bequeathed, shall go to the survivor; and in case of the death of both of my said sons without lawful issue, I desire that the same shall revert to and be equally divided between my said two daughters, share and share alike; and in case either of said daughters shall die without lawful issue, I direct that her fortune so dying shall go to the survivor." Testator duly executed a codicil to the said will, dated the 15th of August, 1828, in the words following:—"Whereas I, the said Anthony O'Donel, have by my last will and testament in writing, and by me duly executed, bearing date the 4th day of June last, willed and bequeathed to my two daughters, Julia and Mary O'Donel, one thousand pounds each, payable with interest on their respectively attaining their ages of twenty-one years, or days of marriage, and charged and incumbered all my properties, real and personal, with payment of said sums. Now my wish is, and I do hereby, by way of codicil to this my last will and testament, order and direct that said sums of two thousand pounds shall in the first instance be paid out of whatever money I now have or may have in bank at the time of my decease, as also out of whatever sums of money that may be due to me by bond or otherwise, as far as same will go towards making up said two sums of one thousand pounds, with interest thereon from the day of my decease until fully paid; and in case said sums so remaining in bank and so due to me, when called in, shall appear inadequate to the payment of said sums of two thousand pounds, with interest as aforesaid, I order and direct that the deficiency may be made up from the produce of the sale of my stock of cattle, as by my said will is directed; and as to the rest, residue, and remainder of my property not disposed of by my said will, I give and bequeath same to my two sons, Michael and Timothy O'Donel, to be equally divided amongst them, whom I hereby name, constitute, and appoint residuary legatees, this 15th day of Aug. 1828."

The petition of appeal then stated "that the said legacies of £1000 and £1000 to testator's said daughters are the charges on foot of which said Martin Cogan has filed his petition for sale. That the said Michael O'Donel, appellant's brother, died on or about the 10th day of July, 1836, intestate, unmarried, and without issue, whereupon your petitioner became absolutely entitled to the entire interest in said houses and other property of his father, Anthony O'Donel. That the said Julia O'Donel afterwards intermarried with one Edward Howley Cogan, and a deed of marriage settlement, dated the 16th of December, 1836, was executed, previous to and in consideration of said marriage, whereby the said legacy of £1,000, so bequeathed to the said Julia as aforesaid, was assigned by the said Julia O'Donel to the said Edward H. Cogan, his executors, administrators, and assigns. That said Mary O'Donel died in the month of March, 1839, unmarried, and without issue, having previously attained her age of twenty-one years, leaving petitioner and the said Julia Cogan, otherwise O'Donel, her sole next of kin her surviving, but no letters of administration have been taken out

to said Mary O'Donel's effects. That the said Edward Howley Cogan, having become greatly embarrassed in his circumstances, by deed of trust, dated the 20th of June, 1839, made between the said Edward Howley Cogan and the said Julia, his wife, of the first part; Martin Cogan, solicitor, a brother of the said Edward Howley Cogan, of the second part; and several creditors therein mentioned of the third part—they, the said Edward Howley Cogan and Julia his wife, purported to assign to the said Martin Cogan the said legacies of £1,000, and £1,000 bequeathed to the said Mary O'Donel and Julia Cogan, otherwise O'Donel, respectively. That the said last mentioned deed was not acknowledged by the said Julia Cogan, pursuant to the statute in that behalf, and therefore as petitioner submits, did not operate to pass the interest of said Julia Cogan, if any, in the legacy bequeathed to her sister, the said Mary O'Donel, and that the said Martin Cogan, acquired no title under said deed to said last-mentioned legacy. Edward Howley Cogan died about the year 1845, leaving the said Julia Cogan, his wife, who is still living, him surviving. No payment having been made or demanded on foot of said legacies or either of them, for 20 years and upwards, the said Martin Cogan, on or about the 26th of November, 1863, having filed a petition in the Landed Estates Court, for the sale of said premises as aforesaid, by order dated the 27th of November, 1863, the Honorable Judge Longfield made an order for sale of said premises, unless cause shewn to the contrary in twenty-eight days after service on petitioner, and said Julia Cogan. That your petitioner, on the 18th of January, 1864, filed an affidavit as cause against said conditional order."

The petition of appeal then closed by averring that Judge Longfield made an order for the sale of said lands, and that the cause shewn by petitioner be disallowed with costs, which is the order now appealed from.

The *Solicitor General* (Lawson), now appeared in support of the appeal—The order of Judge Longfield is erroneous. The legacies of a £1,000 and 1,000, are not charged on the premises, for although they are in the plainest manner made a charge by the will itself, yet they are by equally clear and forcible words restrained from being a charge by the codicil, the codicil unmistakably revoked the will so far as the testator charged those two legacies upon his freehold estates. In his will he "charges and incumbers all his land for the payments of his daughters' fortunes," In the codicil he notices that he had so charged all his "property real and personal with payment of said sums," now he says *my wish is*, evidently shewing that his wish was to exonerate his freehold estates, and to charge the legacies on the moneys he had "in bank," in the first instance, but if they shall prove insufficient; he then in place of charging his estates with the deficiency, actually pointed out where the deficiency was to be made good from—namely, by the sale of his stock in cattle. The legacies then are not charged upon the lands. [The Lord Justice of Appeal.—After the testator has used the word "stock in cattle," does he not say, "as by my said will is directed"?] That cannot point to his charg-

ing his lands, it merely points to the £2,000 bequest made in his will. It is submitted then that this codicil has the effect of exonerating the lands. This will was made before the Wills Act, and therefore under the Statute of Frauds, 7th William III., three witnesses were necessary to pass lands by will. The will in this case was duly attested, but the codicil was not, nor was it requisite that it should; a case nearly similar is *Coverdale v. Lewis* (30 Beav. 409), there a testator made a will, and codicil made in 1839, the former was attested so as to pass real estate, but the latter was not; by his will he bequeathed a legacy of £3,000. and charged it on his real, in aid of his personal estate, and he devised his real and personal estate to trustees, charged with his legacies, upon trust thereout by mortgage sale or other disposition, to pay the legacy of £3,000. By the codicil he reduced the legacy from £3,000 to £2,000, and it was held that the codicil, though not properly attested, affected the reduction. Lord Hardwicke's decision in *Brudenell v. Boughton* (2 Atk. 268), was in point. [The Lord Chancellor asked if this point had not long since been settled by the case of *Ogle v. Ogle* (1 Jones, 349), in the Exchequer Chamber?]

*Serjeant Sullivan*—The codicil in this case could not operate to revoke the will; the will, which was one of lands, required by the 3rd section of the Irish Statute of Frauds, 7, William III., c. 12, three credible witnesses, and by the same section no devise in writing of any lands, tenements, or hereditaments, shall be revocable otherwise than by some other will or codicil, "signed in the presence of three or more witnesses declaring the same;" *Ogle v. Ogle*, above referred to is in point.

THE LORD CHANCELLOR—The precise question the Court is called upon here to determine is, are those legacies of £2,000 well, charged upon the real estate. There can be no doubt but that they are charged by the terms of the will; in the codicil two funds are provided, and we are here asked to infer that those funds so provided, viz.—the money in bank, and the stock, must be taken to repeal the charge on the real estate. It appears to me that this codicil has no effect whatever, except in pointing out what additional funds were to be liable, but I think that the pointing out such additional security, can not for one moment be held to exonerate the reality; it is an evidence that the testator had taken care of those young ladies. Affirm the decision of Judge Longfield with costs.

The LORD JUSTICE OF APPEAL concurred.

*Order of Judge Longfield affirmed.*

## Court of Chancery.

Reported by Oliver J. Burke, Esq., Esq., Barrister-at-Law.

HEWITT v. BREDDIN.—Feb. 3rd and 10th, 1865.

*Will—Construction of—Bequest of "whatever money I shall die possessed of"—Costs.*

*Testator being possessed of considerable sums of money—viz., £800 and £500, secured by mortgage or*

*charges on land; also £449 invested in Government Consols; and £265 in Government New Three per cent. Stock, thus disposed of same by his will: "I will and bequeath whatever money I shall die possessed of to my brother J., and after making several other dispositions, thus concludes—"I will and bequeath all the rest and residue of my property, not heretofore disposed of, to my nephew, H., whom I appoint my residuary legatee." Held—That while the sums secured by mortgage, as also arrears of rent and rent-charge, interest, and dividends on Consols and upon Stock, passed under the expression "money" to J., the sums invested in Consols and New Three per cent. Stock did not pass thereunder, but went to the residuary legatee H.*

THIS was a general cause petition filed for the purpose of having the opinion of the Court upon the construction to be given to the will of the late Archdeacon O'Grady, who died in 1859. The petition stated that "Archdeacon O'Grady, late of Killeenane Glebe, Loughrea, in the county of Galway, clerk, deceased, was at the time of his decease herein-after mentioned, possessed of personal property, consisting of cash, arrears of rent and tithe-rentcharge, personal effects, moneys due on mortgage, or charges on land, and interest thereon; Consols and New Three per cent. Stock and dividends thereon; and was possessed of a sum of money, £2,000, secured by a charge on land, being his wife's fortune, which he specially bequeathed by his will; and of books and plate which he likewise specifically bequeathed by his will; that being so possessed, the said Archdeacon O'Grady died on or about the 17th July, 1859, having duly made and executed his will, bearing date 17th September, 1856, which was in the words and figures following:—'I, William O'Grady, Archdeacon of Kilmacduagh, will and bequeath the sum of £2,000 sterling (being the amount of my dear wife, Isabella Selina Hewitt's fortune, in compliance with her request) to Mary Hewitt and Harriett Hewitt, in trust, the yearly interest of same to be equally divided between them or the survivor of them, for their own or her own particular use, and on the death of both to be equally divided between my nephews Rose Lambert Price, of the Royal Marine Light Infantry, and his brother Henry Talbot Price, of the Royal Navy, for ever. 2nd—I will and bequeath *whatever money I shall die possessed of* to my brother the Hon. John O'Grady, of the Royal Navy, during his natural life, with remainder to my brother, Major the Hon. Thomas O'Grady, for his natural life; and after the death of my two above-mentioned brothers—3rd, I will and bequeath the above money to be equally divided between my two nephews, James Walter O'Grady, of the Royal Navy, and John William Walter O'Grady, of the Royal Marine Light Infantry, absolutely and for ever. 4th, I will and bequeath to my brother, Major the Hon. Thomas O'Grady, all my plate, of whatsoever description, with my library; and request to preserve all my divinity and ornamental books. 5th, I will and bequeath *all the rest and residue of my property not heretofore disposed of* to my nephew, Hugh Hamon Massey O'Grady, whom I ap-

point my residuary legatee, and request him and my brother-in-law, Thomas Henry Hewitt, to act as joint executors of this my last will and testament.' The petition then stated that the will was duly proved on the 13th August, 1859, and probate was granted to Hugh H. Massey O'Grady and to the petitioner, as joint executors, and that the assets of deceased were collected in, and duly distributed and administered, save as therein is excepted—"That after such distribution there remains unconverted and undistributed, not including the specific bequests contained in said will, certain sums of money due on mortgages or charges on lands, and also a certain amount of Consols and New Three per cent. Stock; that the testator was possessed of a sum of money amounting to £2,000, which by his said will he bequeathed specifically to petitioner's sisters, Mary and Harriett, for their lives, and after to go over to testator's nephews, Rose Lambert Price, and Henry Talbot Price, as in the said will. That said £2000 was at the time testator so made his will, similarly circumstanced with the two sums of £800 and £500 hereinafter mentioned, that is to say, a charge on land, and since testator's death, the interest of said £2000 has been paid to the specific legatees for life thereof."

The petition then stated that Hugh H. Massey O'Grady, the said residuary legatee, died in 1859, leaving him surviving his widow, Eliza Selina Maria O'Grady, now the wife of William Bredin, and that administration of all the goods and chattels of said Hugh H. Massey O'Grady was on the 19th April, 1860, granted to said Eliza Selina Maria O'Grady. That during the life of Hugh H. M. O'Grady, no interest on the mortgages or charges for £800 and £500, or dividends on the consols amounting to 449 8s. 9d., and new three per cent. stock, amounting to £265, were paid by the said Hugh M. O'Grady to the said Hon. John O'Grady, but that the interest on said two mortgages, and the dividends on said consols and stock, were paid by the petitioner as surviving executor to, and received by the Hon. John O'Grady, after the death of said Hugh H. M. O'Grady, with the knowledge and consent of the said Eliza Selina Maria O'Grady (now Mrs. Bredin), the administratrix of said Hugh H. M. O'Grady. Three questions were now for the consideration of the Court:—First—Whether upon the true construction of the will of the said testator, the mortgages or charges for £800 and £500 respectively in the schedule mentioned, passed to the said John and Thomas O'Grady, respectively for life, and after their decease to the said James Walter O'Grady, and John William Walter O'Grady, in manner and under the bequest of whatsoever money the testator should die possessed of, or whether the same passed to the said Hugh H. M. O'Grady, under the residuary bequest in said will. Secondly—The same questions as to the consols, and new three per cent. stock in the said schedule mentioned. Third—Whether in the event of the Court being of opinion, that the said mortgages or consols, and government stock, or either of them, passed under the residuary bequest, the said specific legatees of the money of which the said testator should die possessed, are entitled to be recouped out of the said mortgages, consols, and stock, or either of them, the amount of money, consisting of cash, debts, rent, and



rent-charge, interest, and dividends, due to the testator at his decease, and the produce of consols sold for payment of testator's debts, and the dividends which would have accrued thereon, which questions if the Court should see fit to decide, and the parties be desirous of avoiding the expense of a plenary administration of the trusts, your petitioner is willing to act on the above, and apply the said outstanding assets accordingly, deducting only the costs and expenses incurred, and to be incurred as aforesaid. And your petitioner sheweth that the parties interested in the decision of such questions are on the one side, the said Hon. John O'Grady, Hon. Thomas O'Grady, James Walter O'Grady, and Rose Lambert Price, executor of John William Walter O'Grady, who lately died, and on the other, the said William Bredin, and Eliza Selina Maria O'Grady, otherwise Bredin, his wife, in her character of administratrix of the said Hugh Hanion Massy O'Grady, the said residuary legatees."

The following is the schedule to the above petition:

Amount due by the said Rev. J. Crawford:

	£	s.	d.
Secured by mortgage or charge on land	800	0	0
Do. do. ...	500	0	0
Amount remaining invested in government consols ...	449	8	9
Amount remaining invested in government new three per cent. stocks ...	265	0	0
Total,	£2,014	8	9

*Charles Andrews, Q.C.*, with *Leslie*, were heard on behalf of the executor, *Hewett*. The executor had no personal interest in the matter, seeing the conflicting claims of the respondents he had submitted a case to counsel, and was advised to file this petition, and accordingly he had done so, and he now asked for his costs?

*Warren, Q.C.*, with *Chatterton, Q.C.*, for the Hon. John O'Grady.—The testator bequeaths "whatever money I shall die possessed of to my brother, the Hon. John O'Grady," for life, with remainder over. We submit that we are entitled under the terms of the will to take all the moneys testator had at his death in the new three per cents. stock and mortgage securities, which construction of the will it is apparent harmonizes with the real intention of the testator; as for the mortgages there cannot be a shadow of a doubt but that the money secured thereby passes under the word "money" to the Hon. John O'Grady, and not to the residuary legatees, see the judgment of *Gilbert, C.B.*, in *Shelmer's case* (*Gilbert, Eq. Cases 202*).—It is true that he there held that the word *money* did not pass stock, but that it did pass, or rather that money secured by mortgage, passed thereunder. In *Manning v. Purcell* (7 De. Gex. M.N. & G., 55), a bequest of "all my moneys," was held to include two balances standing to the credit of the testator at his banker's. In *Powell's trusts* (1 John. Rep. in Ch. 49) cash of a testatrix at a savings bank was held to pass under a bequest of all her ready money. In *Langdale v. Whitfield* (4 Kay & J. 426), the word *money* in a codicil was held to comprise, not only all moneys in hand, but also all moneys due to the testator, whether

upon security or otherwise, notwithstanding the express mention made in the will of moneys, and securities for moneys. The above cases then show that the legatees are entitled to take under the word *money*, all moneys secured by mortgage, viz., the two sums of £800 and £500; and upon the authority of the late decisions the word "money" will be held to have its widest, and its most popular signification, which it is clear was the testator's intention, and that therefore the petitioners are entitled to the money in stock and consols. See also *Stocks v. Barry* (1 Johnson's Cases in Ch. 54).

*Sergeant Sullivan* (with *Tandy* and *Vereker*) appeared for the residuary legatees.—The residuary legatees are clearly entitled to all government stock, and also to the mortgages and other securities for money in the hands of the petitioner. Money will not pass under a bequest of stock, nor conversely stock will not pass under a bequest of money, and therefore, neither the Hon. John O'Grady, nor after his death, was the Hon. Thomas O'Grady, nor the two nephews of the testator, James Walter O'Grady, nor James William O'Grady, entitled to anything whatever, save "whatever money" the testator died possessed of, that stock does not pass by the word "money," has been decided by Lord Eldon in *Hotham v. Sutton* (5 Ves. jun. 327), and that decision has since been invariably followed, as it was in *Cowling v. Cowling* (26 Beav. 449), where all the cases are collected and noted in the judgment of the Master of the Rolls, from page 451 to 454. *Gordon v. Dotterell* (1 Mylne & K. 56), was where a testator bequeathed to his sister a legacy of £100, and a legacy of £20 to his nephew, and the rest of his money to be equally divided between his brother and his niece. At his decease, his property consisted of £600 three per cent. consols, and £119 in sovereigns, and it was held that the stock did not pass under the words "money," and there it no doubt was the intention of the testator that the word "money" should pass under the expression "stock;" but the Master of the Rolls, in that case when giving judgment says, "I have no doubt that it was the intention of the testator that the stock should pass under the term 'money' but if it be settled that stock shall not pass under the term *money*, unless there be some explanatory context in the will, I am afraid that the testator's intention will not be effectuated." See also *Barry v. Harding* (1 Jones & Latouche 475), *Dunally v. Dunally* (6 Ir. Ch. 540); *Lowe v. Thomas* (5 De. G. M.N. & G. 315); *Barclay v. Maskelyne* (6 Jur. N.S. 12); 2 Jarman on Wills, third edition, 730 and 731. As to the proposition that the expression *money* will pass thereunder all moneys secured on mortgages, not a single modern case has been put to support same, and indeed no case at all, save one *Shelmer's case* from *Gilbert*.

*Feb. 10.*—The LORD CHANCELLOR.—In this case a very short question arises out of the will of Archdeacon O'Grady. This question is, whether a particular bequest of "whatever money I shall die possessed of," includes public stock and money secured on land. Now in regard to public stock, it is manifest that the word "money" could not pass stock. *Lowe v. Thomas* (5 De. Gex. M.N. & G. 315, and Kay 369),



seems to be conclusive on the question. It was there held that the word "money" in a will, will not pass stock in the funds; there the bequest was "To my brother John Thomas, the whole of my money for his life, and at his death to be divided between my two nieces, Rebecca and Mary Lowe, my clothes to be divided likewise between them. I likewise declare the longest survivor of the above mentioned nieces is to become possessed of the whole money," and it was held as I just said, that the stock did not pass. Now I can find nothing in this will that would be sufficient to take it out of the authority of that case. In the case before the Court the testator bequeathed whatever money he should die possessed of: Then as to that money, he leaves it after the life interest given to his two brothers, to his nephews absolutely, and then he appoints his nephew, Hugh Massy O'Grady to be his residuary legatee. I think then that under the expression *money*, that the stock can not be held to pass. But now as to the mortgage, the question is a different one; it is singular that the question has now been exactly determined; it may be that that is accountable for by the impression being abroad that it was settled long ago by the case in Gilbert. *Shermer's case* (Gilbert's cases in Eq. 202), the judgment in that case bears on the one now in consideration. Speaking of "money," the Chief Baron says, "I am of opinion that the word *money* is a general word, but yet not so large and comprehensive as the word *pecunia* in the Roman tongue; for such word in that language would carry all the testator's substance, both real and personal that can be converted into money, but the word *money* in our language, answers to the Barbarians' Latin word *moneta*, and is a genus that comprehends two species, viz., ready money, and money due." The Chief Baron in that case takes a broad distinction between stock and money, secured by mortgage. The testatrix there bequeathed to her two servants, Philip Howe, and Elizabeth Pilgrim, "All my household goods, *money*, and plate, that I shall leave behind me at the time of my death undisposed of," and the Chief Baron there held that under those bequests, stock did not pass to the legatees, while a certain mortgage and arrears of rent did pass thereunder, "since these must be looked upon by all the rules of construction, to be Mrs. Sherman's money at the time of her death; but the word *money* will not comprehend South Sea stock, or annuity stock, because that is an interest arising out of funds, settled by public laws, and though it be redeemable by money, or saleable for money, yet it can be no more looked upon as money at the time of Mrs. Sherman's decease, than a term of years, a coach or horses, and therefore I am clearly of opinion, it cannot be comprehended in the word *money*." I was referred to *Barclay v. Maskelyne* (5 Jur. 12), upon the question of the mortgages, that debts due on mortgages would pass under a bequest of *money*, but I find nothing in that case having reference to mortgages. That case was not one of mortgages, but of stock. *Langdale v. Whitfield* (4 Kay & J. 426), shews that the word *money* may include mortgages; in *Stocks v. Barré* (1 Johnson's Cas. in Ch. 54), a bequest of *money* was held to pass testator's reversionary interest in a sum charged on

real estate. I have been referred to several cases here; for example, *Barry v. Harding* (1 Jones & Lat. 475), which are not in point, and have no bearing upon the case now immediately under consideration. I then think "money" may include mortgages, gathering, as I do, the testator's meaning from the context. Now, coupling all those other cases that have been put with the case in Gilbert, I can find nothing in my mind to upset the judgment in Gilbert, and I shall therefore declare that mortgages or charges for £800 and £500, passed under the description "money" in the will of Archdeacon O'Grady, to John O'Grady and Thomas O'Grady, successively for life, and after the decease of the survivor of them, to James Walter O'Grady, and John William Walter O'Grady, but as to the money invested in government consols, and also remaining invested in government new three per cent. stock, I shall declare that that passed to Hugh Hanion Massy O'Grady, under the residuary bequest. And as to the amount of cash, arrears of rent and rent-charge, interest, and dividends on consols and upon stock due to the testator at the time of his decease, I am of opinion that those pass under the term "money" to the Hon. John O'Grady, and that they do not go to the residuary legatee. As to the petitioner's costs, I shall direct him to have his costs, including the costs of laying his case before counsel, as executor's costs. The several other parties are also entitled to their costs out of the residuary fund.

DILLON v. BLAKE—15th & 17th Dec. 1864.

Articles of agreement—Construction—Word "issue"  
—Estate tail.

By articles of agreement, bearing date 26th May, 1853, it was agreed "that after the death of H. B., the estate of Renvyle shall be limited to and settled upon E. H. B. and his issue, with remainder (in the event of the said E. H. B. dying in the lifetime of his father the said H. B., without lawful issue) to each of the other sons of the said H. B., in succession, according to their seniority, with an ultimate remainder to the right heirs of said H. B." Held, in a suit to carry said articles into execution, that E. H. B. was entitled to have an estate in fee tail in possession conveyed to him thereunder.

THIS was a cause petition presented by Thomas Dillon and Wm. Henry Suffield; the respondents being Edgar Henry Blake (eldest son of Henry Blake, of Renvyle, in the county of Galway,) also Henry Edgar Valentine Blake, only son of said Edgar H. Blake; and Ethelbert Henry Blake, Athelstain Henry Blake, Emilie Ann Blake, Eleanor Elizabeth Blake, and Harold Henry Blake, (all being the younger children of said Henry Blake), and Henry Blake, the infant son of said Ethelbert Henry Blake, by his next friend. The prayer of the petition was, that the trusts of certain articles of the 26th day of May, 1853, which are capable of being, and have not heretofore been

executed, may be carried into execution under the decree and direction of the Court, and that the rights of all parties under the said articles may be ascertained and declared, and the said lands conveyed accordingly, petitioners being willing and undertaking to convey the said lands and hereditaments according to the direction of the Court, and also that it might be referred if necessary to the Master of the Court to settle and approve of a proper deed of settlement to be executed by petitioner, in pursuance of said articles. The facts as stated in the cause petition, were shortly as follows:—By indenture of 21st Dec., 1810, made previous to the marriage of Henry Blake with Martha Louisa Attersell. It was agreed that ten thousand pounds should be vested in trustees, payable after the death of Henry Blake, for the children of the marriage, with power of appointment and revocation. By another deed of same date as the last, and also made previous to and in contemplation of said then intended marriage, said Henry Blake conveyed the said Renvyle estate to trustees, and their heirs, to the use of Henry Blake for life, and after his decease, to the intent that his then intended wife should receive a jointure of £1,000 a year for her life; and a term of 1,000 years was created to secure said jointure, remainder to the right heirs of Henry Blake. The petition then stated that the said £10,000 had not been transferred, and that in substitution therefor, Henry Blake conveyed the lands to trustees in mortgage, for the purpose of securing the said sum of £10,000 subject to said jointure. That there was issue of said marriage, eight children,—namely,—Edgar Henry Blake, the eldest son, Emelie Anne Blake, Eleanor Elizabeth Blake, Harold Henry Blake, Ethelbert Henry Blake, Egbert Henry Blake, Ethelstain Henry Blake, and Herbert Blake. That said Henry by deed poll of 2nd Nov., 1841, appointed among his children, reserving however the power of revocation, after which appointment Egbert Henry Blake died. That by deed of 2nd January, 1852, Henry Blake having revoked the former appointment, re-appointed said £10,000 in shares of £2,000 to each of his five younger children, and also providing for Harold Henry Blake, who was imbecile in mind, by charging upon the three sums so appointed to his younger sons, an annuity of £70 for his life. That it was considered advisable by the family that the said estate should be sold by the Commissioners for sale of incumbered estate, and purchased with the said sum of £10,000, and that the £10,000 should be settled as before mentioned. That accordingly, by articles of agreement, under seal bearing date 26th May, 1853, between Henry Blake, of Renvyle, in the county of Galway, Esq., and Martha Louisa, his wife, of the first part, Ethelbert Henry Blake, Ethelstain Henry Blake, Emelie Anne Blake, and Eleanor Elizabeth Blake, children of said Henry and Martha Louisa Blake, of the second part, and Thomas Dillon and Henry Suffield, Esqrs., trustees named for the purposes herein-after mentioned of the third part. "It was recited that Henry Blake had appointed and limited a sum of ten thousand pounds as aforesaid, amongst his said children, but nevertheless that the sums so appointed shall not be payable to, or revocable by them during the life time of the said Henry Blake, and that

the said sum of £10,000 shall be the third charge affecting said estates. And it is further agreed that subject to the charges," in agreement set forth, "and after the death of the said Henry Blake, the said estates shall be limited to and settled upon the said Edgar Henry Blake, and *his issue*, with remainder (in the event of the said Edgar Henry Blake dying in the lifetime of his father, the said Henry Blake without lawful issue), to each of the other sons of the said Henry Blake, in succession, according to their seniority, with an ultimate remainder to the right heirs of said Henry Blake. And whereas it hath been further agreed that in the event of any of the younger sons of the said Henry Blake, succeeding to the said estates under such settlement thereof as aforesaid, the portion or value of the sum of £10,000, of the child so succeeding, should go to and be divided amongst the others, or other of the said younger children in equal shares and proportions. Now be it known that the said several persons, parties hereto of the first and second part, for himself, herself, and themselves, respectively, and for their, and each of their heirs, &c., covenant and agree with the said Thomas Dillon, and William Henry Suffield, and the survivor of them that they the said Henry Blake, Martha Louisa Blake, Ethelbert Henry Blake, Ethelstain Henry Blake, Herbert Henry Blake, Emelie Anne Blake, and Eleanor Elizabeth Blake, and each of them respectively shall and will join in the sale and conveyance of the said lands of Renvyle, to the said Thomas Dillon, and William Henry Suffield, and sign such receipts acquittances, or other discharges for the said jointure, and the several sums appointed in manner hereinbefore mentioned, respectively, according to their several rights and interests therein, as may be required to enable the said Thomas Dillon, and William Henry Suffield to become the purchasers of the said last mentioned lands, in the Court of the Commissioners for sale of Incumbered Estates, for the purposes and upon the trusts hereinbefore mentioned. And the said Thomas Dillon and William Henry Suffield, for themselves respectively, and their heirs, executors, and administrators, covenant and agree to and with the said Henry Blake, Martha Louisa Blake, Ethelbert Henry Blake, Ethelstain Henry Blake, Herbert Henry Blake, Emelie Anne Blake, Eleanor Elizabeth Blake, and with their and each of their heirs, executors, administrators, and assigns. That immediately after the execution of the conveyance of the said lands to them, they the said Thomas Dillon and William Henry Suffield, shall and will convey, settle, and assure the same, and every part thereof, to for and upon the trusts hereinbefore declared, and set forth or upon such further and other, or modified trusts as may be found requisite or more convenient for carrying into full and legal effect the intention of the parties thereto."

The petition then states the death of Martha Louisa Blake, and also the death of Henry Blake, the father, in 1856, and that questions have arisen as to the limitation of said lands, to be inserted in a settlement to be executed in pursuance of the said articles of 26th May, 1853, and that petitioners were advised that they ought to convey the said lands and hereditaments, subject to the several charges and in-

cumbrances, to the use of Edgar Henry Blake, and his assigns, during his natural life, with remainder to his first and other sons, successively in tail, with remainder to his daughters as tenants in common with cross remainder in tail, with remainder to the said Edgar Henry Blake, and his heir, all subject as aforesaid, to the charges, &c. Edgar Henry Blake had no son at the time of filing this petition. On the 18th of November, 1864, a supplemental cause petition was filed by the above named petitioners, shewing that after the setting down the said petition, "and on the 20th day of August last past, the respondent Edgar Henry Blake had a son born who has since been christened by the name of Henry Edgar Valentine Blake" and who the said petitioners submitted was first tenant in tail in remainder of said lands.

*Chatterton*, Q.C., with *Leech*, appeared for the petitioners, who were willing to convey the lands as the Court should direct. The contending parties were Edgar Henry Blake, who insisted that he was entitled to an estate tail in possession, and his infant son (by his next friend) whose object it was to shew that the true construction of the articles of 26th May, 1853, was to give said Edgar Henry Blake a life estate in possession, and to his said infant son an estate in fee tail in remainder. Ethelbert Henry Blake also insisted that said Edgar was entitled to a life estate merely in said lands with several remainders over.

*The Solicitor-General*, with *W. Cusack Smith*, appeared for Edgar Henry Valentine Blake, the son of Edgar Henry Blake, in support of the view that Edgar Henry Blake was merely entitled to a life estate.—The question—in executory articles, where lands are directed to be limited to a man and his issue, is how are those to be carried out? All the cases as to the distinction between executory and executed articles, where the directions are incomplete, are collected in *Fearne on Contingent Rem.* 184. We must first consider what was the intention of the parties and direct the conveyance according to it, and the Court will go the length of disregarding the rule in *Shelly's case* in order to carry out the intention of the parties. Here however no great difficulty exists, as the words "heirs of the body" does not exist in the articles, the word being "issue," and every estate given to the issue, must be taken by them as purchasers. This view was expressed in the judgment of the Lord Chancellor in *White v. Carter* (2 Eden, 368):—"This is one of those cases of imperfect trusts, which are left to be modelled by the Court; and where, according to the expression of Lord Talbot in *Lord Glenorchy v. Boaville*, something is left by the creator of the trust to be done, and it therefore becomes solely one of intention." That case was where there was a devise to trustees of money to be laid out in land, and to be settled as counsel should advise in trust for A, and his issue in tail male, to take in succession and priority, and the interest of the money till laid out to be paid to A, his sons and issue; and it was held that A should have only an estate for life in the lands, to be purchased, with remainder to his first and other sons. The word "issue," then which occurs in these articles, can be moulded without difficulty to mean first and other sons; there is no difference between

the construction of executory trusts in marriage articles, and in a will, except that the object and purpose of the former furnish an indication of intention which must be wanting in the latter. *Rochford v. Fitzmaurice* (2 Dr. and War. 1), was, where by post nuptial articles, J. Fitzmaurice covenanted with trustees to settle certain lands, of which he was seized in fee, as counsel should direct, to the use of J. Fitzmaurice for life, remainder to trustees to preserve, &c., remainder to the use of H., to permit him to take the rents and profits for his life, remainder to the heirs male of the body of H., remainder to the use of T, to permit him to take the rents and profits for his life, remainder to the issue male of T; and it was there held that H took an estate for life only. *Blackbourne v. Stables* (2 Ves. & B. 559, 367). Now the Court is asked by the other side to give such a construction to this instrument (signed by the several brothers), as will have the effect to give Edgar Henry Blake, the power to cut out all said brothers of the remainder.

*Serjeant Sullivan* (with *Raymond*) for Ethelstan Henry Blake.

*Finch White* for Ethelbert Henry Blake, cited *Pearse v. Simpson* (15 Ves. 29).

*Brewster*, Q.C., and *Warren*, Q.C., (with *Shakleton*) for Henry Edgar Blake.—It has always been held from a very early history of our law that you cannot in carrying into execution executory articles, assume any intention except in cases of marriage articles; marriage is not an element in the present case. We are here destitute on both sides of any cases exactly in point: the articles are not executory. *Samuel v. Samuel* (9 Jur. O.S. 222; 23 L. J. for 1845, 222), shews what construction the word "issue" shall have: in that case the testator directed his moneys to be settled upon his children "for the sole use of themselves, and their lawful issue," and it was held upon the petition of one of his daughters that she was entitled to her share absolutely. No life estate is given by those articles to Edgar Henry Blake, the exact expression being "that the estates shall be limited to Edgar Henry Blake and his issue," that gives an estate tail to Edgar without any preceding life estate to any one else—here as in *Blackburn v. Stables* (2 V. & B. 371); *Sweetapple v. Brandon* (2 Vernon 536); *Seale v. Seale* (1 P. W. 290).

19th Dec.—THE LORD CHANCELLOR said he was of opinion in this case that Edgar Henry Blake took an estate tail in possession: by the articles the younger children of Henry Blake were to take nothing except in the event of Edgar Henry Blake dying in the lifetime of his father without issue. In many of the cases referred to, the limitations provided for a life estate preceding the estate tail; but there is no provision of that kind in the case now under consideration, the estate is to be settled upon Henry Edgar Blake and his issue, and there is no indication in the instrument that any life estate was to be conveyed at all. I think the instrument appears the other way. I have is no difficulty whatever in arriving at this conclusion; and I shall therefore decree an estate in fee tail in possession to Edgar Henry Blake.

## Court of Exchequer Chamber.

Reported by D. H. Madden, Esq., Barrister-at-Law.

[BEFORE MONAHAN, C J., PIGOT, C B., KEOGH, CHRISTIAN, J J., FITZGERALD, HUGHES, DEAST, B B.]

THOMSON v. ROBERTS AND ANOTHER.—*Jan.* 16, 21.

### Recital—Condition—Indemnity bond.

*When an indemnity bond, after reciting that A. had been taken and admitted into the service of a banking company as a writing clerk, was conditioned for the performance by A. of the said service, and all and every other services of the said company wherein he is, shall, or may be employed.*

Held—[*Monahan, C J., and Pigot, C B., dissentientibus*].—*That the particular words in the recital did not limit the more general words in the condition to the continuance of A. in the service of the company in the capacity of a writing clerk, and that the sureties were not discharged on his promotion to the office of cashier.*

THIS was an appeal from the judgment of the Queen's Bench, overruling the plaintiff's demurrer to the defence. The action was brought on an indemnity bond by John Thomson, on behalf of the Belfast Banking Company against the defendants as the co-obligors. The summons and plaint set forth the bond, which was as follows:—"Whereas the said Alexander Roberts has been taken and admitted into the service of the said Belfast Banking Company as a writing clerk, the condition of this bond is that if the said Alexander Roberts do, and shall from time to time, and at all times hereafter, during his continuance in the service or employment of the said company, faithfully, honestly, diligently, and carefully execute, perform, and discharge the said service, and all and every other service of the said company wherein he is, shall, or may be employed; and also shall, so soon as he shall be thereunto required, give and deliver, in writing, a just and true account of all moneys, notes, bills, bonds, securities for money, tallies, orders, papers, writings, books, goods, and effects whatsoever, which in the said service or employment shall come to the hands of the said Alexander Roberts, or which he shall be intrusted with by or on account of the said company; and also shall make good, answer for, and pay to the said company, or to the directors of the said company for the time being, or to such person or persons as the directors thereof shall appoint, the moneys due in the balance of such account; and shall, at the expiration, discontinuance, or other determination of his said service or employment, or when he shall be thereunto required, hand over and deliver the said moneys, notes, bills, bonds, securities for money, tallies, orders, papers, writings, books, goods, and effects whatsoever, then in his hands or custody; and shall, moreover, well and sufficiently save harmless, and keep indemnified, the said banking company from and against all losses, damages, actions, suits, costs, charges, and expenses which may be sued, commenced, or prosecuted, or which the said company might bear, sustain, or be put unto for or by reason of any matter, cause or thing, whatsoever committed,

neglected, omitted, or suffered to be done by the said Alexander Roberts, in or during his said service or employment; then the said obligation shall be void. And it was agreed that the said A. Roberts should remain in the employment of the said Belfast Banking Company for three years certain, subject to the right of discharge for misconduct; and that the said sureties might, after three years, withdraw their liability by giving to the directors three month's previous notice in writing. The breach complained of was that Alexander Roberts did not discharge the services of the company, but absconded on the 21st of Feb., 1863, fraudulently embezzling and appropriating £5000 of the company's money. To this the defendant, Benjamin Roberts, pleaded that he executed the bond as a co-surety; that at the date of the execution of the bond, Alexander Roberts was in the service of the company as a writing clerk, and not in any other service; that he continued in the said service as such writing clerk for a considerable time during which no breach occurred; that in 1861, and before breach, Alexander Roberts ceased to be a writing clerk, and the company, without the consent of the defendant, appointed him to be a cashier; that the duties of a cashier are wholly different from, and greater than, those of a writing clerk, to which he was subject at the time of the execution of the bond; and that the breaches complained of took place after his appointment as cashier, and after the lapse of three years from the date of the bond. The defence of William Morgan, was substantially the same.

*Serjeant Armstrong, M'Donnell, Q.C., and Robert Carson,* appeared for the plaintiff.

*Harrison, Q.C., and Hamill,* for the defendant Roberts.

*Battersby, Q.C., and O'Driscoll,* for the defendant Morgan.

On the part of the plaintiff it was contended that the condition of the bond contemplated the performance of more duties than those of a writing clerk, and the case of *Samson v. Bell*, (2 Camp., 39); *Oswald v. the Mayor, Aldermen, and Burgesses of Bervick on-Tweed* (5 Ho. Lord Ca. 856); *Anderson v. Thornton* (3 Q.B., 271), were referred to. On the part of the defendant, that the words "other services" in the condition referred to incidental and collateral services in which the principal might be employed by the company while he continued to fill the office of a writing clerk; and that the particularity of the recital must control the general and ambiguous words in the operative part of the deed.—*Lord Arlington v. Merricks*, (2 Wms. Saun. 403); *Peppin v. Cooper*, (2 Barn. and Ald. 431); *North-West Railway Company v. Whinray*, (10 Exch. 77); *Napier v. Bruce*, (8 Cl. and Fin. 470); *Mayor of Cambridge v. Dennis*, (Ell. Bl. and Ell. 660).

*Jan. 21*—The Court now delivered judgment.

DEAST, B.—The defence is in substance, that before any breach Alexander Roberts ceased to be in the employment of the Belfast Banking Company as a writing clerk, having been appointed a cashier; and the question is whether this defence is a good one. The bond recites, that "Alexander Roberts has been taken into the employment of the Belfast Banking Company as a writing clerk;" and the

argument for the defendant is that this recital controls the condition of the bond, limiting the more general words in it to the particular employment of writing clerk. Now the recital here is one of a *fact*, and not of any intention, and the present case differs in this respect from the cases cited by the defendants' counsel. There can be no doubt that the condition will be controlled by the recital, when the attention of the parties clearly appears; but it is the duty of the Court, in each individual instance, to ascertain from the entire of the instrument what the intention of the parties really is. In *Oswald v. the Mayor, Aldermen and Burgesses of Berwick-on-Tweed* (5 Ho. Lord, Ca. 856), Lord Cranworth says, "It has been contended upon the authority of a well known case in Saunderson's Reports, *Lord Arlington v. Merriche* (2 Wm. Saund. 403), that where a person has been elected to an office, and has given a bond, with sureties, only to discharge the duties of that office, if it appeared by the recital of the bond that that office was an annual office, and he was re-elected, and continued in the office after that year, neither of the sureties was bound, nor could the party himself be bound by virtue of his bond. But that case turned upon the particular nature of the recital. The recital in that case was, that the party appointed, had been appointed a post-master for the space of six months, and there the bond was conditioned upon his duly performing the duties of the said office so long as he shall continue post-master. It was held, upon very intelligible grounds, that that meant so long as he shall continue post-master, according to the recital, namely, that he had been appointed for six months, that is to say, it bound the parties for the whole six months, whether he continued in office for the whole of that period, or only for a part of it. But when the six months came to an end, and he was re-elected, then the recital shows that the persons then bound did not mean to be bound for a future election, because, looking at the true construction of the instrument, all the parts being taken together, it is clear that what they meant to bind themselves for was, for the holding of office during the time mentioned in the recital. But, of course, it is competent to parties to make themselves liable to a future appointment if they think fit." Applying then the principle thus laid down by Lord Cranworth let us see what was the extent of the liability intended in this case by the bank and the sureties. Now the recital is, that Roberts has been admitted into the service of the company as a writing clerk, but in the condition of the bond the word "service" is repeated in a general sense, and not confined to any particular office, "service or employment." There are also the words "the said service, and all and every other services of the said company, wherein he is shall or may be employed." It is impossible to give to the latter words any more restricted construction than as applying, not only to the office of a writing clerk, but to any other office or service in which Roberts might be employed by the Bank. It was urged in behalf of the defendants that the words "other services" refer to any collateral services not strictly those of a writing clerk, in which Roberts might be employed by the Bank, while continuing in their service as a writing clerk. But once you go be-

yond the duties and services of a writing clerk, it is impossible to fix any other limit to the liability of the sureties, than the continuance of the principal in the service of the Bank. This extension of the liability beyond the mere duties of a writing clerk, is confirmed by the following clause in the deed:—"And also shall so soon as he shall be thereunto required, give and deliver in writing a just and true account of all moneys, notes, bills, bonds, securities for money, tallies, orders, papers, writings, books, goods, and effects, whatsoever, which in the said service or employment shall come to the hands of the said Alexander Roberts, or which he shall be entrusted with, by, or on account of the said Company." It has been urged that the words "said service or employment," in the condition of the deed refer to the particular service mentioned in the recital, but the first time these words occur they are used generally, "the service or employment of the said Company," without any reference to the particular employment of a writing clerk, and when they are subsequently used, there is a word of reference, showing that they are used in the same sense as in the first instance. The plaintiff's demurrer must therefore be allowed, and the judgment of the Court of Queen's Bench overruled.

HUGHES, B., concurred.—This case differs from many that have been cited, as it is free from any conflict between the recital and the condition of the bond. The recital here does not purport to represent the object of the parties, but is merely one of a fact, and is not of more significance as to the intention of the parties than the date of the bond; it is merely the statement of a fact, and cannot, therefore, control the condition, if the intention can be collected from the condition itself.

FITZGERALD, B., also concurred.—It is not here alleged that the principal ceased to be in the employment of the bank. There was no interval of time in which he was not in the employment of the company. The recital of this bond certainly does not show any contemplation by the parties of a change in the nature of the employment; but at the same time there is nothing in the recital inconsistent with the contemplation of such a change. The recital is consistent with it, though it does not show it. No sensible meaning can be given to the words "from time to time, and at all times hereafter," &c., if they are confined to the service of a writing clerk alone.

CHRISTIAN, J., also concurred.—In the case of the *Mayor of Cambridge v. Dennis* (Ellis Bl. and Ellis, 667), Coleridge, J. applying himself to the judgment of Lord Campbell, says, "I do not know that I entirely agree with my lord as to what was probably passing through the minds of the parties, when they executed this bond. I incline, from what generally passes on these occasions, to believe that the parties did not think much about the point, but, knowing that the office was annual, gave their security for it as they found it. However, supposing that not to be so, we are clearly not at liberty to resort to such considerations in construing this instrument, we must take its words, and apply the law to them." And in the case of *Hargreave v. Smea* (6 Bing, 248), Chief Justice Tindal remarks.—"The question is, what is the fair import to be collected from the language used

in this guaranty? The words employed are the words of the defendant in this cause, and there is no reason for putting on a guaranty a construction different from that which the Court puts on any other instrument. With regard to other instruments the rule is, that if the party executing them leaves anything ambiguous in his expressions, such ambiguity must be taken most strongly against himself." The case which has been cited of *Lord Arlington v. Merriche*, (2 Wm. Saund, 411), does not conflict with this. It establishes that when the recital of a bond limits and defines as to duration, or as to function or employment, the nature of the office which is the subject of the guaranty, and is followed by more general words in the operative parts, the particularity of the recital will restrain the subsequent general words. The cases of *Samson v. Bell*, (2, Camp. 39), and *Oswald v. the Mayor, Aldermen, and Burgesses of Berwick-upon-Tweed* (5 Ho. of Lords Cases, 856) establish the principle, that if general expressions in the operative part are followed by more particular expressions, these more particular expressions will prevail over the recital. Where the conflict is between a particular recital, and mere general words, the recital will prevail, but where it is between a particular recital and general words followed by particular words, the particular recital gives way. What is the language of this bond? "Whereas the said Alexander Roberts has been taken and admitted into the service of the said Belfast Banking Company, as a writing clerk." Here then is the recital of two facts. First, that at some time anterior, Roberts had been taken into the service of the company. Secondly, that the office he held was that of a writing clerk. And the condition is that "the said Alexander Roberts, do and shall from time to time, and at all times hereafter, during his continuance in the service or employment of the said company, faithfully, honestly, diligently, and carefully, execute, perform, and discharge the said service." If the bond had stopped short here, the case of *Lord Arlington v. Merriche* would have applied. But the bond, after exhausting the offices of a writing clerk, proceeds, "and all and every other services of the said company, wherever he is, shall, or may be employed," that is, other than those incident to the office of a writing clerk. It is evident that some interpretation must be given to this clause in the bond. What is intended is, that the sureties should be liable, first, when the writing clerk might be employed in some more responsible services, or secondly, at some future time, when either other duties might be added, or the principal be removed from the position of a writing clerk, as for instance, when he was appointed cashier, both of these coming within the meaning of the words of the condition. Mr. Harrison has suggested that the condition refers only to any more responsible duties which might be imposed by the company, on the principal while he remained in the situation of a writing clerk. But once this position is taken, the limitation of the recital is gone. Once you travel beyond the duties properly belonging to the position of a writing clerk, what right have you then to cut down the generality of the words "other duties?" The construction of the condition contended for by Mr. Harrison, is in reality more

perilous to the sureties. Suppose a mere writing clerk is entrusted with valuable property of the company, that would be within the condition of the bond according to Mr. Harrison, but this is more perilous to the sureties than the appointment of the principal, to the office of a cashier, because in the former case, the sureties have nothing to inform them of the additional risk. We have no right thus arbitrarily to cut down the meaning of the words "other services." In short, although without such special words, the case would come within the authority of *Lord Arlington v. Merriche*, with the words in the condition, it is governed by *Samson v. Bell*, and *Oswald v. the Mayor, Aldermen, and Burgesses of Berwick-upon-Tweed*.

KELGH, J. also concurred for the same reasons.

PIGOT, C.B.—To a certain extent there is no dispute as to the general principles that govern cases of this kind. There is no doubt, first, that clear and distinct words in the obligatory clause, going beyond the recital, will bind, and secondly, that mere general words will be controlled by a particular recital. But this proposition is also true, that when the obligatory words are ambiguous, the recital must explain and control them. This is proved by the cases of *Peppin v. Cooper* (2 Barn. and Ald., 431), *North Western Railway Co. v. Whinray* (10 Exch. 77), *Napier v. Bruce* (8 Cl. and Fin. 470), *Mayor of Cambridge v. Dennis* (Ell. Bl. and Ell. 660). A recital showing the nature of an office will be applied as a key to the condition where the latter is ambiguous. In the case of *Walsh v. Trevanion* (15, Q. B. 751), the rule is stated in a few words by Patteson J. "when the words in the operative part of a deed are clear and unambiguous, they cannot be controlled by the recitals, or other parts of the deed. On the other hand, when those words are of doubtful meaning, the recitals and other parts of the deed may be used as a test to discover the intention of the parties, and to fix the true meaning of these words." In the case of the *Mayor of Cambridge v. Dennis* (Ell. Bl. and Ell. 666), Lord Campbell says, "I am of opinion that the parties did in fact, look beyond the current year. But, judicially and technically, I am not at liberty to come to that conclusion. For, according to the authorities, when the office in respect of which the security is given is for a year only, express words are required to make the security extend to more than the year." See also the case of the *Mayor of Dartmouth v. Lilly* (7, Ell. and Bl. 97). Eyre, J. in *Soc. Afric. v. Mason* (Gilb. 240), lays it down that "the condition cannot be taken at large, but must be tied up to the particular matters of the recital." How is the condition in this bond affected by the recital? Now several portions of this instrument would become useless, if the construction contended for on the part of the plaintiff were to prevail. It would be the same as if the recital were completely expunged, with everything referring to the particular situation of a writing clerk. They would then be only incumbrances to the instrument, and the only object for which they could ever have been introduced, must have been to control the recital. The words "other services" in the condition must either refer to services during the continuance of the principal in the employment of the bank as a writing clerk

merely, or during his employment in any other service. Now, while it would be most unreasonable to contemplate a permanent engagement in other and different duties, such as those of a cashier, any occasional services he might be called upon to perform while continuing a writing clerk, might fairly be taken into account. Upon this construction being adopted, the recital becomes pertinent and proper, but if the other prevail, all services of every new employment, however onerous, must be included. When words in condition of a bond are capable of two meanings, one of which will give effect both to the recital and to the other parts of the bond, and the other render the recital nugatory, we ought to give the preference to the former. In construing the words "other services," to mean any other services in which the principal might be employed while continuing a writing clerk, we are aided by the subsequent words, "and all and every other service of the said company wherein he is shall or may be employed." What meaning could he give to the word "is" if we adopt the plaintiff's construction of the words, "other services?" When it afterwards occurs, the expression "said service or employment" is in the singular, referring to the employment of a writing clerk, "during his said service or employment," but the expression "other services" is in the plural. The Court will look with jealousy upon ambiguous and general words, introduced into bonds by the very persons for whose benefit they are framed.

MONAHAN, C.J.—I concur with my Lord Chief Baron. The general principles which govern cases of this kind, have been accurately laid down, and the only question is as to their proper application to the particular facts of the case. The general rule is that a particular recital will control general words in the obligatory part of the bond. It is no less certain that those who want to get rid of a particular recital, must show clear and unambiguous words in the obligatory part. In the case of the *Mayor of Cambridge v. Dennis* (Ell. Bl. & Ell. 667), Coleridge, J. says, "No doubt those words (i.e., those in the obligatory part of the deed) may mean 'such statutes as may be passed during any time for which the office shall hereafter be appointed,' but they may mean also 'such statutes as may be passed while he holds under the present employment,' that is, the current year of office. The meaning may be that the surety is willing to take his chance of any change that may occur during the year, and to undertake such contingent liability for that time. Now if the latter may be the meaning, then I crave in aid the presumption of the greater probability, which I think overpowering. I think, therefore, that judgment should be given for the defendant." The difficulty is how to apply this exposition of the law to the facts of this case. The principal, Alexander Roberts, was appointed as a writing clerk by the Belfast Banking Company. Some years after he ceased to be a writing clerk. I do not mean to say that there was any interval during which he was not in the employment of the Bank, but he ceased to be employed as a writing clerk, and was appointed a cashier. What was the use of introducing any recital at all, except to give some meaning to the bond? It must cut down the words "said service or employ-

ment" to the service of a writing clerk. If this be so what construction is to be given to the words, "all and every other service of the said company, wherein he is, shall, or may be employed." Now we cannot give one meaning to the word when applying to the services in which he "is" employed, and another when applying to those in which he "shall or may be employed." The meaning is, "I am security for a writing clerk, when he is employed as such, and in any other business in which he may be *bona fide* employed in the discharge of his duties as such." The whole question is one of the application of the general principles to the particular facts of the case.



## Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

SMITH v. BERNAL—BUTLER v. SMITH.—June 10, 11; Nov. 11, 22, 1864.

*Sub-letting—Landlord and Tenant Amendment Act, 23 and 24 Vic. c. 154, secs. 10, 43.*

*The defendant was tenant from year to year of a quarry, under a demise, by one of the Masters in Chancery, which contained an agreement by the tenant not to sub-let or assign, or part with the possession thereof without the consent of the said Master. The defendant assigned the quarry to one Butler, by a bill of sale. The plaintiff subsequently seized the quarry under an execution, against the defendant. An interpleader issue having been tried, Held,—that the interest in the quarry remained in the defendant, and was liable to the execution—that the effect of the clauses against sub-letting or assigning, without consent, in the Landlord and Tenant Amendment Act was not to confine the right to take advantage of them to the landlord only; and that though the assignment might have been validated subsequently to the execution, it could not, in the event of the rights of third parties, having been altered in the meantime.*

Gamble (with him Exham, Q.C.) showed cause against making absolute the conditional order, which had been obtained in this case, to turn the verdict obtained by the defendant into a verdict for the plaintiff, or for a new trial. The plaintiff, Smith, had caused to be seized, under an execution against Bernal, a quarry, some stones, and a crane, to all of which Butler laid claim, and an interpleader issue was directed, which was tried in the Consolidated Nisi Prius Court. Butler abandoned his claim to the crane, and Smith abandoned his claim to the stones, and the question at the trial was, whether the bill of sale under which Butler claimed the quarry was illegal because made in violation of the clause against assigning or sub-letting, contained in the instrument, under which Bernal had held the quarry, as



tenant, from year to year. The premises were involved in Chancery proceedings, and the instrument demising the quarry, contained the following:—March 28, 1863, "Ratification of agreement between Wm. Brooke, Esq., the Master, of the one part, and Bernal of the other part—Whereas, in pursuance of an order made in a matter entitled, &c. Now, the said Bernal, for himself, &c., agrees to, and with the said Wm. Brooke, to hold as tenant from year to year all that, the quarry, &c.; and also, not to sub-let or assign, or part with the possession thereof without the consent of the said W. Brooke," &c. A week before the assignment to Butler, 29th February, the receiver's solicitor, Octavius O'Brien, stated he would consent, provided an eligible tenant were procured. He was told Butler was the person, and he said he would do. A letter from the same Octavius O'Brien, after the assignment was executed, stated he would apply to the receiver, and on the 12th of May, 1864, Butler paid a year's rent to the receiver.

This demise is an instrument not under seal. [Christian, J. referred to the section of the Landlord and Tenant Act]. The 10th section of the Subletting Act throws us back on the agreement to see what it is. What we have is this: an application to the Master before the agreement; then, a parol statement to the effect, that the solicitor expected the Master would agree to it. Unless the assignment is contrary to the agreement that section does not apply. This cannot be taken by itself as a mere naked agreement not to assign. It is an agreement which it was competent to waive. If neither the Receiver nor the Master could take advantage of this, a third person cannot. A liberal construction ought to be put on this. [Monahan, C. J.—Is not this an assignment before you could get the written consent of the Master?] That is only a part of the agreement, because the waiver is to be taken as part of it. [Christian, J.—The 43rd section overrules that]. We take ourselves out of the 43rd section, by the letter. As to the 10th section, there is a new agreement between the parties—When third parties come to annul transactions between landlord and tenant, the whole of the transactions should be taken into account. [Monahan, C. J.—What operation would you give to the 10th section?] That the landlord or tenant could insist on it. [Monahan, C. J.—Supposing it was conceded, there was no written consent by the Receiver or the Master, and there was no execution, could Bernal bring an ejectment against you?] He could not; because he would be bound by his own act. [Keogh, J.—Your argument is, that the very act of violating the Act of Parliament is the agreement]. The Act speaks of any assignment contrary to the agreement. [Monahan, C. J.—Where there is any evidence of a parol waiver? O'Brien, the solicitor, never said he would do anything but bring it before the Master?] [Ball J.—In the meantime, the bill of sale is executed. Monahan C. J.—Assuming you have not satisfied us on the 10th section, what title have you to the quarry?] It applies as between landlord and tenant only, and not to third parties.—Smith's Landlord and Tenant, 303; *Troy v. Kirk*, (Al. and Nap. 230); *Penny v. Gardner*; (Al. and Nap. 345), show that these Acts

were passed for the protection of the landlord, and that third parties cannot take advantage of them.

*Sidney, Q.C., and Concannon, contra.*—As to the effect of "shall not be lawful," they cited *Gye v. Felton* (4 Taunton, 876), *Woodfall's Landlord and Tenant*.

*Exham, Q.C., in reply.*—[*Monahan, C.J.*—Show anything done by Master Brooke, binding on him before the execution was lodged. Must not the assignment be in writing? How could approval by word of mouth by the Master on the 2nd of March avail, the assignment being on the 1st March?] The Act contemplates the tenants' assigning without the assent of the landlord, and it was intended that he might get the assent of the landlord, and the landlord may choose to give it in the right way or not. [Monahan, C.J.—Suppose he does refuse, there being a clause against alienation, what is the effect between the parties?] The landlord, if he does not give his consent may invalidate. He might sue for use and occupation, whomsoever he found in occupation. But if he chose to give his consent, saying, "I assent," a question might arise if he could sue the assignee.

The case stood over for an arrangement between the parties, which was not effected.

*Nov. 10.—Sidney, Q.C.*—It appearing that there was no assent on the part of the master or receiver prior to the seizure, we called on the judge for a direction at the trial. The words of the 10th section of 23rd and 24th Vic., c. 154, "shall not be lawful to assign," &c, render this assignment null and void.

*Gamble contra.—Ex post facto* the landlord could have validated any assignment. Whether the assignment made by a party without the consent of the landlord, but which the landlord afterwards ratifies, is within the section of the Act, is an important question coming on in another court. [Christian, J.—If you mean ratification as pointed out by the Act, by indorsement, we have not that here.] The letter from Octavius O'Brien, the receiver's solicitor after the assignment stated he would apply to the receiver. The receiver takes the rent, and we say that that was the assent of the landlord, not within the Act of Parliament, but within the terms of the agreement.—*Davis v. Davis* (4 Ir. L.R. 353). Though there was the provision not to assign, yet that was waived at the time of the assignment. There is not a clause of re-entry, only an agreement not to assign. The letter of Octavius O'Brien, and the receipt by the receiver are a waiver. [Christian, J.—Is the receiver the agent of the master, to dispense with the non-alienation clause?] It would be competent to do it now. [Monahan, C.J.—Why did not you get it before the trial?] [Christian, J.—How could the Master give a ratification, now to prejudice the execution creditor?]

*Sidney, Q.C., in reply.* In *Davis v. Davis* the words of the contract made the lease void at the election of the party.

*Curr. adv. vult.*

*Nov. 22.—MONAHAN, C. J.*—This case comes before the Court on a new trial motion. It was an interpleader issue. The question was, Whose was the property in a quarry and stones and some other matters which were



seized in execution at the suit of Smith against Bernal? The facts appear to be these:—The property seized was a quarry, held from year to year under the Court of Chancery; also a quantity of stones in an unfinished state, which, it was alleged, were the property of Bernal; also a machine called a crane. The execution creditor, Mr. Smith, claimed the entire under the execution. Butler got the interpleader order. The entire property consisted of the three—a quarry, stones, and this crane. It turned out that Butler had no right to the crane. The execution creditor admits that Butler was entitled to the stones, and, therefore, the only matter to be decided was, whether, under the execution, Smith was justified in seizing the quarry itself. This is the only question we have to decide, save in relation to the costs of the proceedings. The facts are, the property and the quarry are in the Court of Chancery. There was an agreement by which these premises were agreed to be let from year to year, the terms being that the tenant was not to assign or sublet; also to keep in repair, and also not to part with the premises, or any part thereof, without consent. The facts appear to be these, that Mr. Butler, on the 2nd of March, purchased this property by bill of sale, and on the same day got possession of it, and continued working it from that time. It appeared that some negotiation was on foot between Butler's solicitor and the receiver's solicitor, to the effect that the Master would sanction the transfer of this agreement, if Butler were approved of. No final approbation of this man, as tenant, binding on the Master, was ever made, and no proceedings were taken in pursuance of the Act of Parliament; and the only question is, having regard to that state of facts, had Bernal, at the time of the delivery of the execution, such an interest in the quarry as justified the Sheriff in seizing and selling it, or had Butler such an interest by assignment as took the property out of the tenant? That depends on section 10 of this recent Landlord and Tenant Act. [His Lordship read the section.] It is plain that if it were necessary to render this a valid assignment, that the Master was never an executing party, nor was the receiver, nor did he give his assent by indorsement; and, therefore, the first question is, what is the proper effect to be given to "It shall not be lawful to assign," &c. Mr. Gamble's argument was that this was altogether between landlord and tenant, and was introduced to regulate the relation between landlord and tenant, and that third persons had nothing to do with it, and that unless the landlord chose to dissent, the tenant would be bound. If the matter rested merely on this Act, having regard to the principles of construction, there would be a good deal of force in that argument; but the Court, in deciding a question of this kind, must consider, as best they can, what the law was when the Act was passed, and what the changes were that were contemplated. This is to amend and consolidate the law. What was the law at the time of passing the act? That was regulated by the then Subletting Act (2 W. IV., c. 17). [His Lordship read the section.] I am not aware whether there have been decisions on that Act; but on the Act of Geo. IV. we have had many brought before us. The penalty was this, that it should be null and void.

The subsequent Act made an alteration in this respect, that where the lease was silent the tenant had the ordinary rights, as at the common law; but where there was a lease prohibiting or restraining all alienation, any alienation without consent should be absolutely null and void; and the question arose, What construction was to be given to this? The Court held that, having regard to the policy of the Act, and to this, that unless the thing was void for all intents and purposes, there was no mode of giving any benefit to the landlord, it should be held null and void. The question, then, is, What is the construction of the present Act? The words are, "It shall not be lawful to assign." What is the true construction of this? It is impossible to give that any reasonable construction but by holding that the Legislature, by a short form of expression, not very happy, intended to enact substantially the same as was previously enacted by the statute of W. IV., and which there is no apparent intention to alter, the object being to consolidate. Unless we give it this construction, there is no way to benefit the landlord; because, at common law if the tenant assign, the assignee becomes the legal tenant of the landlord, and is liable to no covenants, because he has committed no breach. We think it was to get rid of that, and to render it impossible, without the consent of the landlord, that this was enacted. Mr. Gamble argued forcibly that there is no time limited for giving the assent, and that it may be done some time long subsequent to the alienation by the tenant; and if matters remained as they were, no doubt there would be nothing to prevent Master Brooke from validating that assignment. There is authority for that. But the rights of third parties must not have been altered in the meantime. In the case I refer to, the Court held that though the party might have done it at any distance of time, he might not so as to interfere with rights altered in the meantime. So we think, however *bona fide* Butler acted, the property remained in the debtor, and was liable to the execution; and, accordingly we shall determine that the property in question belonged not to Butler, but to the execution creditor. Then as to the costs. All parties are in the wrong. Mr. Sidney's client claimed the stones, which he abandoned. Mr. Gamble's client claimed the quarry. The parties will abide their own costs.

*Rule absolute to change the verdict.*

BOULGER v. M'CANN.—April 27, 28, 1864.

*Sub-leases—Term created by marriage settlement—Geo. II. c. 4.*

*In 1804 Lord Mountjoy, the owner in fee, made a lease for three lives, with covenant for perpetual renewal, to J. N., of ground in Dorset-street, upon which houses were subsequently built. By marriage*

settlement of date 10th May, 1822, *F. N.*, in whom the interest of the lease had vested, demised the ground to two trustees for 999 years, provided her interest should so long continue. At this time two of the lives in the lease were in being. In 1831, there being only one in being, a renewal of the lease was obtained from the representatives of Lord Mountjoy. One of the two trustees died; and on the 7th June, 1855, the surviving one made a lease of portion of the premises to *M.* for three lives, reserving rent. An ejectment for non-payment of rent having been brought against *M.* by the trustees' administrator, held—that though the term in the trustees was created by marriage settlement and no rent reserved, it was, nevertheless, a sub-lease within the provisions of 5 Geo. II. c. 4.

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seized in execution at the suit of Smith against Bernal? The facts appear to be these:—The property seized was a quarry, held from year to year under the Court of Chancery; also a quantity of stones in an unfinished state, which, it was alleged, were the property of Bernal; also a machine called a crane. The execution creditor, Mr. Smith, claimed the entire under the execution. Butler got the interpleader order. The entire property consisted of the three—a quarry, stones, and this crane. It turned out that Butler had no right to the crane. The execution creditor admits that Butler was entitled to the stones, and, therefore, the only matter to be decided was, whether, under the execution, Smith was justified in seizing the quarry itself. This is the only question we have to decide, save in relation to the costs of the proceedings. The facts are, the property and the quarry are in the Court of Chancery. There was an agreement by which these premises were agreed to be let from year to year, the terms being that the tenant was not to assign or sublet; also to keep in repair, and also not to part with the premises, or any part thereof, without consent. The facts appear to be these, that Mr. Butler, on the 2nd of March, purchased this property by bill of sale, and on the same day got possession of it, and continued working it from that time. It appeared that some negotiation was on foot between Butler's solicitor and the receiver's solicitor, to the effect that the Master would sanction the transfer of this agreement, if Butler were approved of. No final approbation of this man, as tenant, binding on the Master, was ever made, and no proceedings were taken in pursuance of the Act of Parliament; and the only question is, having regard to that state of facts, had Bernal, at the time of the delivery of the execution, such an interest in the quarry as justified the Sheriff in seizing and selling it, or had Butler such an interest by assignment as took the property out of the tenant? That depends on section 10 of this recent Landlord and Tenant Act. [His Lordship read the section.] It is plain that if it were necessary to render this a valid assignment, that the Master was never an executing party, nor was the receiver, nor did he give his assent by indorsement; and, therefore, the first question is, what is the proper effect to be given to "It shall not be lawful to assign," &c. Mr. Gamble's argument was that this was altogether between landlord and tenant, and was introduced to regulate the relation between landlord and tenant, and that third persons had nothing to do with it, and that unless the landlord chose to dissent, the tenant would be bound. If the matter rested merely on this Act, having regard to the principles of construction, there would be a good deal of force in that argument; but the Court, in deciding a question of this kind, must consider, as best they can, what the law was when the Act was passed, and what the changes were that were contemplated. This is to amend and consolidate the law. What was the law at the time of passing the act? That was regulated by the then Subletting Act (2 W. IV., c. 17). [His Lordship read the section.] I am not aware whether there have been decisions on that Act; but on the Act of Geo. IV. we have had many brought before us. The penalty was this, that it should be null and void.

The subsequent Act made an alteration in this respect, that where the lease was silent the tenant had the ordinary rights, as at the common law; but where there was a lease prohibiting or restraining all alienation, any alienation without consent should be absolutely null and void; and the question arose, What construction was to be given to this? The Court held that, having regard to the policy of the Act, and to this, that unless the thing was void for all intents and purposes, there was no mode of giving any benefit to the landlord, it should be held null and void. The question, then, is, What is the construction of the present Act? The words are, "It shall not be lawful to assign." What is the true construction of this? It is impossible to give that any reasonable construction but by holding that the Legislature, by a short form of expression, not very happy, intended to enact substantially the same as was previously enacted by the statute of W. IV., and which there is no apparent intention to alter, the object being to consolidate. Unless we give it this construction, there is no way to benefit the landlord; because, at common law if the tenant assign, the assignee becomes the legal tenant of the landlord, and is liable to no covenants, because he has committed no breach. We think it was to get rid of that, and to render it impossible, without the consent of the landlord, that this was enacted. Mr. Gamble argued forcibly that there is no time limited for giving the assent, and that it may be done some time long subsequent to the alienation by the tenant; and if matters remained as they were, no doubt there would be nothing to prevent Master Brooke from validating that assignment. There is authority for that. But the rights of third parties must not have been altered in the meantime. In the case I refer to, the Court held that though the party might have done it at any distance of time, he might not so as to interfere with rights altered in the meantime. So we think, however *bona fide* Butler acted, the property remained in the debtor, and was liable to the execution; and, accordingly we shall determine that the property in question belonged not to Butler, but to the execution creditor. Then as to the costs. All parties are in the wrong. Mr. Sidney's client claimed the stones, which he abandoned. Mr. Gamble's client claimed the quarry. The parties will abide their own costs.

*Rule absolute to change the verdict.*

Boulger v. M'Cann.—April 27, 28, 1864.

*Sub-leases—Term created by marriage settlement—5 Geo. II. c. 4.*

In 1804 Lord Mountjoy, the owner in fee, made a lease for three lives, with covenant for perpetual renewal, to J. N., of ground in Dorset-street, upon which houses were subsequently built. By marriage

settlement of date 10th May, 1822, F. N., in whom the interest of the lease had vested, demised the ground to two trustees for 999 years, provided her interest should so long continue. At this time two of the lives in the lease were in being. In 1831, there being only one in being, a renewal of the lease was obtained from the representatives of Lord Mountjoy. One of the two trustees died; and on the 7th June, 1855, the surviving one made a lease of portion of the premises to M. for three lives, reserving rent. An ejectment for non-payment of rent having been brought against M. by the trustees' administrator, held—that though the term in the trustees was created by marriage settlement and no rent reserved, it was, nevertheless, a sub-lease within the provisions of 5 Geo. II. c. 4.

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*Chatterton, Q.C., and Jellett, contra.*—The case is narrowed to the construction of the Act. It would no doubt be a convenient construction to give it what is asked for. This is one section of an Act of a code regulating the law of landlord and tenant. What are the introductory words? They show the class of cases to which it is to apply. They cannot contemplate a marriage settlement, dealing with the whole of the interest where a portion is carved out. Any portion carved out is a lease or demise in the strict meaning of the word. If the words coming after, enlarge the words in the beginning, the Act may include different cases *ejusdem generis quoad* the mischief, but the subsequent words are restricted, and it would be arguing in a circle to argue from the subsequent words to the words at the beginning, and then back from the words at the beginning to the subsequent words. [*Christian, J.*—Suppose underleases made by the trustees.] It might be asked if an actual surrender, and not merely a surrender by operation of law was contemplated, but we will not argue upon that. [*Monahan, C.J.*—Whoever passed this Act of Parliament, if he thought of this case, would perhaps have made his language more comprehensive, but if the words are large enough, they will embrace this case, even though it was not present to the mind of the framer.] If this had been so held, it would have saved a great many proceedings in equity. This is a case of the first impression. The Act of Parliament is to be limited to a case where tenure exists between the parties. It is contended that it applies to every case in which a partial interest is carved out of the estate of the middle-man, for if the argument does not go that length, it is not worth much. It is difficult to lay down the distinction between a term of years, and a lease or underlease, but that distinction is familiar to every one versed in conveyancing. The chief landlord, immediate lessee and under lessee, mentioned in the section, show that cases are contemplated where the relation of landlord and tenant exists. Why have they not provided for terms carved out by will? The consequences of holding with the plaintiff would be serious. If an equitable charge were secured by a legal term, the position of the party would be very different in the Court of Chancery. It is said that general terms are in the statute. *Hawkins v. Gathercole* (6 De. Gex. M.N. & G. 1), was a case upon the Act, abolishing mesne process. It was contended that it constituted a judgment, a charge, on an ecclesiastical benefice. *Cope v. Doherty* (2 De. Gex. & Jones, 614), was on the Mercantile Marine Act. The Courts held there that the general words were to be governed and controlled. [*Christian, J.*—Technically there is tenure here, the termors hold under the creation of the term.] [*Monahan, C.J.*—There is no doubt there is tenure here.] There is not tenure within the meaning of the section. [*Christian, J.*—Where would you draw the line? Is it to be by the length of the term: is it by the reservation of rent?] It depends on the reservation of rent. [*Monahan, C.J.*—One of the objects of the section is to make the renewal of leases more easy. *Christian, J.*—It is not clear, if a tenant for lives renewable for ever makes a lease to one for life, and a term for years to

another, whether both are not within the statute, so that a renewal taken out by the maker of these, will feed the uses of such a settlement.] *Pollock v. Stacy* (9 Q.B., 1033).

*Byrne in reply.*—This case is within the concluding words, and within the mischief, and within the object of the Legislature. The judges in former days took far greater liberties with Acts of Parliament, than at present. As to *Hawkins v. Gathercole*, it deals with a peculiar case. [*Christian, J.*—Did not *Hawkins v. Gathercole* go upon some disabling statutes?] [*Monahan, C.J.*—The Court could not make a construction which would be repealing these statutes; a clergyman could not charge his ecclesiastical benefice.] Shepard's Touchstone, 268, 7th ed. The other point made is that tenure is necessary, what is called tenure. I need not cite authorities to show that there is tenure at common law. Littleton, 130, referred to in Burton's Real Property Statutes. [*Monahan, C.J.*—Does that apply except when taken out of the fee-simple?] Burton is dealing with fee simples, but the reason applies. The main object of the Act is to facilitate renewals. The case is within the enacting clause, and if there be a doubt on that, it is within the preamble, and within the mischief, and the object.

*MONAHAN, C.J.*—We have had an opportunity of looking into this case since yesterday, and there is no use in postponing it. We all concur in the judgment that this case does come within the Act of Parliament. By the first recital, the difficulty seems to have been, that a property was subdivided amongst several under tenants, and it was hard to get their concurrence to renew. It was conceded that if the property was as here a house, or a plot, on which a house was built, that no doubt an under tenant was within the mischief and words of the Act of Parliament. There were several other cases put, but then it proceeds, "for making the renewal of leases more easy," &c. Here is an object applying to every case where there is a lessee, the lease of which is entitled to a renewal, and the object is to facilitate his obtaining that renewal. What are the words of the enacting part, "that in case any leases shall be duly surrendered," &c. This is general, and not confined to leases exposed to the particular inconveniences, but it says wherever any lease of any description, &c. It is as if every under lease had been surrendered. There is no doubt, but that in legal parlance, in terms and form, this is an under lease. It is not the case suggested by Mr. Jellett, of property left in settlement to A B for life, &c., which might be an assignment to somebody, but it is one under lease coming within the words, and then the Act says, that every person "shall have the like remedy," &c. It is quite true that because there is no rent reserved the parties have not a remedy for the recovery of what does not exist. Is not this man an under-lessee? It clearly in words applies to the present, if you only assume that this is an under-lease, and though it does not come within all the mischief, it does within some. And in that case, in 13 Ir. Law Rep., the Court are of opinion that this is to receive a liberal construction, and in that other case they held it to be beneficial. But here we are not asked to hold what is not within the

terms. Here, if we were to hold according to the defendant's construction, the result would be that the landlord would have been deprived of his principal rights during the period of the life of William IV., because no doubt then it was a subsisting term in these trustees. Then in that case in *Barnewall & Adolphus*, it was held that the intention was to make the party liable to all covenants, &c. Upon the simple ground that this case is within the words, without considering whether it was within the contemplation of the Legislature, we are bound to extend the operation of the Act unless that construction would be injurious or contrary to the intention of the Legislature. We do not think it can be. A lease is made to trustees. The case is not very meritorious on the part of the defendant.

CHRISTIAN, J.—I think it very probable that the framers of this Act never thought of terms created by settlement or by will, and so the terms created by will are still subject to the mischief intended to be obviated by this Act. But that is no reason we should hold that if the language will embrace this case, because it may not have been present to the mind of the Legislature, it is not included.

*Rule discharged.*

## Court of Bankruptcy & Insolvency.

[Reported by John Levy, Esq., Barrister-at-Law.]

[BEFORE LYNCH, J.]

IN RE SAMUEL LILBURN.—Feb. 14.

*Bill of sale—Assignment of trader's property—Reputed ownership—Exception of part of chattels—Book debts.*

*Where an assignment of a trader's property must result in the stoppage of his business and prevent him from paying other creditors, such assignment is an act of bankruptcy. Excepting from an assignment of a trader's chattels all the book debts due to him, but still leaving him in possession of the other chattels assigned, is not such an exception as to prevent the assignment from being an act of bankruptcy; and all the property purporting to be assigned by such a bill of sale passes to the assignees.*

This case came before the Court upon charge and discharge.

Kernan, Q.C., was for the assignee under a bill of sale, and in support of the charge which claimed the benefit of the alleged assignment.

Falkiner was for the assignees who disputed its validity.

They cited *Pennell v. Reynolds* (11 C.B., N.S., 709) *Graham v. Chapman* (12 C.B. 85); *Smith v. Tins* (1st Hurl. & Colts. 849); *Pennell v. Dawson* (18 C.B. 355).

The facts appear in the following judgment:—

LYNCH, J., said—In this case the charge of John Clarke is filed on foot of a deed of sale executed to him by the bankrupt on the 17th October, 1864, claiming benefit of that deed against the assignees; and a

discharge by the assignees thereto has been filed, whereby they insist that the execution of that deed was an act of bankruptcy, and secondly, that as to all the chattels and goods of the bankrupt, there was a possession left in the bankrupt, and that he was left to be, and was, the reputed owner thereof, notwithstanding such assignment, and that these chattels and goods passed to them by law.

As to the last point—there was very little argument, most properly. It was admitted that, except as to certain goods handed over to the chargeant by the wife of the bankrupt, the chargeant could make no case, and therefore the case only was argued as to such goods and chattels as the wife had so handed over. As to these, however, I find on the evidence that the bankrupt had absconded previous to this transfer, and, therefore I find for the assignees as to all the moveable chattels of the bankrupt at the time of his absconding. The case still remains to be considered as to the leasehold premises, &c., contained in the deed of sale, and it is, therefore, necessary that I should adjudicate as to the validity of this bill of sale.

It is not disputed by the chargeant's counsel, that at the time when the bill of sale was executed, the bankrupt was in insolvent circumstances—in fact it appears that he was so, disgracefully and criminally. The bankrupt was liable to prosecution in respect of forgeries committed by him, and I see no grounds of doubting that in the transaction of the matter as to the bill of sale and his other arrangements then, and he was doing more than keeping things as well as he could with a view to his ultimate flight from responsibility for his acts. However, I do not find that the chargeant had any knowledge of his criminal acts, or that he had specific knowledge of his state of insolvency. I do not found my judgment on the fact of actual knowledge being proved satisfactorily against him. The question raised here is an important one on the laws administered in this Court, and well demands that I should consider the matter so very ably advanced by the counsel before me.

The ground of evidence alleged against this deed by the assignees is, that it amounted to an act of bankruptcy. The consideration being the securing of a by-gone debt, the conveyance being of all the bankrupt's estate and effects, and it being a deed to defeat and delay the general creditors of the bankrupt, these propositions raised questions of law and questions of fact, and I will try shortly to distinguish my findings on the facts from my legal judgment on the facts proved.

The first question is, what was the consideration of this deed, and in what am I bound as a juror to find was the conduct?

The deed itself very specifically states the consideration; viz., a debt due of fifty-six pounds, and an agreement to advance one hundred and forty-four pounds; and the deed witnesses the present payment of this sum of £144. But this statement of the deed is manifestly falsified. No sum was paid on the occasion of its execution, and no such agreement as stated was ever made. The party before me has put his hand and seal to an instrument deliberately framed with a false statement of the transaction out of which the deed originated; and it must have a strong in-

fluence on the mind of anyone judging of a transaction like this, that the parties themselves shrink from stating the real transaction truthfully and have tried to give it validity by instalments.

The real case was this: These fifty-six pounds were due, and the deed was executed as a security for it; and this recital was put in without any obligatory contract for future advances, but afterwards the chargeant did pay an obligation of his own for the bankrupt's accommodation to the extent of £49 17s. 6d., and also gave him shortly after the deed was executed the sum of £50, and he now seeks to have these payments incorporated into as part of the consideration of the deed. Mr. Falkner is quite right in saying that the discharge of this existing liability after the deed was executed does not take the case out of the class as being for a by-gone debt, and on the plain principle that it leaves no equivalent to the estates for the conveyance made of the property. Then it stands solely on the advance of the £50—a voluntary payment—but, no doubt, made on the assumption that it would be secured by the deed. Now, in my judgment, in citing the numerous cases here the parties have lost sight of the real state of facts in this case. *Pennell v. Reynolds* (11 C.B., N.S., 709), is an important case, chiefly as it expounds the law on the question stated in Commissioner Hill's able judgment; viz., that any part being for a by-gone debt renders it invalid. That is not absolutely in its terms an admitted principle; but such circumstance is only an element in the case, but not *per se* conclusive. The authority of the case of *Graham v. Chapman* (12 C.B. 85) is not questioned in *Pennell v. Reynolds*; and all that it does is to prevent so wide a proposition as that announced by Mr. Commissioner Hill passing as admitted. It would be manifestly equally a mistake on all the cases to announce the proposition that where even a large part is for a present advance it is not within the statute. The rule, rather, is—that when the dealing does not bring any equivalent in value substantially the deed is within the provisions of the law on this point. And Mr. Justice Willes, at p. 720, says, "The real question is, whether there was such an equivalent here as fairly to prevent the deed from having the effect of withdrawing the property from the reach of creditors." The whole body of cases therefore stand if rightly looked at, as each having been ruled rightly enough on their merits and the law applied thereto, but only distinguished when general inflexible rules are attempted to be deduced from them; and the case before C. J. Jervis has, as Mr. Falkner properly relied, a feature very applicable in one view to this case—namely, that there, as here, the after-acquired property also passed. But having said so much on these cases I must direct attention to a matter in this case which, in my mind, sets it clear of all the disputed points in any of the cases. The consideration of this deed is now falsified; and there was no present advance of any sum whatever. There, perhaps, I would be justified in refusing to hear any discussion which sought to uphold this dealing on any other consideration. Let parties deal honestly and recite truthfully what they are doing—let them pay the just penalty for want of truth by the Court refusing to listen to their substituted statement. But

at least how stands the deed—a past consideration—and a proviso under which it is to stand as security for future advances, without any contract or obligation to make such advances. Is such a deed to be upheld? Is it not directly and palpably within the mischief intended to be prevented? Can so small a contrivance, if resorted to, give such deeds validity? Is there in such a transaction any equivalent such as is stated to be necessary? By such a deed the party gets the control of everything to defeat all other creditors; he advances or not as he pleases, and has prostrated himself by reaching the after-acquired property; and any moment he can take possession and defeat all others. Such a deed, as far as this point goes, is, in my judgment, most plainly within the statute, and I think I act in the spirit of all the authorities in so ruling.

But, then, he said that this deed was not an assignment of all bankrupt's property, as it did not pass the book-debts then due. In the first place, upon the facts, I find that no exception was intended at the time the deed was executed; and the security was given by the bankrupt as the largest security he could offer on all his tangible means of payment. At the time the deed was executed the bankrupt was threatened with criminal proceedings by chargeant; and though, perhaps, he need not have apprehended such a prosecution, yet as regarded other transactions he might naturally dread the effect of such proceedings, and consequently he consented to give to chargeant the whole of his property as security to him. The case of *Smith v. Timms* (1 Hurl. & Coll. 549) has been relied on as ruling that the exception of the book-debts from the operation of this deed prevents it from being an act of bankruptcy; and this, not because that case states any such rule, but because the judges, in estimating the matters excepted, state the book debts. But that case does not profess to deal with the proposition, and the case of *Pennell v. Dawson* (18 C.B. 355) is referred to with approval in it. If necessary I would hold with Jervis, C.J., that the exception of the debts alone would not necessarily make the deed unavoidable on this ground; and in my judgment *Smith v. Timms* is not in conflict with this decision. In all the cases the real question is to the dealing; such as if acted on must stop the trade and produce insolvency as to the other creditors, and so necessarily defeat and delay creditors? In this case is there any doubt of the necessary result of this deed—the plain and contemplated result—namely, that the bankrupt would be put out of trade—in hopeless insolvency, and the chargeant be alone protected, while all his other creditors would be delayed and defeated. The clause in this deed giving to chargeant all the after-acquired as well as the existing property makes this case quite plain as to its effect. I therefore hold that this was a dealing with the property so as necessarily to defeat and delay the creditors; that this was its necessary and palpable consequence; and that chargeant, as well as the bankrupt, must have known of this necessary result.

On these grounds I hold that the execution of this deed was an act of bankruptcy, and that all the property dealt with by it has passed to the assignees. I therefore rule for the assignees with costs.



## Court of Appeal in Chancery.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.

IN RE DEVEREUX'S ESTATE.—November 29, 30.

*Landed Estates Court—Setting aside sale.*

*In 1858, the estate of S. D., to which certain equities were attached, was sold in the Incumbered Estates Court, discharged of said equities. Held (no conveyance thereof having ever been made), that an application to set aside said sale, which was refused with costs by Judge Dobbs, ought to have been allowed.*

THIS was an appeal brought by Selina Devereux, the owner of the lands of Killarin, in the county of Wexford, from two orders made by Judge Dobbs, one of the judges of the Landed Estates Court.

The petition for the sale of the lands was presented by William P. Hoey, a judgment creditor, in the Incumbered Estates Court, on the 21st March, 1861. The estate contained 197 Irish acres, held under a lease for lives renewable for ever, at the yearly rent of £252 10s., Irish, equivalent to £233 1s. 6½d., British. It appeared by the petition of appeal that Hoey's solicitor in said petition was Laurence W. Corcoran; that in the rental that was annexed to said petition it was stated that one John E. Redmond was tenant to said lands, under a lease of 10th October, 1835, from the then owner, James Edward Devereux, the father of said present owner, for two lives, with a covenant for perpetual renewal, at the yearly rent of £230, and 1s. renewal fine; that said Corcoran was also solicitor of said Redmond; that in the column of observations in said rental a statement was made, namely, that the said lease so made to Redmond was a yearly subsisting interest, although the appellant insisted that said interest had terminated, and that Redmond should have been described as a tenant from year to year; that said observation was, amongst others, calculated to depreciate the sale of said lands. The following is the said statement:—"In an answer sworn, and filed on the 23rd day of March, 1848, in the cause of *Devereux v. Redmond*, in the Court of Chancery, the said Redmond admits that in the year 1835 said Devereux entered into an agreement to grant to him a lease of said lands, with a covenant of renewal for ever, at a yearly rent of £1 over the head rent, and 1s. renewal fine on the fall of each life; and that, in pursuance of such agreement, on the 10th of October, 1835, a lease was prepared and engrossed by said Devereux's solicitor, and executed by said Devereux; and that, through some mistake in the calculation of the rent reserved by the said lease of 26th July, 1800 (which was in Irish currency); the rent reserved was £2 1s. 6½d. under; instead of £1 over the head rent of said lands; and also admits that he has always paid a much greater rent for said lands, inasmuch as he has paid the tithe rentcharge chargeable thereon, though not bound by his lease to do so. The said lease contains a covenant by the said Devereux, his heirs or assigns, that he, the

said Devereux, his heirs or assigns, shall not, during the continuance of said demise, and of every renewal thereof, cut down or fell, or cause to be cut down or felled, the timber or trees then standing or growing upon said thereby demised premises, or any of them. The lease contained a *proviso* to said Devereux, his heirs or assigns, on every 25th day of March prior to 25th day of March, 1848, to terminate the lease on giving twelve months' notice, and paying to the said Redmond £100, or any less sum that might have been expended in improving the lands. Notice to terminate the tenancy was served by said Selina Devereux on the 21st day of March, 1846, but the tenant still holds possession. The said Devereux, some years since 26th July, 1800, planted on said lands timber trees, which are now of considerable growth, and value of about £192." Appellant insisted that he had fulfilled the conditions in said lease contained; and that in said observations Redmond should have been described as tenant from year to year. In this state of facts the lands were advertised to be sold on the 15th July, 1854, in the town of Wexford. Five days before the said intended sale said L. W. Corcoran brought before Baron Richards, the then Chief Commissioner, a private offer of £210 from one R. W. Ryan, which offer was objected to by appellant, and which the said Baron declined to accept. On the 15th July, 1854, the lands were put up for sale, and a sum of £210 was the highest offer; but said sale was never confirmed. Baron Richards having ceased to be Chief Commissioner, said L. W. Corcoran, on 15th May, 1858, submitted to Chief Commissioner Martley a private offer for said lands for £210 by said R. W. Ryan, in trust, for Mr. Corcoran's said client, John E. Redmond, which private offer was, on 31st May, 1858, accepted, without notice to the appellant. The petition of appeal then alleged said sale to be at a gross undervalue; that were it not for the misrepresentations the lands would have brought £3,000. No conveyance of the lands had ever been made either by the Incumbered Estates or Landed Estates Court. On the 10th of May, 1864, an application was made by the owner (the appellant) to Judge Dobbs on notice, "That the said sale of the 31st May, 1858, might be set aside, on the ground that same was irregular, and contrary to the course and practice of the Court; and that same being a sale on a private offer, no notice thereof had been given to the owner; and that at the time there was a subsisting order for the sale of said lands by public auction in the town of Wexford; and on the ground that said lands were sold at a gross undervalue, and also that the rental might be amended, and said lands set up and sold by public auction, after proper advertisements." This motion came on to be heard before Judge Dobbs on the 11th June, 1864, whereupon it was ordered to be refused, with costs. The petition then stated that after the learned Judge had made said order, it was ascertained that Robert L. Kane, appellant's then solicitor, upon whom it was alleged that notice had been served of said private offer, at 79, Talbot-street, had not his registered address in Talbot-street since the year 1864; and accordingly an application was made and liberty granted to reconsider said order of 11th June, 1864; and the motion coming on to be heard on the

27th June, 1864, it was refused with costs; and from these several orders the appeal was now brought.

In answer to case made by the appellant, it was said by James A. Wall and Patrick W. Redmond, executors of W. P. Hoey, deceased, that the said sale in Wexford was not confirmed, because the Chief Commissioner, Baron Richards, was of opinion that the right of renewal of the lease of 26th July, 1800, was lost to Redmond; that Baron Richards' successor, Chief Commissioner Martley, directed (the matter of confirmation of the sale having been before him on motion) that the opinion of counsel upon Baron Richards' ruling should be taken, which was accordingly done; and said counsel, differing with Baron Richards, Chief Commissioner Martley was of opinion that the right of renewal was not gone, and that a Court of Equity would confirm the granting of such renewal to Redmond; thereupon a notice of motion to approve of said private offer was served, upon 26th May, 1858, upon R. L. Kane, at 79, Talbot-street, aforesaid; and upon 31st May, 1858, the said Chief Commissioner Martley accepted said offer; and on the faith of said acceptance said Redmond had expended vast sums of money in improving said lands.

*Hemphill, Q.C. (with Palles)* appeared for the appellants.—Judge Dobbs was clearly wrong in refusing the motions made in his court to set aside the sale, for two reasons: first, Miss Devereux, the owner, had no notice whatever of the private offer, Mr. Kane having ceased to be her solicitor; and further, his registered address was not in Talbot-street for four years before the motion which was made before Baron Richards, and which he refused to entertain. Secondly, the value of the estate was grossly depreciated by the appearance on the face of the rental of a subsisting tenancy, the owner of the estate, Miss Devereux, insisting that no such tenancy subsisted; and this question as to the equities of the parties does not appear to have been adjudicated upon. If a misrepresentation of the property had been given, the Court below ought to have allowed the motion. Corcoran was the solicitor for the petitioner, Hoey, and he was also the solicitor for the purchaser. In *Athins v. Delmage* (12 Ir. Eq. 1), a sale was declared void after sixteen years, on account of the property being depreciated in value, owing to the negligence or design of the solicitor who had the carriage of the sale.—In *re Ronayne's Estate* (13 Ir. Ch. 444), it was held that the Landed Estates Court will set aside a sale of an estate at an under-value made to the party having the carriage of the sale.—*Ex parte Bennet* (10 Ves. 380); *Coles v. Trecothick* (9 Ves. 249); *Popham v. Exham* (10 L. Ch. 440).

*Brewster, Q.C. (with Owen)* for the petitioners.—Everything was done in the ordinary course of proceeding in the Incumbered Estates Court. One Chief Commissioner confirmed the sale, and Judge Dobbs in the orders now appealed from followed Mr. Martley's decision. [*The Lord Chancellor* thought that this estate ought not have been sold with an equity on the face of it.]

*Flanagan, Q.C.* appeared for the purchaser, Mr. Redmond.—Miss Devereux had notice through Mr. Kane, her solicitor; and her laches, at all events, disentitle her to relief in a court of equity.

THE LORD CHANCELLOR said, that without in any manner determining the question of notice, he was of opinion that there was sufficient on the face of the proceedings—the position of the solicitor, the looseness of the proceedings; although he was far from saying that any fraud was intended; still a true representation of the property was not made, and therefore it would be better to set aside the order of Judge Dobbs and to remit the matter back again to the Landed Estates Court.

THE LORD JUSTICE OF APPEAL.—I am entirely of the same opinion as the Lord Chancellor. There was an equitable question involved in the case. There was a lease made in 1835 for lives renewable for ever, the landlord reserving certain rights thereunder; and it does not appear that the landlord ever did any act relinquishing those rights, and yet here is an attempt in 1864 to give Mr. Redmond the whole of this property discharged altogether from that equity. Baron Richards refused to confirm this private arrangement. I think Judge Dobbs was wrong, and that the order he made ought not to be allowed to stand. I am of opinion, therefore, that this lady ought to be put back in her original position.

*Order of Judge Dobbs reversed.*

## Court of Chancery.

Reported by Oliver J. Burke, Esq., Barrister-at-Law.

MONTGOMERY v. MONTGOMERY.—Jan. 13-16.

*Will—Blank devise—Interpolation of words—Mistake in deed—Correction.*

*Testator, in his will dated 19th June, 1862, having recited that all his estates in the Counties of Mouth and Westmeath were settled on his eldest son, except the lands of Baskin, and a townland called K., gave, devised, and bequeathed (without mentioning what he so gave, devised, and bequeathed) to trustees, in trust for his son, A. M., and he then gave, devised, and bequeathed to said trustees, in trust for his son A. S. M., the said townland called K., together with other premises therein mentioned. Held, that A. M. was absolutely entitled under said devise to the lands of Baskin.*

*Testator, being seized of the lands of Baskin in fee, and also of a life estate in certain entailed lands, was empowered by a settlement made upon his marriage in 1845 to charge the entailed estates with a sum of £5,000 for his own use. By indenture of mortgage bearing date 19th January, 1861, after reciting that by her will his mother had bequeathed to her son, R. B. M., certain arrears of jointure (amounting to more than £5,000) charged upon testator's entailed estates, which estates, for the purpose of securing said arrears, he thereby charged with a sum of £5,000, he accordingly proceeded to mortgage same to R. B. M. Among the names of the townlands so mortgaged, the name of Baskin occurred. Held, that Baskin was introduced by mis-*

*take into the deed, and that same was not charged with the payment of said mortgage debt.*

*Testator having charged by mortgage £5,000 on his said entailed estates, by his above-mentioned will further charged "said property according to the power given me, with a sum of £1,000 sterling for my daughter Julia, in addition to her share of the sum charged by my marriage settlement." Said mortgage debts at testator's death were reduced to £4,688, whereby a sum of £311 became absolutely discharged from said mortgage. Held, that as to the sum of £311, Julia was absolutely entitled thereto.*

THIS was a cause petition praying "that the trusts of the will of Alexander Montgomery may be carried into effect, and that it may be declared that upon the true construction of said will that the petitioner, Allen Montgomery, is absolutely entitled to the lands of Baskin; and that the true construction of the will of the said testator may be declared in respect of the residuary gift therein contained." The petition opened by stating that a settlement was executed on the marriage of Alexander Montgomery with Frances Tisdall, dated 20th August, 1845, whereby, after reciting that said Alexander Montgomery was seised of certain lands in the counties of Meath and Westmeath in fee-simple, subject, among other things, to an annuity or jointure of £1000, Irish currency, to Elizabeth Magan, for her life; and also to an annuity of £1000 per annum to Anne Montgomery, widow, the mother of said Alexander Montgomery, for her life; it was agreed that the lands in said settlement mentioned should be settled to the uses and trusts of the then intended marriage, and accordingly that said lands were conveyed to trustees to the use of the first and other sons of said intended marriage successively in tail male. "But as to the lands of Baskin, it has been agreed that the same shall be settled only for the purpose of securing to the said Frances Tisdall an annuity, by way of jointure, of £600 per annum, and that only during the joint lives of said Frances Tisdall, Elizabeth Magan, and Anne Montgomery;" and that immediately upon the decease of any of said three annuitants the lands should enure unto and to the use of said Alexander Montgomery, his heirs and assigns, freed from and discharged of all the trusts of the settlement. And said settlement gave a power to said Alexander Montgomery to charge said entailed lands with £5000 for his own use, and upon a further trust to raise a sum of £10,000 for the children of the marriage. That said intended marriage was solemnized; and there was issue thereof Alexander Shirley Montgomery, the eldest son, and five younger children, Allen Montgomery (petitioner), Archibald, Henrietta, Julia, Catherine, and Emily. That said Anne Montgomery, previous to her death in 1859, bequeathed a sum of £5938 10s. 3d. due on foot of arrears of said jointure to her son, Robert B. Montgomery, to whom for the purpose of securing said sum so bequeathed said Alexander executed a mortgage bearing date 16th January, 1861, with interest at the rate of five per cent. per annum.

The petition then stated that Alexander Montgomery made his will dated the 19th of June, 1862, and thereby, after reciting that under and by

virtue of the settlement executed on his marriage all his property in the counties of Meath and Westmeath was assigned to trustees upon certain trusts; and, amongst others, in case he should die without leaving a son living at the time of his decease, or who should attain the age of twenty-one years, in trust for his heirs and assigns, he devised and bequeathed unto the said trustees all his real and freehold estates situate in the counties of Meath and Westmeath, subject to the payment of the several incumbrances which said estates were liable to, and which he might charge them with upon trust for the use of the said testator's daughters should they or any of them attain the age of twenty-one years, or be married with the consent of their mother should she be living; and in case none of his daughters should attain the age of twenty-one years or be married with the consent of their mother, should she be living; and in case none of his daughters should attain the age of twenty-one years or be married, upon trust for the use of the testator's brother, the said Robert Blackall Montgomery, his heirs and assigns, "my estates being settled on my eldest son, except the lands of Baskin, in the county of Westmeath, and a townland called Kilnamullock, in the barony of Farbill, and county of Westmeath, I give, devise, and bequeath\* to Richard Challoner, of Kingsfort, and Archibald Tisdall, of Sunnyside, Clontarf, Esquires, in trust for my son, Allen Montgomery. I further charge said property, according to the power given me, with a sum of £1000 sterling for my daughter Julia in addition to her share of sum charged by my marriage settlement. I leave, devise, and bequeath unto the said Richard Challoner and Archibald Tisdall, Esquires, in trust for my son, Archibald Senior Montgomery, the townland of Kilnamullock, in the County Westmeath, and the houses and premises belonging to me in Great Britain-street and Granby-place, in the city of Dublin. I leave to my dear wife the use of all my plate and furniture for her life. And as to the rest, residue, and remainder of my property that I may die possessed of at the time of my death, I leave to my dearest wife for her own use."

By the said indenture of mortgage it was witnessed "that in pursuance and part performance of said agreement, he, the said Alexander Montgomery, in pursuance and execution of the power and authority so reserved and given to him in and by the said indenture of settlement of the 20th day of August, 1845 as aforesaid, and of every other power and authority enabling him in this behalf, doth by this deed or instrument in writing by him sealed and delivered, in the presence of and attested by the two credible witnesses whose names are endorsed hereon as witnesses to the execution hereof, charge and incumber the messuages, lands, tenements, hereditaments, and premises herein-after particularly mentioned and described, and their and every of their appurtenances, and all and singular other the lands and premises comprised in the said indenture of settlement of the 20th day of August, 1845, with the payment of said sum of £5,000 sterling, to be paid and payable on the day of the death of the said Alexander Montgomery, and not sooner, without his consent in writing,

\* Here occurs the omission.

with interest at the rate of five per cent. per annum from the day of his death. And this indenture further witnesseth that for the more effectually securing of the sum so due for arrears of the said jointure, he, the said Alexander Montgomery, in further pursuance and by virtue of the herein-before recited power or authority, and of every other power and authority enabling him in this behalf, doth by this deed or instrument in writing by him sealed and delivered in the presence of two credible witnesses as aforesaid, direct, limit, and appoint, All That and Those the town and village lands of Summerstown, the parcels of land called Stucking Tivern," &c. Then follows a long list of townlands, among which the name of Baskin occurs. The petitioner now asked the Court for a declaration that same was introduced among the names of other townlands by mistake. Said mortgage having been reduced by a sum of £311 10s., said Julia Montgomery asked for a declaration that so far as that sum went, her legacy was absolutely charged on such portions of £5,000 as amounted to £311 10s., and that the lands of Baskin, which were liable to contribute to the payment of Anne Montgomery's jointure during the time said arrears accumulated, should now contribute to the payment of £688 10s., portion of said £1,000 bequeathed her by testator, her father.

*Warren, Q.C.* (with *Reeves*) appeared for the petitioner.—The testator has evidently omitted the name of the lands he wished to devise after noticing that he had power over the lands of Baskin, Kilnamullock, and those he devised to trustees "in trust for Allen Montgomery," without saying what he devised, and we now ask the Court to supply the words "Baskin and Kilnamullock." It is said in 1 Jarman on Wills, 3rd ed. 456, that when it is clear on the face of a will that the testator has not accurately or completely expressed his meaning, and it is also clear what are the words he has omitted, these words may be supplied.—*Abbott v. Middleton* (21 Beav. 143; 28 L. J., Ch. 110; 7 H. L. Cas. 68); *Edmunds v. Waugh* (4 Drew, 275); *Newburgh v. Newburgh* (5 Mad. 364); *Doe v. Turner* (2 Dowl. & Ry. 398). As to the mortgage of 1861, the Court is asked to declare that although Baskin is included by name therein, yet that manifestly Baskin was introduced by mistake, and therefore it ought not to contribute to the payment of the mortgage of £5000.

*Chatterton, Q.C.*, with *Falkiner*, were for the respondent, Alexander S. Montgomery.

*Turleton* for Julia Montgomery.

*Reeves*, in reply, cited *Incorporated Society v. Richards* (1 Dr. & War. 258).

*Jan. 16.*—THE LORD CHANCELLOR.—I entertain now a more favorable view of the case for Mr. Warren's client than I had done on hearing the argument. The rule in such cases is, that intention by necessary implication must appear in order to enable the Court to supply a blank in a will, as it was laid down that parol evidence was not sufficient for this.—*Edmunds v. Waugh* (4 Drew, 275); *Hill v. Mill* (12 L. Eq. 107). *Lord Say & Seale's case* (10 Mod. 40) was a case on trial at bar, where the Court held a deed of bargain and sale good, though the name of Lord Say, the grantor, was omitted; and the Court

there said, according to the common rules of indentures, "The words of the deeds are the words of all the parties. But Lord Say is a party, and therefore he granted." So in the case I have just mentioned, *Hill v. Mill*, Sir George Hill, although in the words of the conveyance his name was not used, was held to be a party to the deed. In this case the testator, after mentioning that two denominations of his property, Baskin and Kilnamullock, were not included in the trusts of his marriage settlement, proceeded to make a blank devise to the trustees mentioned in the will in trust for his son Allen, the petitioner; and then after the omission, a bequest to his daughter Julia, which I shall pass over for the present, but to which I shall afterwards return to, as a very important question arose upon it. The testator proceeded to devise the property of Kilnamullock to the same trustees in trust for testator's son, and then devised and bequeathed all the residue of his property to his wife, Frances Montgomery. Now, although the residuary devise would, in a strictly technical point of view include the lands of Baskin, yet what was popularly meant by a residue was all the property not before mentioned; and therefore, Baskin having been already mentioned by the testator, would not be included in the residuary devise to the wife. It was clear, upon the face of the will, that the testator had used the word "residue" in a popular and not in a strictly technical sense, and did not intend to include in it the lands of Baskin. There was, in fact, a manifest intention to give one of the two properties mentioned to Allen; and as the testator had actually given the other property to his son, A. S. Montgomery, it followed that he must have intended to give Baskin to his son Allen. Under these circumstances, therefore, although the facts of the case have not been argued at much length, that is to say, not in a contentious manner, which had caused me to feel some hesitation, I shall make a decree that the blank in the will shall be filled up by inserting therein the words "the lands of Baskin," and that the petitioner, Allen, was, under the will, entitled to an estate in fee therein, in which view I am supported by the decision in the case of *Edmunds v. Waugh* (4 Drew, 275). There the testator, after certain bequests, and, among others, after making a provision for Henry Anthony Slade, went on thus—"And whereas in the likely event of the decease of Henry Anthony Slade without leaving lawful issue who shall then have attained the age of twenty-one years, I am desirous of making some provision for his present wife in case she should survive him, now I do hereby direct my said trustees and their executors, in such last-mentioned two events, out of my residuary personal estate to purchase and invest in their names, or to transfer into their names from my name, within three months next after the happening of such two events, and to stand possessed of the dividends thereof in trust, to pay the same to said Maria Slade during the remainder of her natural life." It will be observed that no trust sum is here named, and on this the first question arose—whether the blank could be supplied. The will then contained a bequest of £1000 on trust, and £5000 on trusts, and another bequest on trusts in which no sum was mentioned; but the language was continuous, and no blank was left, and in the end of

the will there was power to invest the said sum of £5000 and the said two sums of £1000; and it was there held that the latter clause was evidence that the testator intended a bequest of £1000 in the bequest in which no sum was named.

With respect to the other question, to which I have already referred, and which was also a curious question, and one of considerable difficulty—namely, what was the effect of the bequest to Julia Montgomery, and out of what fund (if any) she was to be paid—it appeared that the position in which the testator stood at the time of the execution of the deed of 1861 was this:—By the marriage settlement of the testator, executed in 1846, a power had been given him of charging certain lands with a sum of £5,000 for his own benefit. In this settlement the lands of Baskin, together with other lands which may be called the settled estates, were comprised; but it was clear that Baskin had been introduced for a certain purpose only, namely, for the purpose of better securing the jointure of £600 a-year given by the settlement to Frances, the intended wife of the testator, and that only for a limited period—namely, during the joint lives of three persons mentioned in the settlement; therefore, whether the lands were at any time subject to the power of charging £5,000 or not (and I am rather inclined to think they were not), they undoubtedly ceased to be subject, supposing they ever had been so, upon the death of Anne Montgomery, the testator's mother, who was one of three persons mentioned in the settlement. Anne Montgomery died before the execution of the deed of 1861. Accordingly, at that time Alexander was the owner of two different estates—one was a power which he had of charging the settled estates with the sum of £5,000, and the other was the estate of Baskin, of which he was then the absolute owner in fee. Being then the owner of those two estates, he executes the deed of 1861, the nature of which was this—By her will Anne Montgomery, the testator's mother, had bequeathed to her son, Robert B. Montgomery, a sum of money which at the time of the death was due to her from the testator as the arrears of her jointure; but had at the same time directed that Robert was to accept payment of it by instalments of £260 every half year until the whole should be paid. In order, therefore, to secure to Robert the sum then becoming due upon foot of those arrears, which then amounted to more than £5,000, the testator first created this charge upon the settled estates, exclusively of the lands of Baskin, and then proceeded to mortgage this charge thus created, together with the lands of Baskin, to Robert B. Montgomery, to secure £5,000. It is clear that the real intention of the testator by the deed of 1861, as appeared by the recitals, was only to charge the settled estates pursuant to the power conferred by the settlement of 1846, and that Baskin had been introduced into this deed by mistake. So far, therefore, as the settled estates are concerned, it would plainly be a mistake to make Baskin contribute at all towards the payment of this sum of £5,000, to the whole of which sum the settled estates are clearly liable. Having then created this charge, and having dealt with it as already stated, the testator by his will makes this disposition—"I further charge said lands," &c. As if

forgetting all that had been done, he proceeded to charge the settled estates with a sum of £1,000 for his daughter Julia. Now if the testator, at the time he made his will, had finally disposed of the charge of £5,000, the disposition to Julia—which clearly was a disposition of a part of this charge—would have been nugatory; but the testator had not finally disposed of this charge: so far from it, he had the absolute dominion of the whole of said charge of £5,000, subject only to the mortgage to Robert. So far as Robert, the mortgagee, was concerned, whether Baskin was included in the deed of 1861 by mistake or not, he had a right to resort either to the settled estates or to Baskin; and the question was, had Julia a right to call upon Robert to marshal his securities in her favour, so as to discharge from his mortgage so much of the charge of £5,000 as would be necessary to enable her to be paid her £1,000? It appeared at the time of the testator's death that Robert's claim under the deed of 1861 had been reduced to a sum of about £4,688, whereby a sum of about £311 had been discharged from Robert's mortgage, and to this sum under the will Julia was clearly entitled. But how was Julia to be paid the remainder of the £1,000? This must be made up by Baskin. Therefore I am of opinion that the effect of the bequest to Julia was to give her a sum of £1,000, portion of the charge of £5,000, exonerated from Robert's mortgage of Baskin, to the extent of the difference between the sum by which Robert's claim for £5,000 had been diminished and £1,000.

The Court made the following order:—"His Lordship doth declare that, according to the true construction of the will, the petitioner, Allen Montgomery, is absolutely entitled to the lands of Baskin; counsel for the petitioner in open court undertaking to pay the sum of £688 10s., the residue of the sum of £1,000, with interest at the rate of 5 per cent. from the death of Alexander Montgomery to the day of the payment thereof, in satisfaction of the equitable claims for contribution against the lands of Baskin, in respect of her legacy of £1,000, in said will bequeathed to Julia Montgomery. And his Lordship doth declare that, according to the true construction of the mortgage of 16th January, 1861, the said lands of Baskin were not charged with the payment of the mortgage debt of £5,000 in said indenture mentioned, or any part thereof." Costs to all parties.

SMITH v. CROWE.—Jan. 19, 20, 25.

*Injunction—Lease—Term "dwelling-house."*

*Lessor, being seised in fee of certain lands, situate and lying on both sides of Alma-road, in the County of Dublin, by indenture bearing date the 11th June, 1855, demised the lands lying on the west side of said road to J. S., his executors, &c., for a term of years, and he thereby covenanted with the said J. S. that he the said lessor would not convert, or permit or suffer to be converted, any portion of the*

*ground opposite to said premises thereby demised, or any part thereof, or any dwelling-house or building to be erected thereon," for any purpose whatsoever, save and except and other than as a private dwelling-house to be erected and built," in the manner in lease provided. Lessor subsequently, on 19th June, 1860, leased to W. C. the lands lying on the east side of said road, and opposite to the premises demised to J. S.; forthwith W. C., having built a dwelling-house on the lands so leased to him, proceeded to build stables on one side of his said house, and opposite to and fronting the said premises of J. S. Upon application for an injunction to prevent the erection of said stables, it was Held (W. C. having notice of the covenants in the lease from lessor to J. S.), that the expression "dwelling-house" included stables, and that as the building of stables was not provided against by the words of the instrument, the injunction must be refused.*

THIS was a cause petition presented by John Smith against William Crowe and Thomas Hone, praying "for an order that William Crowe, his workmen, labourers, and assistants, be restrained by the perpetual injunction of this Court, and in the meantime by the order or injunction of this Hon. Court, from building or erecting, or causing to be built or erected, any coach-house, stable, or stable-yard, on any part of the ground demised to him by an indenture of lease bearing date the 19th day of June, 1860, fronting the new road or avenue called Alma road and the lots of ground demised to petitioner by said Thomas Hone by an indenture of lease bearing date 11th June, 1855, or other than respectable, good, and substantial *dwelling-houses*, and in the nature of semi-detached or single-detached houses, with an opening of at least twenty feet unbuilt upon between each building and the adjoining one." The petition stated that Mr. Hone was owner of a portion of the lands of Newtown Byrne, opposite Mountpelier-terrace, between Blackrock and Monkstown, near this city. That he got the land mapped into plots for the erection of 36 houses, and made a road, called Alma-road, for the accommodation of parties erecting houses. The petitioner, it was alleged, entered into an agreement to take some of the land for building, and by a lease of the 11th June, 1855, and made between and by Thomas Hone of the one part, and John Smith (petitioner) of the other part, the said Thomas Hone thereby demised to petitioner, his executors, administrators, and assigns, "All That and Those, that part of the land of Sea Point, formerly called Newtown Castle Byrne, otherwise Newtown on the Strand, situate on the west side of the road or avenue called Alma-road, lately made by the said Thomas Hone." Under this lease Smith entered into possession of the premises thereby demised, and said lease contained a covenant by Smith to erect only detached or semi-detached houses. Mr. Hone also agreed that he would not, without Mr. Smith's consent in writing, build, or permit to be built, any house fronting this new road less than twenty feet from the pathway, or build on the ground fronting the petitioner's land any buildings but detached or semi-detached houses, with

openings of at least twenty feet between each lot, &c. The petitioner erected houses on the land he so obtained; and in 1859 the respondent Crowe proposed to take the land opposite to the petitioner from Mr. Hone, and in June, 1860, he obtained a lease of eight lots thereof, which lease did not contain covenants similar to those entered into by the petitioner. It was then alleged that the respondent was preparing to build stables opposite to the petitioner's house, which would seriously injure his property. The case of the respondent, Crowe, was, that he was only to be bound by the covenants in his own lease, which did not contain the covenants by Mr. Hone which were embodied in the petitioner's lease: and that, in fact, no injury was caused to the petitioner's property. The principal question in the case arose on the construction of the lease from the respondent, Hone, to the petitioner, the petitioner insisting that upon the true reading of the instrument, Mr. Hone covenanted not to permit any stables or offices to be built adjoining any houses which might be built opposite to the petitioner, but merely good substantial dwelling-houses. The case of the respondent, Hone, was—that the instrument was not open to that interpretation. It appeared that Crowe had notice of the fact that Hone had covenanted with Smith, and by those covenants, therefore, Crowe was bound.

*Brewster, Q.C., Berkely, Q.C., and W. Smith,* were for the petitioner.

*The Solicitor-General, with Serjeant Sullivan, Warren, Q.C., Owen, and Robertson,* were for the respondents.

**JAN. 25.—THE LORD CHANCELLOR.**—In this case the question was on the construction of the lease of the 11th June, 1855, to the petitioner; Mr. Crowe, who was lessee of the premises on the opposite side of the road, and held under lease from Hone, executed subsequently to the 11th June, 1855, commenced making excavations opposite the petitioner's house for the purpose of erecting stables, with a stable-yard, in direct violation, as it is pretended, of the covenants in the lease of 1855, and accordingly the petitioner prays for an injunction to restrain the respondent Crowe, from building those stables or any houses other than good substantial dwelling-houses in the nature of semi-detached or single detached houses, with an opening or space of twenty feet between each house or block of two houses and the neighbouring block. Now, I think it is certainly a very startling proposition, looking to the condition of this property, to its situation, and to the general class of persons in that neighbourhood, that by the terms of the covenant the respondent is to be restrained from building stables or any other offices absolutely necessary for the enjoyment of this property. Well, the words of the instrument must be very strong indeed, very coercive, when the Court shall restrain the parties from building offices, without which the dwelling-houses would be uninhabitable. The words used in the instrument must be taken in their ordinary sense, and we must examine every word of the instrument. Now, what are the facts of the case? On the 11th of June, 1855, this lease was made, of "that part of the lands of Seapoint formerly called Newtown, &c.; and which said ground hereby demised is divided into ten lots, num-

bered respectively 9, 10, 11, 12, 13, 14, 15, 16, 17, 18. To hold the said lots or parcels of ground, and all and singular other the premises hereby demised, together also with a certain right of way unto the said John Smith, his executors, administrators, and assigns, from the 25th day of March, 1855, for and during and until the full end and term of 1000 years from thence next ensuing, and fully to be completed and ended, yielding and paying therefor the yearly rent of £70 sterling." The deed then contained a covenant that Smith "shall and will, within two years to be computed from 25th of March, 1855, build, erect, and finish for habitation, or cause to be erected or finished for habitation, on some two or more of the lots hereby demised two good and substantial dwelling-houses, of the value of £600 each at the least," and that he shall within six years, to be computed from the said 25th March, 1855, build, erect, and finish for habitation two further good and substantial dwelling-houses, of the value of £500 each at the least; and shall also construct "good and sufficient sewers or drains in the front of said house and offices, and leading from the said offices and buildings to the main sewer." The deed then contained a covenant by said Thomas Hone that he, the said Thomas Hone, his heirs and assigns, shall and will not without the consent in writing of the said John Smith, his executors, &c., for that purpose had and obtained, build or erect, or cause, permit, or suffer to be built or erected on any other part of the ground or premises, or any part thereof, any house, or cottage, or cabin, or other building, save and except the necessary stables and offices, and good and substantial dwelling-houses." Then follows a covenant that was much relied upon by the petitioner, whereby Hone covenanted with his lessee, Smith, that he, "Hone, would not convert, or permit, or suffer to be converted, any portion of the ground opposite the premises thereby demised or any part thereof; or any dwelling-house or building to be erected thereon, unto or for a nunnery, Roman Catholic or dissenting chapel, public hospital, or infirmary, or mill, manufactory, distillery, brewery, shop, warehouse, or for any ale-house keepers, &c., or for any noisome or offensive trade, business, or purpose whatsoever, save and except, and other than as a private dwelling-house, to be erected and built in the manner herein provided for; nor do, cause, or wittingly or willingly suffer to be done any act or thing on the said premises, or any part thereof, which may be, or grow to the annoyance, damage, or disturbance of the said John Smith, his executors, administrators, or assigns. Now, on reading these covenants, I find nothing whatever to prevent stables being built. Hone was not to allow the building of any of those buildings enumerated, such as cottages, cabins, nunneries, *save and except stables and offices*, and dwelling-houses. Now, it is manifest that stables were necessary for the house; and it is clear that what they meant to prevent being erected was cottages, Roman Catholic chapels, ale-houses, and a long list of trading houses therein enumerated. But, apart from the very license to build stables and offices, no one reading this instrument can doubt but that the expression *dwelling-houses* did not exclude the offices connected therewith. The meaning of the

word "house" includes stables attached thereto. In a very late case, *Eastern Counties Company v. Marriage* (9 H. of L. 48), Baron Bramwell says that the term "house includes gardens and outbuildings." I agree with Baron Bramwell that the word "house" includes outbuildings, such as stables, offices; and accordingly, without the strongest words, I will not hold that those houses are to be mere blocks rising out of the ground without their necessary adjuncts, such as conservatories, out-houses, stables; and, surely, if those adjuncts were removed the houses would be quite uninhabitable, and I repeat that I am of opinion that the word "house" includes all adjuncts. This injunction cannot be granted. If the parties intended to exclude stables; the deed should have said so. If those stables annoy the petitioner, Mr. Smith can have his remedy—he may have recourse to a court of law. I am asked to modify, at all events, the injunction. I can't do so. I can't prevent the respondent building his stables one side of his house; nor can I compel him, as I am asked, to build them behind his house.

*Injunction refused without costs.*

## Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

CRAWFORD v. LORD MAYOR, ALDERMEN, AND BURGESSES OF THE CITY OF DUBLIN.—Nov. 24, 1863.

*Averment of common nuisance—Setting aside defences.*

*To a summons and plaint which complained of a common nuisance, and proceeded to state in what the nuisance consisted, the defendants pleaded a plea which admitted the facts in the summons and plaint, and denied that they constituted a nuisance. On application by the plaintiff, the Court declined to set aside the defence, but gave the plaintiff leave to reply and demur.*

Macdonogh, Q.C. (with him Sidney, Q.C.) applied to set aside the second and third defences pleaded in this case or that the plaintiff might be at liberty to reply and demur. The first count of the summons and plaint complained that before and at the time of the committing of the grievances as hereinafter mentioned the defendants, in a certain common and public highway situate, to wit, within the borough of Dublin, called, to wit, Westmoreland-street, then being the Queen's common highway, and used by her subjects to pass and repass at all times of the day and night, unlawfully and injuriously did cause and procure to be erected and constructed a common nuisance, that is to say, a certain structure or pile of wooden buildings running across said street, and intended to represent the site or position in which it was proposed by certain parties that a certain bridge, if constructed, would cross the said highway, and also did cause and procure divers large quantities of scaffolding and tim-



ber to be placed along and across said highway for the purpose of being used in the erection of said structure, whereby not only was the thoroughfare greatly obstructed and impeded, to wit, for the space of two days, to the common nuisance and danger of all her Majesty's subjects passing along and through said highway; but likewise by means of the premises the plaintiff, while lawfully being and passing in and upon said highway, was crushed and struck down to the ground by a certain portion of the timbers connected with said scaffolding falling on her. The second count was similar to the first. The first plea was a traverse. The second plea was as follows:—And for a further defence to said first count defendants, for the purposes of this plea but not otherwise, admitting that they caused and procured the structure in said count mentioned to be erected and constructed as in said count alleged; and that they did also cause and procure the scaffolding and timbers in said count mentioned to be placed along and across said highway, whereby the said highway was obstructed and impeded, the defendants say that the erection and construction of said structure was not, nor was the placing of the said scaffolding and timbers, nor was the obstructing and impeding in said count complained of, a common nuisance as therein alleged. The third defence was as follows:—And for a further defence to said first count, defendants, for the purposes of this defence but not otherwise, admitting not only as in the second plea admitted, but also that the erection and construction of the structure in first count, and the placing of the scaffolding and timbers in first count mentioned, and the obstructing and impeding in said count complained of was a common nuisance, say that the injuries to plaintiff by said count complained of were not, nor were any of them, caused or occasioned by the acts of the defendants in said count complained of. In the second defence they say—we cannot dispute here or before the jury that we wrongfully erected this scaffolding, and that you sustained injuries by the falling of the scaffolding. Having admitted an obstruction, and having admitted not only the apprehension of danger, but that the accident actually happened, they say they deny that this was a common nuisance; i.e., admitting the facts, they traverse the legal consequence. How can we go to trial upon the third defence? In *Reg. v. Train* (3 Fes. & Fin. 22) Erle, C.J., says—"No doubt, most persons would pass along the road without sustaining any accident; but if the proportion were proved to be 99 out of 100 passengers passing without accident it would make no difference as to the legal right of the hundredth passenger to complain of the nuisance."—*Reg. v. Electric Telegraph Company* (3 Fes. & Fin. 73). [*Monahan, C.J.*—I always thought that the question of a nuisance was for the jury, the judge directing them what in point of law constituted a nuisance.] [*Christian, J.*—Could the defendants, demur to your plaint on the ground that the facts set out by you do not amount to a nuisance?] They could; but instead of that have pleaded traversing the nuisance. This plea virtually sends an issue of law to the jury. [*Christian, J.*—Is it not possible that they might bring forward other facts under that traverse which, taken together, would show there was no nuisance?]

But under the C. L. P. Act, in cases of tort some material fact must be traversed. This is a general issue. They should set out these facts, which would show it was not a nuisance. But what fact could modify or alter what is alleged here? It is the character given to the fact which is traversed.

*Barry, Q.C., and Palles, contra.*—The notice should have pointed out what is objected to. That is the rule in the Court of Exchequer. If the plaintiff will strike out the averment in the plaint that this is a common nuisance, we will strike out the traverse of it. The count is framed here as for a common nuisance. We are, therefore, entitled to take issue upon that. It is said the Act of Parliament requires us to plead facts; but if the plaint contains an averment, our defence is not to spread out a number of facts, but to traverse the averment. It was asked could we demur? We could not, because there is an averment of fact; and if we demur we admit that. We have a right to traverse the fact of a nuisance. There is a count here which will fairly test this. It was in consequence of the negligence in putting up this, and not in consequence of the thing itself, that the accident occurred. [*Keogh, J.*—Suppose the obstruction and the danger both proved, would that prove there was a nuisance? Is it seriously contended that this which we saw was not an obstruction and was not dangerous?] If the allegation in the plea be bad let it be demurred to. [*Monahan, C.J.*—The question is nuisance or not nuisance? is not that a matter of fact like libel or not libel?] In *Reg. v. Train*, Erle, C.J. charged that if the tramways were a source of inconvenience they were a nuisance. Here the jury may be charged in that way. The averment in the plaint was either necessary or not. [*Christian, J.*—The gist of the plaint is an averment of nuisance, i.e. a mixed averment of law and fact.] Four material facts must be proved. There must be an overt act. It must be an act of the defendants. That must be a public nuisance. The injury must be *per quod*. Nuisance is a question for the jury.—*Hole v. Sittingbourne & Sheerness Railway Co.* (6 H. & N. 488). *Reg. v. Electric Telegraph Co.* (31 L.J., N.S. Mag. Cas. 166) lays down that "a permanent obstruction erected upon a highway without lawful authority, and which renders the way less commodious than before to the public, is an unlawful act and a public nuisance at common law." It must be permanent. And in *Reg. v. Train* it is laid down that it must be of a material degree. The plaintiff has not served a notice of trial; and if bad this can be demurred to. Will the Court deprive us of the opportunity of raising this question of law, that if these facts be so there was not a nuisance? As to the third defence, we admit all the three elements and traverse the fourth, the *per quod*. The plaintiff says in the count to which this is pleaded, "whereby not only was the thoroughfare impeded, to wit, for the space of two days, to the common danger of all her Majesty's subjects, but likewise the plaintiff, while lawfully passing, was struck down and crushed to the ground." It is not an allegation that this was a nuisance, and that thereby the plaintiff was injured, but that they were the acts of the defendants, "the premises" being the very things before said to be done

by us. We will demur if the word "whereby" be struck out of the plaint.—*Ellis v. Sheffield Gas Co.* (2 EL & BL 767). We want to traverse the special damage. Has the other side suggested any other mode of doing this? Suppose a malicious person loosened one of the beams when this lady was crossing.

*Sidney, Q.C.*, in reply.—We undertake by these pleadings to prove this was a common nuisance. The first count states in detail the overt acts of the defendants. The defendants, in their plea, admit they did everything we allege from beginning to end; but they say it was not a common nuisance. If left so at the trial the jury would have only a question of law. [*Monahan, C.J.*—Is not nuisance a question of degree? Would any obstruction, however small, be a nuisance? I met with a case lately which said that it was a question of degree. Is it not for the judge to tell the jury what would constitute a nuisance? I always thought it a question of fact; and I do not see how you are prejudiced at all by the traverse of this being a nuisance. I do not see why they may not do this, it being an essential portion of your averment. It must be assumed, on the argument of your employing a contractor, that this did amount to a nuisance.] Our notice is in the alternative for leave to reply and demur. As to the third defence, all facts not traversed are admitted. The proposition of law we desire to raise by this first count is—whereas the acts are illegal, the defendants are responsible for all the consequences following. [*Monahan, C.J.*—There may be an ambiguity in the third defence. Does it mean she was not injured at all?]

*MONAHAN, C.J.*—Demur and reply; the demurrer to be argued before the trial. The Court will have ample jurisdiction at the argument of the demurrer to amend the pleadings if it appear necessary.

*Rule accordingly.*

CRAWFORD v. THE LORD MAYOR, ALDERMEN, AND  
BURGESSES OF DUBLIN.—Jan. 21, 22, 30;  
June 8, 1864.

[CORAM MONAHAN, C.J., BALL AND KEOGH, J.J.]

*Public Nuisance—Liability for Injuries.*

*To an action against the defendants for having caused to be erected a common nuisance, and for having caused quantities of scaffolding to be placed along the highway, for the purpose of being used in the erecting of the nuisance, and for having caused a machine called a shearlegs to be employed in and about the said erection, whereby the plaintiff was crushed and struck down, the defendants pleaded that they contracted with one M. M. to erect the structure—that M. M. had the entire control of the erection—that the defendants did not retain any control—that M. M. and his servants erected the structure and placed the scaffolding, and did also cause the machine called a shearlegs to be employed, and that the defendants did not, save as aforesaid,*

*erect the structure or scaffolding, or cause the said machine called a shearlegs to be employed, and that the injuries complained of were occasioned solely by the negligence of M. M. and his servants in this, &c. Upon demurrer by the plaintiff—Held, a bad plea. Ellis v. Sheffield Gas Co (2 EL & BL 767) followed.*

THE first count of the summons and plaint complained that before and at the time of the committing of the grievances, as hereinafter mentioned, they (the defendants), in a certain common and public highway, situate, to wit, within the borough of Dublin, called, to wit, Westmoreland-street, then being the Queen's common highway, and used by her subjects to pass and repass at all times of the day or night, unlawfully and injuriously did cause and procure to be erected and constructed a common nuisance, that is to say, a certain structure, or pile of wooden buildings, running across said street, and intended to represent the site or position in which it was proposed by certain parties that a certain bridge, if constructed, would cross the said highway; and also did cause and procure divers large quantities of scaffolding and timbers to be placed along and across said highway, for the purpose of being used in the erecting of said structure, whereby not only was the thoroughfare in said street greatly obstructed and impeded—to wit, for the space of two days, to the common nuisance and danger of all her Majesty's subjects passing along and through said highway, but likewise by means of the premises, the plaintiff, while lawfully being and passing in and upon said highway, was crushed and struck down to the ground by a certain portion of the timbers connected with said scaffolding or structure suddenly falling upon her (the plaintiff). The second count complained that the defendants erected, or caused and procured to be erected and constructed across the public highway and street, called and situate as in the first paragraph mentioned, and for the purposes therein also mentioned, a certain structure and scaffolding, as in the said first paragraph also mentioned, so as to obstruct said thoroughfare and be a common nuisance, whereby the plaintiff, while lawfully being and passing along said thoroughfare, was crushed and struck down to the ground by a certain portion of the timbers connected with said scaffolding suddenly falling upon the said plaintiff with great violence. The fourth defence which was pleaded to each of these counts was as follows:—The defendants say that under and by virtue of the statutory provisions in such case made and provided, the entire control and management of the streets, thoroughfares, and highways within the city and borough, in said counts respectively mentioned, were and are vested in the defendants, who under said provisions were authorized and empowered to do the acts in said counts respectively complained of, and that said acts were done by them in exercise and by virtue of the powers conferred on them by the statutory provisions in such case made and provided. The fifth defence, which was pleaded as a separate and distinct defence to each of the counts, alleged that before the committing of the acts, or any of them in said counts complained of, the defendants contracted with one Michael Maude (then being a well-skilled,

qualified and proper person for that purpose) to erect and construct for the defendants the said structure said counts mentioned, over the highway in said counts also mentioned; and under such contract the said Michael Meade had the entire and sole control, management and superintendence of the construction and erection of such structure, and of all matters necessary for the purpose of erecting the same; and the defendants under said contract did not retain nor had any control, management, or superintendence thereof; and that the said Michael Meade and his servants erected and constructed the said structure, and for the purpose of such erection and construction erected and constructed the scaffolding in said counts mentioned, and placed such scaffolding and the timbers in said first count mentioned along and across the said highway; and that the defendants did not, in fact, exercise any control, management, or superintendence over the erection or construction of said structure or scaffolding, or over the placing of such scaffolding or timbers along or across the said highway, and did not, save as aforesaid, erect or construct the said structure, or said scaffolding, or cause or procure same to be erected or constructed, nor, save as aforesaid, place, or cause, or procure the said scaffolding, or the timbers in said first count mentioned to be placed along or across the highway, as in said counts respectively alleged; and defendants say that the injuries complained of in the first and second counts were not, nor were any of them, occasioned by the erection or construction of the said structure, or the erection or construction of said scaffolding, or by the placing of the said scaffolding or timbers along or across said highway; but that said injuries and each of them were occasioned solely by the said Michael Meade and his servants negligently permitting a certain portion of the timbers employed in such erection or construction to fall upon the plaintiff; and but for such negligence such injuries would not nor would any of them have been occasioned. The plaintiff demurred to the fourth defence on the following ground:—That the defendants were not authorized by any statute law in doing the acts complained of. The plaintiff also demurred to the fifth defence on the following grounds:—For that the defendants thereby admitting that they caused or procured the erection of the scaffolding in the said first and second counts mentioned, and the placing of the said scaffolding and timbers along and across the said highway, so as to be a common nuisance, furnish no answer to the action by alleging that the injuries resulted from the negligence of their contractor's servants, inasmuch as persons who employ a contractor to erect a common nuisance are answerable for the negligence of such contractor's servants whilst engaged in such a work; and for that under the circumstances in the said fifth defence detailed the maxim *respondet superior* applies and makes the defendants liable for the negligence of the said Michael Meade's workmen; For that the defendants having done wrong by causing the erection of a common nuisance are answerable for the negligence of all who participated with them in such a wrong, whilst such participators were engaged in the construction of said nuisance; For that the defendants having unlawfully ordered or caused the con-

struction of a common nuisance are answerable for the negligence of all workmen employed in carrying out such unlawful orders, even though such workmen were employed by the defendants' contractor.

*Byrne* (with him *Macdonogh*, Q.C., and *Sidney*, Q.C.) in support of the demurrer.—As to the fourth defence, I have found no Act of Parliament which would give any color to it. The Act which relates to Dublin incorporates about forty Acts. The substantial question is upon the fifth defence. *Ellis v. Sheffield Gas Company* (2 El. and Bl. 767). The count in this case seems to be the same with the count in that case. The facts are few, and appear to be the same. The case appears to be *quatuor pedibus*. It never was disturbed. The only ground open to the other side to take is, that it was against the whole current of previous decisions. Although *Bush v. Steinman* (1 Bos. and Pull. 404) has been questioned, it has been held to be sustained, on the ground of there being a public nuisance. Eyre, C.J., throws out a strong observation on the great inconvenience. Suppose that this Corporation employed a man of straw to erect a nuisance, will it be for them to say, True, we erected a nuisance, but there intervenes a contractor—*Burgess v. Gray* (1 C. B., 578). In *Overton v. Freeman* (11 C. B., 867) the contract was to do a lawful act. In *Peachey v. Rowland* (13 C. B., 182) Maule, J., says that he is satisfied that the decision in *Overton v. Freeman* was right, but he withdraws the reasons given in it, and, therefore, I cannot rely on the reasons given in that case—*Reedie v. London and N. W. Railway Co.* (4 Ex., 244); *Upton v. Townsend* (17 C. B., 30); *Holt v. Sittingbourne and Sheerness Railway Co.* (6 H. and N., 488); *Reg. v. Sheffield Gas Co.* (18 Jur., 146). In the *Queen at the prosecution of The Stoke Gas Co. v. The Longton Gas Co.* (6 Jur. N.S., 601) the defendants were held to be indictable. They were authorized to interfere for public purposes, but not for private purposes. In *Byrne v. Wilson*, in this country (unreported), where the omnibus fell into the canal at Portobello, the action was brought for the death, under Lord Campbell's Act. The defence was that the omnibus did fall in, but that the party would not have died if another party, over whom the defendants had no control, had not let in the water. That decides the point in this case. There was no joinder there of the two persons in an act of trespass. The defence was held to be bad. Apply that to this case. The immediate cause of the death was the act of the lock-keeper; but the primary cause was the negligence of the omnibus driver. [*Monahan*, C. J.—In the present case the defence is that the defendants employed Mr. Meade, and that case would have been like this if the defendants had pleaded they had employed the man to pull the party out and he let the water in.] In *Duncan v. Findlater* (6 Cl. and Fin., 909) Lord Brougham refers to *Bush v. Steinman*. [*Ball*, J.—In what case is it alleged that *Bush v. Steinman* was overruled?] None. Lord Denman speaks of it in commendation. They were not dealing with a nuisance in the case in which it is said that the reason in *Bush v. Steinman* cannot be supported. [*Monahan*, C. J.—We would follow *Ellis v. the Sheffield Gas Co.*, if undistinguishable from the present, and leave

the parties to appeal.] The counts allege that the defendants caused and procured the public nuisance to be erected; and the defence states that the Corporation employed a contractor, over whom they had no control, and ends by saying the injuries were occasioned by this contractor's negligence. There is a class of cases which show the defence not to be sustained by this, assuming it was not contradicted by the other averments on the record. The defendants will not be excused by showing there was negligence in a third person, over whom they had no control. [Monahan, C. J.—The only thing is, that it was not *qua* nuisance it injured the plaintiff.] *Lynch v. Nurdin* (1 Q. B., 29.) The defendant left his horse and cart in the street: a child got up on the cart, another child led the horse on. The defendant was held to be liable, though there was negligence in the plaintiff. That case is cited in *Hughes v. Mafie* (9 Law Times, 513. [Monahan, C. J.—That case seems contrary to the last case.] No: the thing fell upon the two children. Hughes contributed. If Abbott had not been playing with Hughes, Hughes would have been responsible. *Byrne v. Wilson* also comes within this class of cases. Lefroy, C. J., stated in his judgment "it was the consequential result of the defendant's act." The defence stated that merely bodily injury would have ensued if the lock-keeper had not let in the water. Though a matter be averred in the pleading, yet the Court will look at the whole record, and see if it is contradicted by other averments. It is said here that this was occasioned solely by Meade's negligence. It appears from the record that the primary occasion of the injuries was, as in the case in EL and BL, the act of the defendants. The defendants are answerable, although the secondary cause was the interference of a third person using the materials.

*Palles* (with him *Barry*, Q.C.) in support of the defence.—The entire ground of liability is this, that an employer is always liable for the thing he ordered. *Qui facit per alium, &c.* Where the thing is lawful nothing can arise, except from the unlawful mode in which it is done; and as the employer is not liable for the unlawful mode, there is no liability in that class of cases. Secondly, if the act be unlawful, if the contractor does the thing, the person ordering is as much liable as the contractor. The question is, was the thing that caused this accident the thing ordered to be done? [Monahan, C. J.—You admit that the Corporation would be liable if the accident was caused by the thing they ordered?] Yes. [Monahan, C. J.—Suppose the Corporation ordered me to erect a nuisance across a street, and I did so, and killed a woman in doing it, would the Corporation be liable?] They would not. The judgment in all the cases cited upheld the liability, because the thing was the thing ordered to be done. If a party orders a lawful thing to be done, he is not liable at all; but if unlawful, he is liable, if the act be the act he ordered. We do not admit that the thing we ordered was a nuisance, but we admit the thing done was a nuisance. [Monahan, C. J.—The only distinction which, though fine-drawn, is intelligible, is that the Corporation ordered the nuisance to be made, but that it was not its being a nuisance caused the injury, but the negligent way it

was made.] The fifth defence alleges that Meade is an independent contractor. [Monahan, C. J.—You do not aver, if it be material, that the Corporation did not adopt the work when done.] There are two distinct averments here—1. The injury was not occasioned by the thing we ordered. [Monahan, C. J.—Though that thing was a complete nuisance.] 2. What did cause the injury was the negligence of Meade and his servants. [Monahan, C. J.—That is, the negligence in erecting the nuisance you ordered to be made.] In *Ellis v. Sheffield Gas Co.* the act directed to be done was the opening of a trench, and the consequence was that the plaintiff fell on the heap dug up out of the trench. [Monahan, C. J.—How do you show they were ordered to leave the stones there?] [Keogh, J.—You have passed over Lord Campbell's judgment, except a small portion of it. It seems made for this case, and has strong commonsense.] The case would be the same as this case if a person had knocked his head against a bridge, or if a horse were frightened and ran away. [Keogh, J.—There was no contract in that case to take up rubbish. Your argument is, that if the bridge were so low as that a party struck his head against it, the defendants would be liable; but if a beam were fixed loosely and fell, they would not.] [Monahan, C. J.—Is there any affirmative decision for your argument?] None directly. [Keogh, J.—Everything necessary to support the plaintiff in this case occurred in *Ellis v. Sheffield Gas Co.* The act was a nuisance; then the injury collaterally arose. As a part of the thing not to be done at all, the contractor put rubbish on the pathway and the person fell against it. I cannot see the distinction between that case and this, where the beam fell and injured the party. There was this distinction—that there the thing was on the ground, here it tumbled on the party. The work in this case was unlawful.] No one is responsible for collateral negligence in another, except where the relation of master and servant exists. The express averments in the defence distinguish the injury from the nuisance, and show it to be wholly collateral and independent. [Monahan, C. J.—What Act of Parliament gave authority to erect this?] 12 & 13 Vic., c. 97, and 14 & 15 Vic., c. 34 give power to shut up streets for repairs, and to make fences. [Keogh, J.—That is the nearest to the present—to make fences.] There cannot be shown a specific power to erect the model of a railway. [Monahan, C. J.—Show an authority that if you erect a nuisance under an Act of Parliament you are at liberty to plead law and facts together without telling us the facts which justify it.] The only case of such a plea is *Connolly v. Dublin and Drogheda Railway Co.* (3 Ir. C. L. R., 255.) That plea under the existing law would have required all the facts to be set out authorized by the Act of Parliament. It is *a fortiori*, because that was a private act. The plea was sought to be set aside as not tendering issues which could be tried, and Monahan, C. J., said, "We cannot set aside this plea; if it be not correct in point of law, the plaintiff's course is to demur." *Brownlow v. Metropolitan Board of Works* (13 C. B., N. S., 768.) "Management of all streets" entitles us to erect anything we like across the street, subject to an indictment. [Monahan, C. J.—To erect a nuisance?] Yes. [Keogh, J.—

Does it not rest on you to point out the Act which justified you in doing the thing complained of?] The action should be on the statute. If we do the thing negligently we are liable under the statute. We may do as we like, subject to an action being brought against us. The question will be whether these Acts give any power to do what but for them would be a nuisance. [Monahan, C. J.—If a carriage were broken in consequence of a nuisance in the street, I do not think that the plea would be good unless it said that in pursuance of the Act these things were erected to repair the street.] C. L. P. Act, 1853. [Keogh, J.—It would result in this, that if an Act allows a nuisance, the Corporation can do anything which is not allowed, and the party has only a trial of an action, and there can be no demurrer.] It may come to that. [Monahan, C. J.—There are several Acts in which "Not guilty, by statute is given, and the particular plea is set out." That is all abolished by the C. L. P. Act, section 69. [Monahan, C. J.—How does that authorize this plea?] Under that Act it is sufficient to say that an act complained of was done in performance of a duty of a magistrate, suppose, and that no notice had been served. The only course is to take issue on the plea. [Monahan, C. J.—Where is there any section of any Act which would authorize this erection?] It is not necessary to show any. Dublin Metropolitan Act, section 63.

Macdonogh, Q. C., in reply.—The management of the streets in every section is connected with the mode and method of the management. A nuisance is never perpetrated where the streets are broken up. Barriers and lights are placed round. The Corporation are to act *pro bono publico*. *Reg. v. Train* (2 Best and Smith, 668.) It is said we are to send an issue to the jury to try if there be an Act of Parliament which justifies this nuisance. In *Connolly v. Dublin and Drogheda Railway Co.* this Court gave no encouragement to this kind of pleading. We have taken the advice in that case, because we have demurred. The fourth plea could not stand at common law. Magistrates had a right to plead under a statute, but it was only where a particular plea was introduced by the statute. That was abolished by the C. L. P. Act 1853. The defendant must traverse or show facts in confession and avoidance. The defendants here should show a particular Act. With respect to the fifth plea, where the party averred the doing of lawful acts, and the doing of them negligently—if the defendant pleaded they were not done by himself or his servant—that he had contracted, and through the negligence of a servant of that contractor the injuries had resulted, the defendant could not be made liable. But with respect to unlawful acts, that doctrine is unauthorized. Suppose that six parties go out to poach, one knocks down the keeper and kills him: all are guilty of murder. In trespass, as in treason, the two extremes of the criminal law all are principals. There is no statement in this plea that the defendants and their servants did this, but that they did it, no matter how. They all committed a crime. Where any mischief arises from the materials of the nuisance, they are liable. Suppose the contractor contracted under seal to keep the nuisance there for ten days, and he kept it eleven days, would it be said it was the act of the contractor vio-

lating his contract by keeping it a day longer? *Rippen v. Cubitt* (9 M. and W., 710); *Matthews v. West London Waterworks Co.* (3 Campbell, 403); *Knight v. Fox* (5 Ex., 721). The order must be lawful, and the relation of master and servant must not exist, and if so, the party is not responsible. [Monahan, C. J.—What is the meaning of the words of Lord Campbell in *Ellis v. Sheffield Gas Co.*, "and in so doing?" Wightman, J., who tried the case, knew the facts, and if his opinion be right, you must have judgment; but there seems to have been an impression on the mind of Lord Campbell that this was part of the thing ordered to be done.]

*Cur. adv. vult.*

Jan. 30.—MONAHAN, C. J.—We wish to tell the counsel for the parties that we shall insist on their altering their pleadings, so as to tell what they mean. We cannot give judgment on this demurrer as it stands. I need not go into the plea. The defence says the injuries were not, nor any of them, caused by the erection of the said structure, &c., but solely by the said Michael Meade and his servants negligently permitting a portion of the timber employed in such erection and construction to fall upon the plaintiff, and but for such negligence such injuries would not have been occasioned. We find it impossible to understand this, and if trying the case at Nisi Prius I would not know what it was, and would insist on its being amended. We want to know was it a portion of the building, or of the scaffolding, or was it a piece of timber which was not attached, but which these people were carrying, and which fell on the plaintiff.

KEOGH, J.—"Erection or construction" are the words used in the pleadings, and these are ambiguous.

The summons and plea and the fifth defence were accordingly amended as follows:—The first count complained that before and at the time of the committing of the grievances as hereinafter mentioned they, the defendants, in a certain common and public highway, situate, to wit, within the borough of Dublin, called, to wit, Westmoreland-street, then being the Queen's common highway, and used by her subjects to pass and re-pass at all times of the day or night, unlawfully and injuriously did cause and procure to be erected and constructed a common nuisance, that is to say, a certain structure or pile of wooden buildings running across said street, and intended to represent the site or position in which it was proposed by certain parties that a certain bridge, if constructed, would cross the said highway; and also did cause and procure divers large quantities of scaffolding and timber to be placed along and across said highway for the purpose of being used in the erecting of said structure; and did also cause a certain machine called a shear-legs to be employed in and about the said erection of said structure or nuisance, that is to say, for the purpose of raising into position pieces of timber to be used in relation to said structure, whereby not only was the thoroughfare in said street greatly obstructed and impeded, to wit, for the space of two days, to the common nuisance and danger of all her Majesty's subjects passing along and through said highway, but likewise by means of the premises the plaintiff, while lawfully being and passing in and upon

mid highway, was crushed and struck down to the ground by a certain portion of the timbers connected with said scaffolding or structure suddenly falling upon her, the plaintiff, or by the slipping from its place of the said shear-legs whilst the same was being raised into position at or near the site of said structure, or whilst a piece of timber intended to form part of said structure was being raised by means of said shear-legs from the ground to its place in said structure. By means of the committing of the said grievances she, the plaintiff, not only suffered and underwent great pain, and her life was thereby greatly imperilled, but she has been permanently injured; and she hath also from thence hitherto been wholly unable to follow her ordinary occupation and business as assistant in Messrs. Lindsay's silk mercery establishment, whereby she was enabled to earn large gains; but she will also, by reason of said injuries so sustained by her, be unable again to resume said business. And she hath also incurred divers large expenses in and about endeavouring to be cured of said injuries, and hath by reason of the premises sustained damages, to wit, to the amount of £3000. The fifth defence was as follows:—The defendants say that before the committing of the acts, or any of them, in said count complained of, the defendants contracted with one Michael Meade (then being a well-skilled, qualified, and proper person for that purpose) to erect and construct for the defendants the structure in said count mentioned over the highway in said count also mentioned; and under such contract the said Michael Meade had the entire and sole control, management, and superintendence of the construction and erection of said structure, and of all matters necessary for the purpose of erecting the same; and the defendants, under said contract, did not retain nor had any control, management, or superintendence thereof; and the said Michael Meade and his servants erected and constructed the said structure, and for the purpose of such erection and construction erected and constructed the scaffolding in said count mentioned, and placed such scaffolding and the timbers in said first count mentioned along and across the said highway, and did also cause the machine in said count called a shear-legs to be employed in and about the erection of said structure for the purpose of raising into position pieces of timber to be used in relation to said structure; the defendants did not, in fact, exercise any control, management, or superintendence over the erection or construction of said structure or scaffolding, or over the placing of such scaffolding and timbers along or across the said highway, and did not, save as aforesaid, erect or construct the said structure or said scaffolding, or cause or procure same to be erected or constructed, or, save as aforesaid, place, or cause or procure the said scaffolding or the timbers in said first count mentioned to be placed along or across the highway as in said count alleged, or, save as aforesaid, cause the said machine called a shear-legs to be employed in or about the erection of said structure. And the defendants say that the injuries complained of in the said first count were not, nor were any of them, occasioned by the erection or construction of said structure, or by the erection or placing of said scaffolding or timbers along or across said highway,

or by the obstructing or impeding in said count complained of; but that said injuries and each of them were occasioned solely by the negligence of the said Michael Meade and his servants. In this, to wit, that the said Michael Meade and his servants negligently placed the said machine called a shear-legs in so insecure a manner that by reason of such negligence the said shear-legs either whilst the same was being raised into position at or near the site of said structure, or while a piece of timber was being raised by the said shear-legs from the ground to its place in said structure, slipped from its place, and struck the plaintiff and caused the injuries complained of, and said injuries were not caused otherwise than by such negligence of said Michael Meade; and but for such negligence such injuries would not, nor would any of them, have been occasioned.

June 8.—*Byrna*, in support of the demurrer.—*Overton v. Freeman* (11 C.B. 867) excludes the case of a nuisance from the general rule, according to the judgment of Cresswell, J., who says—"If the act would itself have been a public nuisance of course the defendants would have been responsible." No doubt, two of the judges threw out doubts, but both in subsequent cases showed they altered their views. In *Peachey v. Rowland* (13 C.B. 185). Maule, J., says—"If the thing complained of could not be done otherwise than in an unlawful manner, no doubt they would be responsible." Where an employer employs a person to do what may be lawfully done, if from want of due precaution against the danger an accident follows, the employer remains responsible. *A fortiori* this applies to where the act is not lawful, where all the probable consequences are mischievous. The criminal law with reference to excess in executing orders to commit a crime applies to this.—3 Hawk. c. 29. The defendants do not allege that the putting up of the shear-legs was unfit or unnecessary. [*Monahan, C. J.*—They do aver that though they employed Meade to do all these, that it was not the employing Meade but the negligence of Meade which led to all this.] Considerations drawn from the criminal law, it seems to me, were what led the Queen's Bench in England to the conclusion to which they came in *Ellis v. Sheffield Gas Co.* (2 El. & Bl. 767). Wightman, J. says—"But for the direction to break up the streets the accident could not have happened. I think the nuisance was the primary cause of the accident." If that be law, it is undistinguishable from the present case. [*Monahan, C. J.*—One of the difficulties in applying *Ellis v. The Sheffield Gas Company* does not apply in the present case. When this was formerly before us it did not distinctly appear what caused the accident. Now it does appear to have been the negligent construction of the shear-legs; but it appears to me now the shear-legs was erected by the direction of the corporation. There is no averment in the defence that Meade was not appointed to erect the shear-legs.] Whether Erle, J.'s dictum were well founded or not, our case falls within his observations. *Hole v. Sittingbourne and Sheerness Railway Company* (6 H. & N. 488). This case is undistinguishable from these two cases.

*Serjeant Armstrong and Pales, contra.*—The allegation in the first count is not that we employed any per-

son, but that we caused to be erected a nuisance, and caused to be erected a shear-legs. We do not aver the employment of Meade was for no other purpose, nor do we say this was the only purpose. We go on to say what Meade did; and that was, first, to erect the structure, then the scaffolding mentioned in the count, and thirdly, he placed it across the highway, and fourthly, he caused the machine to be employed for the purpose of raising pieces of timber to be used in the construction of this structure. The nature of the defence is—1. We employed Meade for specific purposes. 2. He did certain things; nor, save as aforesaid, did we cause the said shear-legs to be erected; i.e., having alleged Meade employed the shear-legs, we say we did not cause the shear-legs to be raised. [*Monahan, C.J.*—You do not allege that it was not necessary.] Nor do they allege in the count that it was necessary. We aver the proximate cause was the negligence. As to the criminal cases and the doctrine that the person is responsible for all the consequences of an act directed to be done, we are not charged in that way. There is not an averment that the cause of the accident was the negligence of the contractor. All the grounds of *Overton v. Freeman* are in our favour. Upon the averments in this defence there is nothing to show the corporation employed Meade to erect the shear-legs. We did not interfere farther than to employ Meade; and the injury did not arise from doing the thing we employed him to do, but from the instrument Meade used in doing the thing. The question is—whether on the facts now before the Court this case is not essentially distinguishable from *Ellis v. Sheffield Gas Company*. No case goes to this: that if we employ a man to erect a public nuisance, we are responsible for the negligent use of a tool. [*Monahan, C.J.*—It appears on the pleadings that it was fixed on the ground.] Can it be collected from the plaint that the employment of this tool was necessarily connected with the structure? [*Monahan, C.J.*—They charge that you were causing it to be employed.] They say first we caused a structure to be raised, and then we also caused this to be employed. That second thing is a different thing. It is the case of a tool slipping out of a workman's hands which we never authorized him to use.

*MacDonogh, Q.C.* was not called on to reply.

*MONAHAN, C.J.*—We are of opinion that this is undistinguishable from the case in *Ell. & Bl.* There is an express charge of a common nuisance. It is charged that certain scaffolding was caused to be erected; that the defendants caused to be erected this shearlegs, which was for the purpose of raising timber. They are charged with causing these things to be done. The defence says we employed Meade to erect the bridge. There is no allegation that the defendants did not employ him to erect the shear-legs. We think the case comes not merely within the reasons of Lord Campbell, but even within those of Erle, J., whose judgment it was that on the former state of the pleadings gave me some doubt if this case came within it. Mr. Byrne has argued the case in a very able way, and his argument has received no answer. This demurrer must be allowed.

*CHRISTIAN, J.*—I do not take any part in the decision, because the case was fully argued when I was

not here. The amendments which have been since made have been with a view to that argument.

*Judgment for the plaintiff.*

*SCRIBER v. M'CANN. Jan. 30, 1864.*

*Amendment of summons and plaint.—C. L. P. Act 1853, section 231.*

*To a summons and plaint which contained a count for goods bargained and sold, the Court, on the application of the plaintiff, allowed him to add a count for goods sold and delivered, giving the defendant four days to plead.*

*Palles* moved to amend the summons and plaint in this case, by adding a count for goods sold and delivered. There is a count for goods bargained and sold. We have made an affidavit that the defendant cannot be misled; that he knows the cause of action; that the mistake was not discovered till pointed out by the counsel. The action is brought for the price of an organ. There is no answer to that affidavit. The question is if this is to be without prejudice to the notice of trial. The amendment would have been made at the trial if we went to trial as we are. The section which gives this power is the same as gives it to a judge at Nisi Prius.—*C. L. P. Act, 1853, section 231.* The Court can impose terms on us as they think proper. It is the nicest question, whether a count for goods bargained and sold, or for goods sold and delivered, would lie. There is a recent decision in the Court of Common Pleas in England to the effect that a count for goods bargained and sold would not do. The Court have the same discretion as the judge at Nisi Prius; and it is possible a judge at Nisi Prius would postpone the case for two days, that the defendant might see if he had any answer, but would not change the notice of trial.

*Abraham contra.*—If the consent had proposed to us liberty to amend, subject to our having time to plead, I would not have objected; but the condition attached was that it should be without prejudice to the notice of trial. This is not a clerical error. The solicitor should have availed himself of the counsel's assistance sooner. The insertion of this new count makes a new action. "Bargained and sold" would have required a writing. We want twelve days to plead.

*MONAHAN, C. J.*—Let Mr. *Palles* add a count for goods sold and delivered, and let the defendant have four days to plead—the cause to be transferred to the special jury list. The defendant is to have the costs of this motion.

*Rule accordingly.*

*MAGRATH v. O'GORMAN.—Jan. 30, 1864.*

*Demurrer.—Summary Bills of Exchange Act, 24 & 25 Vic., c. 43.*

*It is not competent to a defendant against whom an action has been brought under the Summary Bills*



of Exchange Act, to file a demurrer, any more than to plead a defence of fact without the leave of the Court.

T. White moved that the judgment marked in this case might be set aside—that the demurrer might be allowed to be argued—that the writ of execution and the judgment be withdrawn—or that the Court direct all the proceedings to be stayed. The plaintiff was the indorsee of the bill, £20 and 2s. 6d., and 10s. costs of attorney's letter was demanded. The defendant and the drawer of the bill went to the office of the attorney, and tendered £20 and the 2s. 6d., which he declined to accept without the 10s. The writ was bad, and a demurrer was filed to it. The proceedings were taken under the Summary Bills of Exchange Act. There was not leave to defend obtained, and it was not necessary. The judgment was marked. We got liberty to lodge the sum and to stay proceedings. The plaint does not say there was any indorsement by the payee. The word "or" in the sentence "any appearance or defence" in section 1, is the only word which would give a color of reason for supposing that a demurrer must have leave, in order to be filed; but that is a mistake in the Act: it should be "and"—it should be "appearance and defence," not "appearance or defence." In *Copeland v. Armstrong* (13 Ir. C. L. Rep. App. xlvii.) it was held that the provisions of the C. L. P. Act are incorporated with this Act. This is a penal Act, taking away the common law right, and, therefore, is to be construed strictly. Unless there be something in express terms, or by necessary implication taking away the right, the Court cannot take it away. A demurrer and a defence are in no instance confounded. The terms legal and equitable defence are fully recognised by the C. L. P. Act. The words "the defence and replication and subsequent pleadings" in section 56 show matters *in pais* are meant. [Ball, J.—The preamble speaks of "frivolous or fictitious defences." Your construction would make the Act fail of its object.] There is a remedy for a frivolous demurrer, because it can be set aside. The 59th section takes a distinction:—"The defendant may plead and demur." If defence is to include a demurrer, was there ever a replication to a demurrer, or a demurrer to a demurrer? [Monahan, C. J.—Is there anything in the Bill of Exchange Act to prevent a writ of error? Is it not *ex deb. jus.* for a defendant who has a judgment by default against him to bring a writ of error? If we refuse this motion, is there anything to prevent you from giving security and bringing error on this judgment? Under the old law, as a matter of course, a party could do so.] [Keogh, J.—It could be done under the 170th section.] Why should defence mean demurrer in this Act, and not in the C. L. P. Act? The 81st section is to the same effect. In *M'Loughlin v. Jeffers* (12 Ir. C. L. Rep., Appendix i.) a defendant who pleaded without leave, got leave to retain his plea. Look at the morality of the case. Mr. Lawless has made an affidavit which withholds that part which stated that the 10s. 6d. was demanded. The letter says, "I have been instructed to apply, &c., and unless same shall be paid, with 10s. 6d. costs of this application," &c. This is signed

by Lawless. Lawless's affidavit says the defendant received the proceeds of the bill, that the deponent ascertained that leave had not been obtained from the Court, and that a contrivance had been used to mislead the officer of the Court, for the purpose of getting the pleading on the file, as the officer would not have allowed it to be filed without the leave of the Court; that as he was leaving the Court he was asked to wait a few moments for a pleading that was about to be filed; that after that, or in the morning, somebody put the pleading on the desk; that the defendant called on him and asked him not to expose him; and that, he says, was to get time to get the order we did from the Court. It would be very hard on us to allow this judgment to remain against us. [Monahan, C. J.—If the demurrer be rightly filed it is *ex deb. jus.*] *Jones v. Jeffreys* (7 Ir. C. L. R., 13.)

*Jellett contra.*—The defendant says a demurrer does not come within the terms of this Act. The words "appearance and defence" are used in the C. L. P. Act, to mean either a defence or demurrer. The appearance and defence are all one, whether that be a defence in law or of fact. Section 39 says, "With respect to the appearance and defence," &c.; then it says, "file an appearance and defence or demurrer"—i.e., it classifies. The observation is new which precedes some eight or ten sections. It states, we now proceed to legislate for appearance and defence. The 43rd section puts the matter beyond doubt. If that section does not cover a demurrer, a defendant may file it within any time, and there is no limit, and will it be contended, nine years after this Act was passed, that the party must not demur within so many days? A frivolous demurrer was one of the most common ways of delaying the plaintiff; and the preamble of this Act says it is for avoiding delays. As to the merits of the case, what was the meaning of calling the defendant a remote indorser? He got the money. [Monahan, C. J.—He is called that to show there should have been an indorsement by the intervening party.] The tender was not a good legal tender, when he offered the £20 and the 2s. 6d. What is the form of judgment by default for want of defence? If defence does not include demurrer, one could not mark judgment where there was a demurrer which was overruled.

MONAHAN, C. J.—In this case, which has been argued at considerable length, it would be a very extraordinary result if the party were to be at liberty to file a demurrer, though not a plea, without the leave of the Court. [His Lordship read the section of the Summary Bills of Exchange Act.] So that the defendant must get leave both to appear and defend. It would be strange to infer it was the intention of the Legislature that, no matter how bad the defence, a demurrer might be filed. [His Lordship read the preamble. The party is at liberty to mark judgment. Are we to set it aside when regular? Why did the defendant not plead in sufficient time? He showed what seems to have been a very little short of a legal tender. The defendant must pay the costs of this motion; and let the officer pay over the sum to prevent any further application to the Court.

*Rule accordingly..*

WATTS v. BRENNAN.—Jan. 30, 1864.

*Ejectment for non-payment of rent—Common Law Procedure Act, 1853, s. 223—Withdrawal of defence.*

*The 223rd section of the Common Law Procedure Act, 1853, which provides that "a sole defendant, or all the defendants in ejectment, shall be at liberty to confess the action as to the whole or part of the property by giving to such plaintiff a consent for judgment," &c., applies to an action of ejectment for non payment of rent.*

Clarke, Q.C., moved that the plaintiff might be at liberty to proceed with this action notwithstanding the consent entered into by Crofton, one of the defendants; and, if the Court should think fit, that such consent be taken off the file. The action was an ejectment for non-payment of rent. Brennan took premises in Aungier-street and Clanbrassil-street from Watts, the father of the plaintiff, who was a minor, at one rent, and subsequently let the premises in Clanbrassil-street, called Emor-villa, to Crofton. Crofton was the only one who took defence, but he was not the sole defendant. Brennan is made the defendant as well by the summons and plaint, but he took no defence, and has since died, and has left, we believe, his affairs in confusion; and Mr. Crofton, the other defendant, thinks no person will ever take out administration, and that he will be able to keep the rent in his pocket which he owed to Brennan. He is sole surviving defendant. But there is nothing to prevent us from continuing the proceedings against the representatives of Brennan. We say Crofton is not a sole defendant. We cannot get a *habere*.

Sidney, Q.C., and Coxe, contra.—Emor-villa was demised by Brennan to Crofton at a rent of £100 a year. Brennan allowed his rent to fall in arrear, and an ejectment was brought. We filed a defence which, we must admit, was for time, when we found we could be put out in twelve days. A consent was taken. The plaintiff marked judgment against all the defendants. He then sought to withdraw his act. He moved for liberty to set aside the consent and judgment. We did not oppose that, and the Court told him to go on as usual. Then comes the question—whether Mr. Crofton cannot withdraw a defence in any species of action without the leave of the Court. There are circumstances under which a defendant may take defence for a portion of the premises—C. L. P. Act, 1853, s. 199; *Murphy v. Tuohy* (3 Ir. C. L. R., 226). [*Monahan, C. J.*—That was by consent of the plaintiff.] There is nothing in s. 224 limiting it to ejectment on the title. [*Monahan, C. J.*—You say there is a general right in every defendant in every personal action of ejectment to withdraw his defence irrespective of any Act of Parliament. Where is the authority for that?] It would be hard on our client, who is sorry for his errors and willing to pay the costs, to have to go to trial to try a point of law. The question is—whether a defendant in ejectment for non payment of rent, after taking defence, can withdraw his defence. Ferguson's Practice, p. 600, shows that before the Act it was as

of course with a stay of execution. The 46th order says it shall not be with stay of execution, and without the leave of the plaintiff. [*Monahan, C. J.*—All the sections but two apply to both sorts of ejectment.] It is a narrow construction to say "sole defendant or all the defendants," means defendants named in the summons and plaint.

*Richy in reply.*—The questions are—whether these two sections, 223rd and 224th, apply to ejectment for non-payment of rent? and 2ndly, does the defendant come within them at all? Ejectment includes both in the preceding sections. But the contents of the 223rd section show it is there confined. In the 199th section a defendant must defend for the whole; but the section goes further, and says he may apply for the leave of the Court to defend for a part. *Prima facie*, where the defendant can defend for a part is where the action is in tort for questions outside ejectments of that nature, although the action be in the form of an ejectment for non-payment of rent. Supposing the section does apply, does the defendant come within it? There are four cases where the defendant can take advantage of the privilege. *Prima facie* this defendant does not come under any of these unless it be under that of sole defendant. No doubt, he is the sole defendant in *rerum natura*; but the sole defendant must be ascertained by the record, not by the accident of death and survivorship. [*Monahan, C. J.*—The only real question is—if this section applies to ejectment for non-payment of rent.] There is no provision for ascertainment of the rent where the judgment is by confession. [*Monahan, C. J.*—The question is—if a judgment by confession is a judgment by default within that 206th section.] A judgment by default is quite distinct from a judgment by confession.

*Cur. adv. vult.*

Feb. 1.—MONAHAN, C.J., said that there was no doubt but that the section did apply to ejectments for non-payment of rent, and therefore the motion would be refused with costs.

*Motion refused.*

DEXTER v. LLOYD.—Feb. 1, 1864.

*Ejectment for non-payment of rent—Setting aside defences.*

*In an ejectment for non-payment of rent, the Court refused to set aside the defence "that the defendant did not, at the commencement of the suit, nor does he now, nor does any other person, hold as tenant or tenants to the plaintiff."*

Barry, Q.C., moved that the defence in this action, which was an ejectment for non-payment of rent, might be set aside as a sham, and embarrassing. It is ambiguous, and does not show whether the defendant means to deny the tenancy under us, or our title. The defence is, that the defendant did not at the commencement of the suit, nor does he now, nor does any other person, hold as tenant or tenants to the plaintiff. He might show under this that he does not hold the

lands, or that he does not hold as tenant to us, or that we have no title to the lands. The defence is taken by Flannery, who is gone to Australia, leaving his wife and family in possession. By the new L. & T. Act a reversion is not necessary. [Monahan, C. J.—How did you serve Flannery?] We served his wife. [Monahan, C. J.—Is that good service?] Clarke, Q.C. (*amicus curiae*), said that the Act allowed the wife, child, &c., to be served at the defendant's residence. [Monahan, C. J.—Then the question is, if that be his residence when a man is known to have gone permanently to Australia. Where is the authority for the Court to set aside this plea?] I do not think the authorities aid me; but I ask it to be set aside as ambiguous. Again, the defence is taken without the authority of the man in Australia.—*Stokes v. Hartnett* (10 Ir. C. L. R. App. xx.).

*Motion refused.*

Savage v. Mapother — April 24, 1864.

*Prochein Amy.*

*The prochein amy of an infant suing need not be the father (per Christian, J.)*

*Purcell*, for the defendant in this case, applied that the *prochein amy* of the plaintiff, who was a minor, might be removed and a solvent person appointed. The plaintiff had been the domestic servant of the defendant. *Watson v. Fraser* (8 M. & W. 660); *Duckitt v. Satchwell* (12 M. & W. 779); *Lees v. Smith* (29 L. J. Ex. N.S. 294); *Ronayne v. Perrin* (10 Ir. C.L.R. app. 36). The cause of action in this case occurred so far back as September last. [Christian, J.—In the case in 10 Ir. C. L. R., was the party a bankrupt or insolvent?] It does not appear.

*O'Driscoll, contra*.—The summons and plaint was served in February. The last day for appearance was the 3rd March.—*Yarworth v. Mitchell* (2 Dowl. & Ry. 423). "An infant who sues by his *prochein amy* need not give security for costs, even though the *prochein amy* is sworn to be insolvent." It is nowhere laid down that the father is to be *prochein amy*.—*Hayes v. Carr* (3 Man. & Gr. 852).

*Purcell* was not called on to reply.

MONAHAN, C.J.—The *prochein amy* is a wandering sailor who has great expectations, but nothing at present. There is no ground to believe there is any truth in the case made of the father being disabled and his intellect affected. The motion must be granted.

CHRISTIAN, J., concurred in the rule solely on the ground of the observation in Baron Parke's judgment, believing that an imposition had been practised on the Court, and considered there was no such doctrine as that the father of an infant must be the *prochein amy*.

*Motion granted.*

FAWCETT v. TOWNSEND.—April 25, 1864.

*Nonsuit—Liability of county surveyor.*

*Semble—Upon a new trial or non-suit motion, it is not a sufficient reason for rejecting the counsel's certificate, that it contains something that is not in the judge's report.*

*Battersby*, Q.C., showed cause against a conditional order to set aside the non-suit in this case. The summons and plaint complained that the defendant wrongfully suffered certain rubbish placed by him on the highway to remain during the night without any light, or any means to prevent any person from driving against the same, whereby the car of the plaintiff was upset, &c. The second defence stated that the defendant did not place the said stones or rubbish on the highway. By the judge's report the plaintiff's evidence was, that the wheel came on the rubbish and the car was overturned; witness was at his own side. The knees of the pony were broken, and the car was broken. There was no evidence that the men who left this rubbish there were the defendant's workmen. The defendant was county surveyor. The declaration did not allege that he was county surveyor, but the plaintiff seeks to charge him in that capacity. [Christian, J.—It was upon those two grounds that the judge non-suited; first, that he was sued personally as having himself placed the rubbish there; secondly, that he was not liable as county surveyor.] Upon this the Court thought it better to hear what was the evidence when the ground of non-suit was that there was no evidence.

*Dowse*, Q.C., for the plaintiff.—It was not intended to make this action out on the ground of the defendant being county surveyor further than that he was liable for the acts of the persons in his employment. The question is, if there be evidence to go to the jury that he did the act complained of. If this highway were in the ordinary state, the surveyor would no more be liable than anyone else. It would be against the contractor we should go; but the contractor not having done his duty, the surveyor was put in direct privity with the road. There was no way of showing these persons were not in his employment unless they were trespassers. It would have been easy if this point was made to have asked any of these men if they were in his employment; but it was upon high constitutional grounds that the defendant's counsel objected. Mr. Byrne's certificate, backed up by the Chief Justice's silence, will be some representation of what took place. The defendant offered us £20 to compensate us, and that was some evidence to go to the jury.

*Battersby*, Q.C., and *Dames, contra*.—It would be a hardship on an officer who is liable for hundreds of miles of the road if he had a verdict against him without evidence. [Monahan, C.J.—If the counsel's certificate state something which is not contradicted by the report of the judge, it is not a reason for rejecting the certificate; the way might be to send back the report. Christian, J.—When I wrote to the Chief Justice I stated there was a controversy in open Court as to the grounds of non-suit, and he does not contradict the certificate of Mr. Byrne in his

amended report.] It ought to be shown that the men were repairing the road, and there is no evidence they were. Even if they were, if this was not a part of that business, the county surveyor would not be liable. The county surveyor is obliged to inspect the roads. In this particular case of their being given to him in charge, he has no more liability in consequence of this Act.—20 & 21 Vic. c. 15, ss. 1, 2. He cannot pay the men; he can only certify, and the grand jury pays. It is not in the nature of things that he could be present all over the roads to see that everything was done right—*Stone v. Cartwright* (6 T. R. 411); *Peachey v. Rowland* (13 C.B. 182); *Young v. Davis* (7 H. & N. 760). He is a public officer, and would not be liable for a wrongful act unless done by his express directions—Addison on Wrongs, 170. For thirty years, persons have been in the habit of putting rubbish on the road. The sole evidence even in Mr. Byrne's certificate is, that the witnesses saw men doing what, under the county presentment, they would have no right to do. It leads to a contrary inference. It is notorious that in the country persons scrape off the road for the purposes of manure. [*Monahan, C.J.*—I quite understand that if it appeared distinctly that the non-suit was asked for because there was no evidence but if a non suit be taken on another ground.] As to the fact of offering £20, in *Hoghton v. Hoghton* (15 Beav. 321), the point arose. Supposing the offer ever was made, it cannot be made use of against us. The Act *per se* imposes no such liability. Many of the roads in Ireland are in the hands of the county surveyor at present owing to the scarcity of labour. He does not get any remuneration under this Act for what he has to do. [*Christian, J.*—You do not plead that he is county surveyor.] The plaint is somewhat curiously framed.—*Buller v. Hunter* (7 H. & N. 826). If the offer of compromise be relied on, it ought to have been so put to the judge at the trial. *Thomas v. Morgan* (2 Cr. M. & R. 496).

*Byrne* in reply.—There are two grounds for setting aside this non-suit. It was not substantially called for on the ground on which it is now sought to be sustained. That defect could at the trial have been supplied. There was evidence, 19 & 20 Vic. c. 63. As to the offer, there is this evidence, that £20 was offered and was refused.—1 Taylor on Evidence, 681; *Nicholson v. Smith* (3 Stark. Rep. 128).

*MONAHAN, C.J.*—We are of opinion that this non-suit cannot stand. We would rather come to the conclusion that the objection was not taken in a proper way at the trial. If the objection, that the men were not in the employment of the defendant were then taken, it would have been competent to the party to go into evidence of it. We think there was some evidence this was put there by parties employed to repair the roads. With respect to the non-liability of the surveyor, we do not think the case ripe for a decision on that point unless we were prepared to hold that under no circumstances the surveyor would be liable. The question is, if the work was done by him; if so, it is a serious question if he should not have pleaded that it was done by him as surveyor. It may also turn out that even though em-

ployed, the acts really done by these men were *ultra* the employment; and he may succeed on the present issue. All we decide is, that we cannot allow this non-suit to stand, the circumstances not being satisfactory to the Court. The non-suit will be set aside, and a new trial directed.

*Rule absolute.*

*M'ENALLY v. WETHERALL.*—April 26 & 27, 1864.

#### *Construction of devise.*

*A devise in these terms, "I leave to M. M. my estate of T. freehold property, and the residue of all I possess, and in case he had no heir at the demise of the said M. M., my estate and freehold to be given to the first heir-at-law," is a devise of the entire interest with an executory devise over.*

*Law, Q.C.* (with him *Beytagh*), for the defendant in this case, which was an ejectment on the title. The testator's will contained the following clause:—"I leave to my brother, Michael M'Enally, my estate of Tullyharmon freehold property and the residue of all I possess; and in case he has no heir at the demise of the said Michael M'Enally, my estate and freehold to be given to the first heir-at-law." And the question was, whether this created an estate tail or a fee, with an executory limitation over.—*Forth v. Chapman* (Tudor L. C. 602); *Wyld v. Lewis* (1 Atkyn. 432); *Peyton v. Lambert* (8 Ir. C. L. R. 485). [*Monahan, C.J.*—How about stops in a will; is it as in an Act of Parliament, where you disregard them?] [*Christian, J.*—No doubt you might send for the original, but may you take out the stops?] It must be read as an Act of Parliament.

*Harrison, Q.C.*, and *Adair*, for the plaintiff.—This is a devise of the entire interest, with an executory devise over. There is no case where there is first a fee given and a subsequent limitation cuts it down to an estate tail.—*Parker v. Birks* (1 Kay & John. 156); *Ex parte Davies* (2 Sim. N.S. 114). In *Wyld v. Lewis*, there were only words which would give an estate for life.—2 Jarm. 494; Hawkins on Construction of Wills, 206. The reason of the decision in *Peyton v. Lambert* is given by Jarman. The cases on the other side can be all distinguished.—*Jones v. Ryan* (9 Ir. Eq. R. 249).

*Beytagh* in reply.—The heir-at-law must mean the heir-at-law of the testator. If it did not it would be more favourable for us; but I could not, after the case of *Doe v. Frost*, contend that.

*Cur. adv. vult.*

April 27.—*MONAHAN, C.J.*, stated that the judgment of the Court was for the plaintiff, saying that the case could not be distinguished from some of the cases cited.

*Judgment for the plaintiff.*

HOWARD v. ARCHER.—May 3, 1864.

*Judge's fiat—Misrepresentation by plaintiff—Form of the order to discharge the defendant.*

*Where a party who has been arrested under a judge's fiat is discharged from custody, the proceedings ought not to be set aside, but it may be different in a case in which the party obtaining the fiat has been guilty of misrepresentation.*

Harrison, Q.C. (with him Kaye), applied that the defendant in this case might be discharged from custody. He had been arrested under a fiat granted by Monahan, C.J. Upon the original affidavit of the plaintiff no rule was granted; and the same day the party mended his hand. The defendant is an attorney, and has a set-off for costs of work done by him for the plaintiff. The affidavit of the plaintiff alleged that he had come over from Glasgow in consequence of a letter received from a Dr. Savage, stating that if he did not take steps he would lose his debt; and that the defendant, in conversation with himself, had threatened to leave the country. The defendant was arrested in Armagh on the 22nd of April, the amount for which the fiat was issued being £29 6s. 4d. The defendant denies in his affidavit that he ever had any intention to leave the country; and in a short supplementary affidavit he says that the only sums he got from the plaintiff were £21 6s. 4d. and £29: that the business done by deponent for plaintiff was all *bona fide*; and that a greater sum than £5 could not possibly be taken off deponent's bill of costs. [It appeared, in answer to a question by Keogh, J., that the letter from Mark Anthony Savage to the plaintiff, telling him to take steps or he would lose his debt, referred to in the affidavit on which the fiat was got, was not present to be produced by the plaintiff's counsel.] In the affidavit last made by the plaintiff he denies that he was liable for the costs of a sale, for he says he considered himself bound to Stanley, another solicitor, for the costs attending it. [Monahan, C.J.—His case now is, that the costs were very small; his former case was, that there had been an agreement that he was not to be charged for some things.] [Ball, J.—Does he retract the statement in his last affidavit that he made before, that the defendant promised not to claim any costs?] No. [Christian, J.—Is there anything in the latter to corroborate the statement that he was about to leave the country?] No. [Christian, J.—Then the case rests upon the original affidavit, and that rests partly upon statements made by the defendant himself, and partly on this letter from Savage which is not produced.] [Monahan, C.J.—The only question is this: Let the plaintiff's counsel show that the affidavit on which the fiat was granted is a true representation of the letter from Savage.] His case is, that the defendant was not to charge him for costs; and Savage, on the contrary, speaks in his letter of a bill minus the costs. This was not the case of an officer going to join his regiment, or of a barrister going to London, but an attorney practising in Armagh. The plaintiff is a wine and spirit merchant in Glasgow.

Serjeant Armstrong and Hamill contra.—No doubt all the letters the plaintiff has are here. The defendant says, "If you do anything to me I will run out of the country." [Monahan, C.J.—The defendant

did wrong in representing that he had lodged money with the agent; but we cannot set off one wrong against the other.] There is a conflict of credit here. [It appeared that the fiat had been got on the 31st March, and was not executed till the 22nd April. The plaintiff's attorney, Mr. Vogan, here explained to the Court that it had been regularly sent by him; but he admitted that the plaintiff himself went down to Armagh on the next evening.] [Monahan, C.J.—The principal inducement to grant the fiat was not the conversation only, but that a respectable man, a doctor of the town, had communicated to the plaintiff the fact that the defendant was about leaving the country. I thought that a gentleman might do that, though he might be unwilling to make an affidavit of it. I recollect communicating to the parties that there must be a distinct statement of an amount due over and above. "How do I know but that there is a bill of costs? You must satisfy me the sum is due over and above all allowances." Then the affidavit is so made with a statement that the man was not to charge any costs. But the ground upon which we are acting is the misrepresentation in the affidavit. I saw in an early stage of the case that one could not justify all the conduct of Mr. Archer.] [The question then arose as to what the form of the order should be. Harrison, Q.C., referred to a case in the English Law Journal. Monahan, C.J., thought if the fiat were set aside the sheriff would have no protection. Kaye said that in a case in the Court of Queen's Bench recently the fiat was set aside; but Monahan, C.J., said that the attention of the Court might not have been called to it, and that he recollected a case of an order made by Judge Crampton, where there was a long discussion as to whether the order should not be simply that the party be discharged. Upon this, Mr. Yeo attended from the Court of Exchequer, and said they never did anything in that Court but discharge the party from custody, and that did not deprive him of any of his rights in the way of an action.]

CHRISTIAN, J., thought that setting aside the fiat did not set aside the writ, for it was regular, and that the fiat remaining might have an effect or an action brought by the defendant for false imprisonment, &c.

Mr. Yeo said that, in the Court of Exchequer, the ordinary rule was to discharge; but where the party was discharged on the ground of misrepresentation in getting the fiat, there the fiat was set aside, but not the writ. *Motion granted.*

INGLIS v. McBLAIN.—June 7, 1864.

*Pleading—Indebitatus count for damages—C. L. P. Act, 1853.*

*The Common Law Procedure Act, 1853, does not authorize the insertion of an indebitatus count for damages in a writ of summons and plaint.*

Piers White moved that the plaintiff in this case might be directed to give security for costs, and that the second count of the summons and plaint might be set aside, and that the action might be stayed as frivolous. The first count complained that the defendant was indebted to the plaintiff in the amount of half a year's rent of a house; and the words of the second

count were, "And for damages done to the said dwelling-house and premises of the said plaintiff by the defendant." The second count read with the prefatory statement of the first is bad. There is no precedent for it. [*Monahan, C. J.*—There is no precedent for debt for damage done.] The defendant's affidavit states that in May, 1863, he took a house from the plaintiff in Kingstown. The plaintiff resided in Fifehire. He told the defendant Dr. Johnston was his agent, and that he was to pay the rent to him. He paid the first half year's rent in advance. He requested the plaintiff to erect a paling, which he refused, whereupon the defendant did it himself at the cost of 30s., it being understood he was to be repaid, or take it away at the determination of the tenancy. On May 1st the defendant left the house, ten days before the expiration of the year. He was applied to by Dr. J. for the amount of £26 5s., half a year's rent. He informed Dr. J. he had a claim on the paling, and asked for plaintiff's address. He got no reply from Dr. J., and was unaware of the residence of the plaintiff, till he saw it on the writ of summons and plaint. He got a letter from one Mr. Morris, of Dawson-street, whom he never heard of before. Mr. Morris wrote to the defendant requesting the half year's rent, which should have been paid, he said, before the key was given up, and added, "I have also to request payment for the damage done to the house during the tenancy, amounting to £3. As to the railing at the back, the value has been taken into account." The defendant did not know Morris was an attorney till he saw the plaint. The defendant wrote, in answer to another letter from Mr. Morris, and never got any reply to this, but the writ. He then knew that Matthew Morris was an attorney. He then wrote to the plaintiff. He got a letter on the 24th May from Morris. He replied on the 25th, saying the cheque was meant in full satisfaction of Inglis's claim. On the 26th he got a letter from Morris, saying, "You are at liberty to dispute the further claim, and can file your defence." The defendant wrote again to the plaintiff, asking why Morris was giving this annoyance. He then got a short letter from Inglis, saying the thing was in the hands of Morris. Dr. J. has made an affidavit, the gist of which seems to be that he attended, expecting to get the house given up. The defendant gave up possession on the 12th. We owe only £24; and when they came to file the plaint they added £2 more to the £3 claimed, and made it £5. The plaintiff has no right to go on with this action for the sake of costs. On the 11th the year ended, and possession was given up on the 12th. Dr. J. said nothing about these dilapidations. I ask the Court to come to the conclusion that the address of the plaintiff was withheld in order to allow this action to be proceeded with. [*Monahan, C. J.*—If we struck out the second count, that would be one thing; it is another if we allow the plaintiff to amend by putting a proper count for dilapidations. There is at the head of Morris's letter, "Offices, Dawson-street."] Merchants head their letters in that way. We answered that letter on the 19th May, before the writ issued, "Sir—On my arrival from the country I found your two favours. I will feel obliged by your giving me the address of Inglis. I wish also to mention to him your claim of £3. I beg to observe that when

he let me the house, he provided for the repairs. No person could be more careful; and I am prepared to show that not even the ordinary wear and tear took place." The writ was prematurely issued. [*Keogh, J.*—The plaintiff's attorney writes to you on the 16th. You answer on the 19th, and say you are going into the country, and wish to know, when you come back, the address of the plaintiff—i.e., to throw him off. You pay as soon as the writ is issued.]

*Armatrong, Sergeant* (with him *Vereker*) contra.—The plaint is very general in its terms. [*Monahan, C. J.*—It is an action for debt for damages done.] There is no embarrassment. I do not find anything so curt in the way of a precedent; but it would be to be desired if there were. There is no ground for staying the action. The defendant leaves the premises, takes the key, and keeps it in his pocket. Dr. J.'s affidavit says that he is the agent, that he never understood from the plaintiff that the defendant had the right to put up the paling, but at his own expense; that he went over the house and saw the dilapidations. [*Christian J.*—The question is, if from your not sustaining the second count the action for dilapidations is not gone, or if we are to make you amend.] [*Monahan, C. J.*—The question is, if on paying the 30s. the action should not be stayed, and then you can commence a new action for dilapidations.]

*Vereker* contended that the count was sustainable. The O. L. P. Act, 1853, does away with forms. It is everyone's right to hold his property undamaged. That damage is a wrong, and there is a remedy for it. The 53rd section says, "Nothing therein contained shall render it erroneous or irregular to depart from the letter of such forms." Section 241—The forms given are as succinct as this, as for work and labour. Nothing is more indefinite than labour. So of a message and lands sold and conveyed. *Mutual*—that is, as this. To accuse a man of damaging property is to charge him with an act. [*Christian, J.*—The 81st section contains something in favour of your argument.] [*Monahan, C. J.*—What description of damage do you claim? The bill of particulars is as bad as the other. Do you mean that he left the premises out of repair, or that he took down a portion?] Would not the defendant be taken by surprise as much when charged with not keeping in tenantable order? [*Monahan, C. J.*—We should oblige the landlord to give the particulars of the breaches on which he relied.] The defendant here could have applied for further particulars. [*Christian, J.*—This is a common *indebitatus* count.] [*Monahan, C. J.*—Could you say A. B. is indebted to C. D. in £100 for assault committed by A. B. upon C. D.?] If it be sufficient for the plaintiff to say the defendant beat me, it is equally sufficient to say the defendant broke my door. Where is there a tendency to mislead? [*Monahan, C. J.*—Could you frame a count in breach of promise, that the defendant was indebted to the plaintiff £100 for breach of promise of marriage?]

*MONAHAN, C.J.*—We shall stay further proceedings, the defendant undertaking to pay £1 10s., also the costs of the action up to the present. This is to be without prejudice to any proceedings which the plaintiff may be obliged to take in respect of the dilapidations.

*Rule accordingly.*

## Court of Chancery.

Reported by Oliver J. Burke, Esq., Barrister-at-Law.

STAPLES v. HARPUR.

Jan. 13, 16, 17.

*Injunction—Mines and Minerals—Fire-clay—Evidence—Map of the escheated counties of Ulster—Costs.*

*Lessor granted certain lands in fee-farm to lessees and his heirs, "excepting the use and benefit of all mines and minerals that might be found in and upon the said granted premises." Upon and under said lands a certain "fire-clay" was found to exist. On cause petition for an injunction to restrain the lessees from taking said clay from out of said lands or any part thereof, it was held that, while the surface clay was not excepted by the reservation in said lease, the clay which was got out from a depth in the ground by mining apparatuses was excepted, and that therefore the injunction must be granted, restraining the lessees from taking the clay from beneath the surface, and refused so far as the surface clay was concerned.*

*Held also—That a map made in the year 1609 of the six escheated counties of the province of Ulster, by virtue of a commission issued by the Crown under the Great Seal of Ireland, dated the 21st of July, in the 7th James I. and which map was preserved in the State Paper Office in London, was properly receivable in evidence.*

THIS was a cause petition presented by the petitioners, Sir John Staples, Bart., and James A. Canfield, praying for an injunction to restrain James Stephenson McClean, Thomas Henry Harpur, and Wolsely Atkinson, the respondents, their workmen, and servants from raising, taking, manufacturing, selling, or otherwise converting to their own use certain stone-bridge fire-clay or fire-brick clay in from or out of the lands of Breakaville and Derry, or any part thereof. The petition stated that by letters patent of the 5th year of the reign of King Charles I. and dated 26th February, 1630, there were granted unto Sir Andrew Stewart, his heirs and assigns for ever, amongst other lands therein mentioned, all that the entire proportion of land called the great proportion of Raveenagh comprising the several townlands therein mentioned, and amongst them the lands of Breakaville, Gortgonagh, and Gortneakea, and a third part of the Ballyboe\* of Derry aforesaid with other lands, which it is unnecessary to mention, all said townlands being situate in the precincts of Mountjoy, barony of Dungannon, and county of Tyrone, with the appurtenances to the same lands belonging and all turbaries, "mines, quarries," &c. in as ample and beneficial a manner and form as the premises thereby granted or any parcel thereof there were or might happen to be in the said king's lands. And by the patent now being stated the said lands were declared to be thenceforth a manor by the name of the manor

of Castle Stewart, with power to the said Sir Andrew Stewart, his heirs and assigns, to alien or grant the said lands to any person or persons, their heirs or assigns, to be held of the said Sir Andrew Stewart, his heirs and assigns, as of his manor of Castle Stewart, in fee and common socage, as by knight service rendering such rents, &c.

The petition then stated that by indenture of 12th December, 1632, made between said Sir Andrew Stewart, of the one part, and John Nicholson of the other part, the said Sir Andrew Stewart did grant, &c. unto the said John Nicholson, his heirs and assigns, in fee farm, a portion of the lands comprised in the said letters patent; that is to say, the lands of Breakaville and Derry, being part of the manor of Castle Stewart aforesaid, with the appurtenances, in as large and beneficial a manner as he, the said Sir Andrew Stewart, then held the same lands under the said grant of King Charles I., "excepting and always reserving out of said grant unto the said Sir Andrew Stewart, his heirs and assigns, free liberty, with ingress, egress, and regress in and through the said premises, to hawk, hunt, and fowl, and the use and benefit of all mines and minerals that could or might be had or found in and upon the said granted premises, and the benefit of all the royalties whatsoever belonging to the said manor of Castle Stewart. *habendum* unto the said John Nicholson, his heirs and assigns, as of his or their manor of Castle Stewart, subject to the yearly rent of £4.

That all the estate and interest of Sir Andrew Stewart in said lands prior to 1672 became and was vested in James Earl of Suffolk and the Hon. Henry Howard, his brother, and Mary, wife of said Henry Howard. That by indenture of the 19th June, 1672, and made between said James Earl of Suffolk, and Hon. Henry Howard, and Mary his wife, of the first part, and William Nicholson, son and heir of John Nicholson, of the second part, those of the first part granted to William Nicholson, his heirs and assigns, all and singular the said lands in the last indenture comprised and thereby conveyed, "except as in the first-stated indenture is excepted," *habendum* to William Nicholson, his heirs and assigns.

The petition then stated that by indenture dated 24th October, 1672, the said James Earl of Suffolk, Henry Howard, and Mary his wife, granted other lands comprised in said letters patent, "excepting all mines and minerals of what nature and kind soever, with free liberty to dig and carry away the same," unto Richard Coulson, his heirs and assigns, at the yearly rent of £5 11s. 2d.

That the said fee-farm rents in said indentures reserved, and all the interest of said Andrew Stuart and of said Earl of Suffolk in said mines, quarries, and minerals were in and prior to the month of August, 1840, vested in petitioner, Sir Thomas Staples, Bart. and E. Houser Canfield, father of petitioner, James A. Canfield, in equal shares as tenants in common. And that said lands of Breakaville and Derry were vested in respondent, Harpur, and others. That there are valuable mines of coal under the said lands of Breakaville, Derry, &c.; and also in and under the same lands a certain "mineral and underground substance called *fire-clay* or *stonebridge clay*, is found in very large

\* Ballyboe, an ancient Irish measure, containing cir. forty statute acres. Vide II Sir James Ware, 227.



quantities beneath the beds of coal, and is obtained by sinking mines on the said lands, sometimes to a considerable depth; and the said *fire clay* is a separate and distinct substance, and is incapable of supporting animal or vegetable life, and is principally, if not altogether, composed of Silica, Alumina, Peroxide of iron, Potash, and Water; and the said fire-clay or stonebridge-clay is of considerable commercial value, and is much used in the production of glass, fire-bricks, draining-pipes, &c., which are of excellent quality; and that the respondents were in the habit of raising large quantities of said fire clay from and out of the lands of Breakaville and Derry, and manufacturing it when raised into flooring-tiles, drainage-pipes, and other articles of commerce; and that over twelve thousand tons were annually raised from said lands to the injury of petitioners. That said fire brick clay was found in strata, for the most part, under the beds of coal; and generally at a considerable depth, though it in some places rises and *crops*\* out to the surface of the ground; and that it is raised and got in the same manner as the coal is got, by sinking perpendicular shafts until the strata are reached, and then excavating tunnels from the various levels on all sides following the direction of the strata; and these tunnels, mines, and excavations generally extend to a considerable distance from the shaft, and at a great depth under the surface of the ground; and the said clay was raised to the surface by mining machinery.

The petition then stated that on the 11th January, 1855, petitioner caused a summons and plaint in ejectment to be issued to recover possession of two open fire-clay mines, ten open stone-bridge clay mines, fifty unopened stone-bridge clay mines, and fifty unopened other mines, situate upon the lands of Derry and Breakaville. That after judgment had thereupon, a writ of *habere* issued to the sheriff of the county of Tyrone, commanding him to have the petitioner, the then plaintiff, put in possession of the mines in summons and plaint above mentioned.

That on the 26th April, 1864, petitioner became the purchaser in the Landed Estates Court of said mines, minerals, royalties, reservations, and other premises respectively, and had a conveyance thereof made to him by Judge Hargreave.

—The case made by the respondents was two-fold: firstly,—a part and parcel question, namely, that the portion of the lands from which said fire-clay was removed were lands different from those granted by the patent of 26th February, 1630, and erected as afore-said into the manor of Castle Stewart. That the lands from which the fire-clay was taken were comprised in another and a different patent of same date as the former, whereby certain lands therein mentioned, including therein two third parts of one Ballyboe of land in Derry into three parts divided, were erected into the manor of Foreward; and the same were thereby by the said last mentioned patent granted to Sir Andrew Stewart, Bart., his heirs and assigns, in evidence of which it was alleged that the seneschal of said manor of Foreward always exercised jurisdiction over the entire of the said lands of Derry; and that petitioners have no title to the mines and mine-

erals mentioned in said last-mentioned patent; and that the petitioners were only entitled to a moiety of one-half of one third of the townland of Derry. Secondly—That the clay in petition mentioned is not a mineral, and is not a distinct substance from the soil; and that the allegation in the petition that said clay was incapable of supporting animal or vegetable life was untrue, but, on the contrary, that in several parts of the lands of Derry the said clay crops out at the surface of the ground, and that the surface soil of a considerable part of said lands is formed of said clay only, and that same produced crops by tilling in like manner as the general surface of the country.

That said clay was not altogether obtained by sinking shafts, but has been obtained in large quantities by a shallow excavation of a few feet in depth at the surface of the ground, and also from quarries opened at the side of a hill, from which quarries and surfaces large quantities of clay can be removed without sinking shafts. Thirdly—Respondent submitted that by said fee-farm grant of 12th December, 1632, the mines and minerals passed to the grantees, and that the words “use of mines and minerals” could not operate as an exception of the mines and minerals themselves; and that as inasmuch as no estate in the lands or mines was retained by the grantors, said words could not operate as an exception of the mines and minerals themselves; and that, inasmuch as no estate in the lands or mines was retained by the grantors, said words could not operate, even by way of grant of an easement, or right of an incorporeal nature; and that the said fee-farm grant was inoperative to reserve or except said mines and minerals, or any interest in or right to them.

The affidavit of Sir Richard Griffith, Bart. (Geologist), was read in support of the petitioner's case. He stated that he was well acquainted with the geological qualities of the townland of Derry and Gortnaskea, which were in the districts where the land collieries were situated in the county of Tyrone. That the stratification of these lands consists of alternations of coal, with sandstone, shale, and fire-clay; and that such fire-clay is commonly called and known in the said county by the name of stonebridge clay, from its close resemblance to a similar substance found in Stonebridge, in Worcestershire, and which there forms the substrata of the coal-beds. “That said fire-clay is a separate and distinct substance from the surface of said lands, although it may in some places crop up to the surface; that it does not contain any vegetable or animal substance, and is incapable of supporting animal or vegetable life;” that this clay is a *mineral* in the proper acceptation of the word; that it is analogous in its constitution to the mineral in England known as stonebridge clay, as the analysis in Sir Robert Kane's book, “The Industrial Resources of Ireland,” demonstrates, which analysis is correct, and is as follows:

Coal Island.	Stonebridge.
Silica.....46·2	.....46·1
Alumina.....30·8	.....38·8
Peroxide of Iron.....8·4	.....
Potash.....0·4	.....
Water.....14·2	.....15·1

100·0

100·0

\* For the meaning of the expression *crops out*, vide Lyell's Elements of Geology, sixth edition, 1865, p. 65.

Sir Robert Kane, M.D., F.R.S., in his affidavit verified the analysis; and he was of opinion that the fire-clay is a mineral in the proper sense of the word. In support of the petitioner's case on the part and parcel question, the following evidence was given:—The affidavit of Samuel Gale, surveyor and valuator, that he had made a survey of the townland of Derry; that it contained eighty-four acres, statute measure; and that the boundaries shown him coincided with those given on the Ordnance Survey map, sheets 46 and 47, of the county of Tyrone. The next evidence given was that of a photozincographic copy of a map of the lands of Derry, which copy of a map was objected to by the respondents. In support of the evidence thus offered on the part and parcel question, the affidavit of W. H. Hardinge was read. It was as follows:—"That having reason to believe from certain records in said Landed Estates Record Office that certain maps were made in the year 1609 of the lands of the six escheated counties in the province of Ulster, by virtue of a commission issued by the Crown under the great seal of Ireland, dated the 21st of July, in the 7th year of the reign of King James the First of England, directed to certain commissioners, amongst whom Sir Thomas Ridgeway, knight, vice-treasurer and treasurer at war in Ireland, was one; and believing that such maps were in existence in London, I made search and inquiry for them among the public archives preserved in the State Paper Office there, the result of which search was that I discovered in the year 1860 in that office the original maps as made in four out of the six escheated counties in said province of Ulster, amongst which was the original map of the county of Tyrone. *That I have no doubt* that said maps are the original maps made by virtue of said commission, as I also discovered in said State Paper Office at same time an original letter (in what I believe to be from a comparison of the handwriting with his signature at the foot of his audited rolls of account as such vice-treasurer and treasurer at war, the handwriting of the said Sir Thomas Ridgeway) distinctly enumerating the volumes of maps he then delivered up, and dated from the Strand, 15th March, 1609 (read 1610), which letter was addressed to one of the ministers of King James (assumed to be Lord Salisbury)."

"That photozincographic copies of said maps and letter were executed at the Ordnance Survey Office under the direction of Captain Scott, of the Royal Engineers, and under the superintendence of Sir Henry James, Royal Engineers, director of said Ordnance Survey Office; and that one set thereof was deposited in September, 1861, in said Landed Estates Record Office by the direction of the Lord Commissioners of Her Majesty's Treasury, accompanied by a letter addressed to this deponent by Mr. Undersecretary George H. Hamilton, dated the 18th of said month.

"That before swearing this my affidavit I applied for and now produce the following officially certified copy of said letter from Sir Thomas Ridgeway, dated 18th March, 1609, to the Earl of Salisbury, as it is supposed. 'May it please your lordship,—The maps of the escheated counties beside Derry being but now newly bound up in six several books for his master's

view and the light of the intended plantacon. I humbly send them herewith all unto your Honour, with like humble desire to receive some advice from your Lordship by Mr. Norton or otherwise, whether I shall sett downe in the playne leaffe at the forefront of each book the contents of the same shire in this very forme of the inclosed summary note of calculation, or else leave it for a time unwritten, to be afterward filled up according to such other forme as any alteracon upon the now course in hand may happen to prodnce. Also I humbly present unto your Lordship, for your Honor's own use and perusal, at yor best pleasure, halfe a dozen lyke books of my own, which (imitature only) I extracted at the camp and at my own house, forbearing to fyll up the very coptimart, with description or the other blanke leaffe, with any notes tyll I receive some tart from your Lordship in generall what will best sort with the same maps and with your Honor's lyking, whereupon all shall be performed accordingly in brieff and yet particularly with three or four days at furdest.

'The true copy of the Lord Deputy's remaining advizes concerning the plantation I have by thence your Lordship's vouchsafed admittance and audience yesterday (for which I rest humbly bound), selected and singled out from among other his Lordship's remembrances, both publyck and private, the late impartable at your Lordship's better leasure.

'The heads and true state of all els requirable of me by yor Honour (this of the plantacon being the honourable age and first and principal part of my employment from Ireland hyther, I will not fail (God willing) even in ipso punto sincerely and sowelly to set down and send about the midst of the next week for your Lordship's perusal at your own best times. My ever good God in heaven continue and increase to your Lordship all honour, health and happynes. Even so forbearing your Honour's furdor trouble, I humbly and ever remain

'Your Lordship's wholly to dispose of,

'THOMAS RIDGEWAY.

'From my lodging in ye Strand,  
March 15, 1609.

'I humbly present also to your Lordship the Irish conclaved petigrees of their great lords.

'SIR THOS. RIDGEWAY, Treasurer of Ireland.

'15th March, 1609.

'Mape of Escheated Countie, Irish Petigrees, &c. of these.'

"The preceding copy is truly taken from a photozincographed copy of the original letter prefacing a volume of photozincographed original maps of lands escheated to the Crown and admeasured in 1609, and containing part of the barony of Dungannon, in the County Tyrone, deposited in the year 1861 in this office for public use, by order of the Lords Commissioners of her Majesty's Treasury.

"W. H. HARDINGE, Keeper of said Record.

"Landed Estates Record Office, Custom-house Buildings, Dublin, 31st August, 1864."

J. E. WALSH, Q.C. for the respondents, on the part and parcel question, opened the objection to the reception of the above-mentioned photographed copy of the

map and letter. This map cannot be evidence; the only attempt to identify this with the map of the Ulster forfeiture is a letter which it is presumed from a similarity of handwriting was signed "Thomas Ridgeway." This map differs from a map of the Down Survey, which is always admissible in evidence. That survey was laid down to a scale, and hence it was called the *Down Survey*, from the fact that all the boundaries were laid down to a scale. Vide Howard's Revenue Exch. p. 114, where a compendious history of several of the Irish surveys is given. *The Archbishop of Dublin v. Lord Trumbleston* (12 Ir. Eq. 267) was where the Book of Distributions was not admitted in evidence. It was indeed, however, received by Lord Chancellor Napier, when he was Chancellor, in *Knox v. Earl of Mayo* (Case in Ch. temp. Napier, 243). This old map is not found in a proper repository, nor made in pursuance of any statute authorizing the making of said map. In *The Duke of Beaufort v. Smith* (4 Ex. 450), a survey taken in the year 1650, the time of the Protectorate, by virtue of a commission to certain persons mentioned in the survey by Oliver Cromwell, was rejected as inadmissible, either as a public document or as evidence of reputation; so also in *Daniel v. Wilkin* (7 Ex. 429) a survey not duly authorized was rejected as being inadmissible in evidence.

THE LORD CHANCELLOR thought there was ample ground for admitting the present map in evidence. There was the commission for the Crown to make the survey; and the maps are identified by this letter of Ridgeway. Then we have a photograph copy thereof duly executed. He saw nothing to prevent this map being admissible in evidence.

*Brewster, Q.C., Warren, Q.C., and F. Whyte*, were for the petitioners.—Mines of clay may exist and have always been known to our law. It is not the chemical or geological feature of what is dug out of the earth that constitutes a mine, but it is the method adopted in getting the substance out—*Rex v. Brettell* (3 Barn. & Ad. 424); *Rex v. Sedgeby* (14 M. & W., 15 L. J. Ex. 67).

*John Edward Walsh, Q.C., Flanagan, Q.C., Ince, and Palles*, were for the respondents.—Can it be successfully urged that the same substance in one instance is a mineral, when taken out of the earth at a considerable depth, and if it happen to be on the surface it is not a mineral?

It is absurd to contend that clay is a mineral. The French law is very precise in defining what minerals are; and clay in France would never be held to be a mineral. It is submitted that this is a proper question for a jury.

Another point for the consideration of the Court was, that the reservation of "the use and benefit of mines and minerals" does not amount to an exception of the mines and minerals themselves, for this is only a licence, and conveys no interest in the soil so as to exclude the lessees or those claiming under them from opening mines, &c.—*Chatham v. Williamson* (4 East. 469). There Lord Ellenborough says that "no case can be named where one who has only a liberty of digging for coals in another's soil has the exclusive right to the coals." The leading case on this point is *The case of Lord Mountjoy* (G. db. 17; 4 Leon. 147).

THE LORD CHANCELLOR.—The facts in this case are sufficiently developed in the several documents before me, and I do not see what case I could send to a jury. A jury in this case could be called on to act merely under the direction of the judge, as the facts are conceded. As to the part and parcel question, it appears that those lands of Derry are the identical lands granted in the patent. We have the ejectment proceedings recognizing them to be the lands. The question, then, for consideration here is, what was reserved by the deeds of 19th June, 1762, and 24th of October, 1726. Does the reservation extend to the beds of clay? The words "use and benefit," it is said, do not convey more than a license to go in there and work in common with those to whom the lands were granted, and that such things occur in wastes and commons, but those are particular customs in England. There is a custom I have read, if one finds a mine he comes to be the owner of it, but all that has nothing whatever to say to what is before the Court. We have only one simple narrow question here to deal with, and that question, in very few words, is—Is fire clay is a mineral? The affidavit of Sir Richard Griffith is very strong on the point of the mineral. I cannot accede to the argument that the owner of the lands buying them takes anything different from what any other stranger would buy. Whatever the owner buys, he buys as any other would buy. Nor can I understand going back behind that now starting point which the statute has given; it appears to me that it comes back to this—what is a mine? What is a mineral? Those words are very variable, and have undergone changes within the last century. The word "mine" is an ancient word: we all know that mines of clay were very old terms—include alum mines for example. In *Rex v. Brettell* (3 B. & Ad. 424; 1 L. J., N. S., M. C., 46,) clay pits were held to be mines. In that case excavations were made, from whence a glass house, pot clay, and fire brick clay, were extracted. A perpendicular shaft was sunk from the surface of the land for the purpose of raising the clay out of the strata, which was done by a steam engine, and other mining apparatus; the excavations were like those for working coal and metallic mines, and the mode of raising the clay was the same as that used in a coal mine, and Lord Tenterden, in giving judgment, said he saw no reason to depart from the opinion he had pronounced in *Rex v. Sedgeby* (15 L. J. Ex. 67), that the true test to determine whether an excavation in the earth constituted a mine or not was, the mode in which the article was obtained, and not its chemical or geological character. That case then decides that clays may or may not be minerals; so also there are limestone quarries.—*Rex v. Inhabitants of Sedgeby* (2 Barn. & Ad. 65). Mines of coal, "or the like," are mentioned in Co. Lit. 53, B. In *The Earl of Rosse v. Wainman* (14 M. & W. 859), it appeared by Inclosure Act, 53 Geo. 3, c. 18, certain waste lands, the soil of which belonged to the lord of the manor, were enclosed and allotted to commoners; the Act which recited the lord's title reserved to the lord all mines and minerals of what nature soever lying and being within or under the said waste lands, in as full, ample, and beneficial a manner to all intents and purposes as he could or might have held or enjoyed the same in case the said Act had not been made; and it

was held that the reservation clause must be construed with reference to the title of the lord to the whole soil. Inasmuch as the object of the Act was to give to the commoners the surface for cultivation, reserving to the lord what it did not take away for that purpose, the word "mineral" must be understood, not in its general sense, signifying substances containing metals, but in its proper sense, as including all fossil bodies, or matters dug out of mines, that is, quarries or places where anything is dug; therefore that the clause reserved to the lord the stratum of stone in the enclosed lands. In *Darvill v. Roper* (24 L. J. Ch. 779), Kindersley, V.C., held that the definition of the word "mineral" does not depend on the nature of the fossil obtained, but on the mode in which it may be worked. In that opinion I entirely concur. Mr. Rogers' Book on Mines contains much valuable information on the question before us. Well, then, the word "mines" in some cases may differ from what it is at other times, but for the purposes of this case the word "mineral" means anything to be got by mining; there are, as I said above, mines of clay and limestone. Limestone would not be mines in France. It is perfectly true that the French law is more definite and precise as to the meaning of the words "mines," "minerals," and "quarries," than ours, and were we in France, perhaps this clay would be called a quarry; however we are not in France now, we are in Ireland, and dealing with the English, not the French law. Well, I think when earthy substances are got by mining, for example, as chalk when got down in depths in the earth, then in that case chalk would be a mineral, and therefore earthy substances may be, and are, minerals. Accordingly, I am of opinion that the words of the deeds, when they except minerals, except clay mines, and therefore I shall restrain the respondent from working the mines of fire clay; but I do not think I could restrain the respondent from working any clay on the surface, that is, when the strata of clay rises to the surface, and crops out far on the surface, the clay is then not a mineral, that is, not got at by perpendicular shafts and horizontal galleries springing therefrom. The reservation in the lease I consider a good one; therefore all mines are reserved. I shall make no rule about quarrying, but I must make a decree with costs restraining the respondents from working any mines.

*J. E. Walsh, Q.C.*—In this case no account was prayed, so it is apprehended that the Court will not give costs following a very late decision made in this Court.—*Harvey v. Ferguson* (9 Ir. Jur., N.S., 342). Your Lordship is there reported to have said, "I can give no costs unless the parties seek an account." In this case you only give the petitioners half what they ask.

*Brewster, Q.C.*—The respondent here raised 250 tons a week of the petitioner's property; you have now restrained them from repetition, and they having failed must now pay the costs, having driven us into Court. [*The Lord Chancellor.*—The question before the Court was, no doubt, a novel one.]

*Flanagan, Q.C.*—It is only just reported that when no account is asked the Court will not give costs. In the Landed Estates Court there was no question of mines decided.

*THE LORD CHANCELLOR.*—*Prima facie* the costs go

with the decree. I think the parties are entitled to their costs.

## Court of Queen's Bench.

[Reported by William Woodlock, Esq., Barrister-at-Law.]

(CROWN SIDE.)

THE QUEEN AT PROSECUTION OF MACAULAY V. FISHBOURNE—Nov. 14, 1864.

*Mandamus—St. 14 & 15 Vic., c. 70, s. 8—Lands injuriously affected by railway works—Notice in writing.*

*In order to induce the Court to grant a mandamus to compel the arbitrator appointed by the Board of Works to assess compensation for lands injuriously affected by railway works, the party should show that he has delivered to the arbitrators the statement in writing of the nature of his claim, mentioned in sec. 8 of St., 14 & 15 Vic., c. 70 (O'Brien, J., dissentiente.)*

This was a motion to make absolute a conditional order that a mandamus should issue, directed to Mr. Fishbourne, the arbitrator of the Board of Works, commanding him, as such arbitrator, to inquire into and adjudicate upon the value of certain lands of the prosecutors, injuriously affected by the works of the Great Southern and Western Railway Company. It appeared that the prosecutors were the owners of a piece of land on which houses were built, situate at Nenagh. The land had not been taken by the Company, nor was it specified on the maps and plans deposited with the Board of Works; but the Railway Company in the course of its works had raised the road in front of the houses, and so prevented ingress to and egress from them. The prosecutors went before the arbitrator at the meeting held by him, but he refused to entertain the claim, on the ground that it did not come within his inquiry, and that where the land was not taken the party had no remedy for consequential damage. The final award was made in September, 1862. The affidavit upon which the conditional order for the mandamus was made did not state that any statement in writing of the claim of the prosecutors had been delivered to the arbitrators; but that point was not raised in the affidavit to show cause, though, as will be seen from the report, it was raised in argument at the bar.

*Ryan* (with him *Heron, Q.C.*), for the prosecutors, —*The Queen v. Rynd* (8 Ir. Jur., N.S., 202) shows that it is not necessary that lands should be absolutely taken in order to entitle the party to a mandamus. As to the lands not being on the maps, see statute 14 & 15 Vic., c. 70, s. 4.

*Serjeant Sullivan and Coffey, Q.C.*, for the defendant. —There is no statement in the affidavit on which the conditional order was granted that any claim in writing was sent in to the arbitrator. Under section 8 of St., 14 & 15 Vic., c. 70, that was indispensable.

*Heron, Q.C.*, in reply.—The point now raised was

not made by the arbitrator, nor was it for that reason that he refused to entertain the claim. Under section 8, the claim in writing is not necessary to give jurisdiction to the arbitrator. Suppose the Railway Company had neglected to put Mr. Fishbourne's appointment in the Gazette, would his award be a mere nullity? That is just the converse of the necessity for giving a notice in writing.

LEFROY, C. J.—The majority of the Court are of opinion that there was a defect in not having served a notice in writing, claiming compensation. It occurs to me that that was the most essential ingredient in the Act of Parliament, in order to ascertain beyond a doubt, first, the claim, and, secondly, the subject matter of the decision, that hereafter it might be known; for the decision might comprise, not merely compensation for land, but other specific things required to be done. It was, therefore, essential that the subject matter on which the arbitrators had jurisdiction should be definitely ascertained. It does not appear to have been so ascertained what was the subject matter of the decision; and you might as well say that you could dispense with a summons and plaint in an ordinary action as dispense with the claim in a case of this nature. I am of opinion that the Act provides it as a necessary substantial preliminary, and that the parties have not complied with that provision of the Act. A certain time also is limited, before which or within which the arbitrator was to proceed in reference to the time of the serving of that notice. In this case, therefore, we cannot make the order against the Company. They have appeared here to resist this order being made absolute, and I think they have shewn a sufficient ground against it.

O'BRIEN, J.—I regret that I cannot concur in the decision arrived at by the other members of the Court. The question turns on the eighth section of the Act of Parliament, 14 & 15 Vict., c. 70. Now, on that, as controlling the operation of the 9th section, it is contended on the part of the company that before a party makes a claim for investigation, he should give notice in writing. Now, the 8th section does not in terms require the party to give such a notice, but says that the company shall publish notices specifying certain times, and requiring all persons claiming to have any interest in the lands, to deliver to the arbitrator, on or before a day fixed by him a statement in writing of the nature of their claim. That is to say, the company is to require them to send in statements to the arbitrator of their claim. Then comes the 9th section, which refers to the claims mentioned in the beginning of the 8th, but it does that for the purpose of specifying the time within which the arbitrator is to proceed, and it says that the arbitrator "shall, after the expiration of the period within which such claims are required to be delivered to him as aforesaid, proceed to inquire into and adjudicate upon..... the compensation to be paid for injury to any lands injuriously affected by the execution of the works of the company." So, it refers to the notice in order to fix the time at which the arbitrator is to commence. But I find no words in the section limiting the arbitrator's jurisdiction to claims which should have been made in writing. The time of his inquiry is fixed by referring to the provisions in the 8th section for the

form of advertisement: but the subject-matter of inquiry is general, and not confined to those cases for compensation which are claimed by notice in writing. I therefore cannot find anything to make it essential for the party to make a claim in writing. Well, now, that being so, or supposing for a moment that the arbitrator was not bound to investigate this claim till it was made in writing, it is not contended here that the period of thirty-one days mentioned by the company in their advertisement under s. 8, is that within which a claim in writing should be sent in, or if that is suggested it could not be maintained, and if a claim was not sent in, it was in the power of the party at the time, if the objection was made, to remove it. Well, it may be said that the Court, in granting a mandamus should be satisfied that a regular demand was made. Well, here a demand was made, when it was in the power of the party to make a more formal one. It was not then objected to, but the objection made in the affidavit shewing cause is one utterly untenable, because of the decision in the case of *The Queen v. Rynd*. That was the whole ground and sole reason for Mr. Fishbourne's original refusal. The company were present then before him, and the objection about the claim not being made in writing was not made, until it is made now in argument by Serjeant Sullivan. I can well understand the arbitrator saying, "I will not investigate a parol claim; send it in writing." If he had said that, and his request was not complied with, it would be matter for the discretion of the Court whether, especially after the time which has elapsed, we should interfere in favour of the party who was required only to do what was reasonable, and had refused to do so. There is nothing of that kind here. I do not see that on the Act it is imperative on the party to send in a claim in writing. The Act says that the Company must have put in advertisements. Even if the party had not sent in a claim in writing, if the objection had been made below, the party could have removed it. I do not think the company should be allowed to make the objection now, and it is my opinion that the mandamus ought to be allowed to go.

HAYES, J.—I think the conditional order should be discharged. I do so reluctantly; but I have come to that conclusion on the general principles which I think ought to prevail in mandamus law. This is an application that a judge should be directed to adjudicate upon a case before him. I take it to be of the essence of mandamus law that the person making that application should shew that he has done everything in his power to bring the matter before the judge, that it is the judge's default alone that he relies upon. I do not think that that is the case here. The party calls on us to require Mr. Fishbourne to hear his case. What case? The case that he is hereafter to bring before him. What has he done to this? He went before the arbitrator, and Mr. Fishbourne said the matter was not before him on the maps. Well, that should have put the parties on the alert, and the only course for the parties was, even at that time, to have put in the written statement. They never do so, and they come here now without going and putting the company in a position to refuse anything. I do not think they have done all they should, or that they

have put themselves into a position to ask for a writ of mandamus.

FITZGERALD, J.—I concur in thinking that the conditional order should be discharged, as having been improvidently made on the loose statements in the affidavit; and I should not say a word more, but that as principles have been advanced at the bar and on the bench more extensive than I think necessary, I wish to state the grounds of my concurrence. It appears to me that on the ordinary rule regulating the discretion of the Court, when you ask the Court for a mandamus to compel a party to perform a legal duty, you must shew, in the first instance, that you have made a proper demand on him to perform it, and that he has refused to do so. The Act of Parliament clearly defines how the claim for compensation is to be made, namely, that the party should state his claim in writing specifying shortly what his title is, how he alleges the lands to be injured, and the sum which he claims, and requiring the arbitrator to assess compensation on that. That is the demand which the law points out; and independent of any legal proposition, it is the character of the demand which the very nature of the case requires. All that took place here is, that the party required the arbitrator to assess damages, and that the arbitrator refused to do so on the ground that the matter was not referred to him; and after the lapse of two years, and what would appear to be the relinquishment of the claim, we are called upon now to issue a mandamus to compel the officer to perform his duty. I think the order was improvidently issued, and that there was no proper demand. But as the company make this objection now for the first time at the bar, I think, and I believe the rest of the Court concur, that the discharge of the order should be made without costs. I wish to say nothing as to whether the claimant is barred by reason of an award being made from making his claim against the Company.

#### THE QUEEN v. MCCORMICK AND OTHERS.

Nov. 15, 16, 1864.

*Criminal law—Bail.*

*Motion to admit prisoners to bail refused under the circumstances of the case (Hayes, J. dissentiente).*

THIS was an application to have the prisoners, who were confined in the gaol of Belfast, admitted to bail. The informations against the prisoners stated that the deponents saw them forming part of a mob or body of men who attacked another body of men who were at work in certain new docks which were being constructed at Belfast, and which second body of men were called the navvies. The depositions stated positively that the prisoners were armed with fire-arms, and that they fired them, kneeling down deliberately to take aim at their opponents, and that a man named Fagan was killed in the course of the disturbance. The prisoners filed affidavits in support of their application. It is sufficient to refer to that of one of them

named James M'Cormick, as the other affidavits were in almost identically the same terms. It is as follows: "I, James M'Cormick, of Belfast, in the county of Antrim, apprentice to the iron ship building trade, aged twenty-seven years and upwards, make oath and say that I was arrested on the 12th day of September last, and committed for trial on the fourteenth day of September last, to the gaol at Belfast aforesaid on a charge of having formed part of a riotous mob unlawfully assembled with fire arms, and who fired at a contending mob called the 'navvies,' on informations and depositions sworn at same time against me and one William Cowan by Jane M'Nally, John Keys, Ellen M'Killen, and Patrick Trainor, to whose said depositions I respectfully crave leave to refer. That new docks are being formed at the entrance to the harbour of Belfast, being at the northern extremity of the town, and in the construction thereof several hundred of that class of men usually called navvies were and are employed, being principally, if not altogether, strangers to the town, and not being connected therewith, except by their temporary employment there as labourers at said works. That some not very serious disturbances took place during the week commencing the 8th August last, and during which week the Summer Assizes for the county of Antrim were being held in the town; but on Saturday, the 13th of August, the town was perfectly quiet, and so continued during the following Sunday. That on Monday, the 16th August last, the navvies were off their work, that day being a holiday, and assembled in a large body at a chapel at a southerly part of the town, and rushed violently through several streets yelling and firing shots, causing terror to the inhabitants; and having reached Brown-street, lying in the western direction, they broke the windows in houses through Brown-street, and in an infant school at the corner of Brown-square, throwing stones into the school-room, and injuring and frightening the children to a very great extent, and were only stopped by some men who were at the time of the attack peaceably at work in a neighbouring iron foundry, but who, having heard of the wrecking that was going on, ran out from the foundry and drove off the navvies, who up to that time had been carrying on their riotous conduct wholly uncontrolled either by military or police, and would have continued to act in the same way to a much greater extent had they not been prevented by the foundrymen. That there was no rioting up to this time at the docks or in that neighbourhood until on the 17th of August some hundreds of navvies came to the docks and tried to intimidate the few of their body who were at work, and then challenged and endeavoured to taunt the men in an iron foundry adjoining the docks to come into collision with them; and at the dinner-hour some of these iron foundry men did go towards the docks, when they were fired at by the navvies and driven back. That this conduct caused great excitement and fears that the houses in the neighbourhood would be attacked as in other parts of the town, and the families of the inhabitants assaulted in the absence of the men, who were engaged at their work, there being no protection afforded by either military or police, and a number of the men engaged on the opposite side of the river

crossed over and drove the navvies from the docks. That these are the riotous proceedings referred to in the informations and depositions as having taken place on the 17th of August last; but I positively swear that I did not fire the shots alleged, and that it is not true that I had a gun and knelt down and fired shots into the docks as alleged in said depositions and informations, or that I fired into the docks at all. That I never was in a magistrate's or other court in my life until brought up on the present charge, and never was summoned for or charged with any offence or breach of the law, and can get good characters from my employers, Messrs. Harland and Wolfe, the extensive iron ship-builders in Belfast, and their managers and foremen, and the clergymen of my Church, and from William Henry Waugh, Esq., of Sion-hill, near Dromara, in the county of Down, a gentleman of considerable property and means, and to whom I was well known previous to my coming to Belfast, and who is willing to enter into security for me to any amount the Court may reasonably require. That I have remained ever since my arrest, and still am, in close custody, confined in a cell, the windows of which are so high as to render it impossible to look through, and having no fire-place, though heated, when necessary, by heating apparatus. That in common with all other prisoners who provide themselves with food, I do not get out from this cell, except for about one hour in the day, when I have to walk up and down by myself in a narrow walk, enclosed between walls at least seven feet high; and I am not allowed, nor are any of such prisoners allowed, to converse with any other of the prisoners; and I am, in fact, placed in solitary confinement, and so must remain until the Assizes, unless admitted to bail. That I am, and ever since my arrest have been, quite ready and willing and desirous to take my trial, and was most anxious to be tried at the late Quarter Sessions for the county of Antrim, and have several most respectable witnesses who are ready and willing to come forward and give evidence on my behalf, but who were not examined by the magistrate taking the informations and committing me, although several of them were in court. That I am dependent upon my wages, as such apprentice, for my support, out of which I have to assist in the support of my widowed mother. That an application was made on the day of last to John C. O'Donnell, Esq., resident magistrate, the committing magistrate at Belfast Petty Sessions, that I should be admitted to bail, but the application was refused on the ground, as I believe, that I was charged with firing a gun at the navvies in the docks, which charge so made against me I positively say is untrue. That if admitted to bail I can procure good solvent and substantial securities for my appearance at the Assizes or other gaol delivery in the sum of fifty pounds. That the ordinary clothes worn by myself and fellow workmen to the number of several hundreds whilst at our work is white jacket and mole-skin or linen trousers, which, of course, become discoloured and soiled."

*Whiteside, Q.C., and Falkiner* appeared for the prisoners.

*Sergeant Sullivan and Waters* for the Crown.

*Cur. adv. vult.*

Nov. 16.—FITZGERALD, J.—In this case an application was made yesterday on the part of the prisoners to be admitted to bail. It appears they were committed for trial in the month of September by the magistrates of Belfast upon a charge arising out of the recent outrages there. I do not mean to express the least opinion as to the guilt or innocence of the parties, who are to be tried by a jury. For the purpose, however, of disposing of this question to-day we must, in the first instance, assume the depositions or informations to be accurate; that is, unless answered or displaced, saving the case in which there would appear on the face of them some such inconsistency as would induce the Court to believe the parties were not entitled to belief. In most cases, unless there is something to be explained, I think a negative affidavit is entitled to very little weight on the part of a prisoner, and it is better to decide on the depositions alone. There were four or five different depositions; but the substance is—that in the course of these lamentable outrages which took place in Belfast, and which were known over the whole world, and were a disgrace to the community, it appears that on a particular day the prisoners are charged with being in the position of being ring-leaders on one side; that is, having singled themselves out, that they were both armed with fire-arms, and that not on one, or two, or three, but several occasions, they discharged a loaded gun, and towards the opposite body, the navvies, who were assembled in a dock yard. No one can doubt if the deponents are worthy of belief that that firing of arms under such circumstances was a firing with intent to kill, or maim, or disable. The parties were committed on this charge, and the magistrates refused to admit them to bail; and now, upon this application the Crown, in the exercise of its discretion, comes in to oppose the discharge of the prisoners, I assume, resting their opposition on the legal ground, that if these prisoners are admitted to bail, there is danger that they would not be forthcoming to answer the charge which is made against them. In the course of the discussion a number of authorities were adverted to. I pass for a moment from the depositions, only pointing out this, that if the parties are entitled to belief, and that on the trial of the case what they depose to is not displaced, and the jury believes it, there is sufficient to warrant a jury in finding a verdict of guilty of firing with intent to kill or do grievous bodily harm. We were pressed with the authority of *The Queen v. Scaife* (9 Dow. Pr. Cas., 553), where Judge Coleridge states the ground on which the judgment of the Court ought to be based; namely, he states that the Court should consider whether the offence charged is serious; whether the evidence is strong; and whether the punishment for the offence is heavy; and having arrived at a conclusion on these circumstances, there remains the consideration whether the prisoner, if discharged, might not appear to answer the charge. Well, then, the first is whether the offence is a serious one; nay, more, whether the offence, as was said by Mr. Falkiner, was not one of enormity. And I will say, supposing the offence to be made out, the offence is one of great enormity; and we cannot shut our eyes to the fact of which we must take judicial notice, that in the course of these



outrages—I pause not to consider which side is to blame—that the town of Belfast was for days in the hands of a lawless mob on one side or the other, and that neither life nor property was secure; and also that in the course of these outrages several human lives were sacrificed. Therefore I cannot doubt that when the charge is that the prisoners singled themselves out as leaders of the mob, that they were armed with fire-arms, and that they knelt down deliberately to fire, the offence is a grave one. Then as to the next point put by Judge Coleridge. As to that I can only say that if the depositions are sustained there would be evidence of the guilt of the parties. Then as to the nature of the punishment, there is, of course, a wide discretion vested in the judge to be exercised according to the circumstances of each case. I do not enquire how that discretion will or ought to be exercised; that will be for the judge; but I can only point out that the prisoners, if convicted, may be liable to penal servitude for life; that is, subject to a punishment second only to that of death. In a case where the magistrates have refused to receive bail, and the officers of the Crown, in their discretion, which is generally fairly exercised, oppose the application, if the Court can see its way that the prisoners will not be present to answer the charge, it is difficult to grant the application. Well, this is no ordinary case. We cannot shut our eyes to this,—that there has been in the borough of Belfast, on both sides, a wide spread combination to set the law at defiance; nor can I say now satisfactorily to myself, that if the parties thought they were likely to be convicted and sentenced to so heavy a penalty as I have pointed out, they would be present to answer at their trial. I have pointed out that on the face of the depositions there is a wide spread conspiracy. There is a proposal to give security, but where there is, as in *The Queen v. Gallagher* (7 Ir. C. L. R. 19), and *The Queen v. M'Cartie* (11 Ir. C. L. Rep., 189), a wide-spread combination against the law, however there might be a likelihood that the prisoner would be forthcoming, the Court take that into consideration, and hold that they would not admit him to bail; therefore I am anxious to avoid any expressions which could now or hereafter prejudice the fair trial of the prisoners; but on the whole of this case I am unable to come to a conclusion that there would not be a failure of justice, that if those parties are discharged they would be here to answer their trial, and on that ground alone, I think, we ought not to reverse the decision of the magistrates.

HAYES, J.—I regret that the opinion which I have formed is not that which has been expressed by my brother Fitzgerald, and which, I believe, will be expressed by my other brothers. In this case an application has been made to be admitted to bail on the part of two prisoners, and it is resisted on the part of the Crown. It is grounded on an affidavit in each case, made so far back as the 1st of November, an affidavit which, so far as regards the facts set forth, and so far as they are not met by the informations, is unanswered in a single part by the Crown. It rests its case altogether upon the facts set forth in the informations against the prisoners. Conformably with the rule laid down in former cases, which, I think,

ought to be followed here, I look with little regard on a denial by a prisoner of his guilt. He may be looked upon as an interested witness; and I take it that it is from the informations clear that there are such facts as, if not displaced, would warrant a jury in convicting, and warrant a judge in sentencing the prisoners to penal servitude for life. Beyond that we cannot, and ought not, to go; but I think we may add a few facts which, as being uncontradicted by the Crown, we may assume to be true. Let us look then to the case on the part of the prisoner, and see if it is of that enormous character which it has been represented to be on the other side, and whether it is of that enormous character which seems to have been contemplated by some of the cases. I take one of the affidavits which have been made in the case. There seem to have been some tumults in the town of Belfast, which went on until Saturday, the 15th August. I happened to be in the town myself at the time at the Assizes, but I say nothing of my own feelings on the subject. The affidavit then says that on the 8th August the town was quiet, and so continued until the following Sunday; that on Monday, the 17th, the navvies—and this word suggests to me this, that the town was divided into two parties, the navvies and the shipwrights; when I say the town of Belfast I do not mean the better part of the town, but the tumultuous part of it,—the navvies were not at work on the 17th August, and they assembled in a large body at a chapel and marched through several streets, and having reached a place they proceeded to wreck a house which happened to be an infant school. The children escaped from the attack, and these persons were stopped by some men who happened to be peaceably at work at a neighbouring foundry. That shows there was a very considerable disturbance on the 17th; and then the affidavit goes on to say that the foundry people drove off the navvies, who till then had been carrying on their riotous conduct uncontrolled. Now, it says there was no rioting up to this time at the docks, nor till the 17th; and I rest here on this day, for this reason that in all cases of this kind when we are to judge of the enormity of an offence it is important to speak of the facts leading up to the crime. I make no doubt that about two or three o'clock of the day the transaction set forth in the information took place; but I think it important to consider the transactions which took place up to that. It is said that some hundreds of navvies came to the dock and tried to intimidate those who were at work, and then challenged the men at the foundry to come and fight with them. The men at the foundry were some of the party of whom the men who came to the dock were composed; and at the dinner hour some of those iron foundry men did come to the docks, when they were fired on by the navvies. Well, the navvies were peaceable men, but they seem to have been prepared for the attack. The assailants were fired upon by the navvies and driven back. This conduct gave great fear that the houses would be attacked and the families of the people assaulted, there being no protection by soldiery or police; and a number of men at the opposite side of the river crossed over and drove the navvies away. This was open war; in fact, there was war in Belfast, and the town was left

uncontrolled by soldiery or police: and the affidavit says these are the riots spoken of in the depositions. Then he goes on to swear that he did not take part in the rioting, which I do not set much value on. But we have clear evidence that this is not the case of a man deliberately in a street going down upon his knees and aiming at his neighbour and discharging a pistol. If it were so, I think the party should be liable to transportation for life and should get it; but we have something leading up to the state of things which was itself very melancholy, but was led up to by something still more melancholy. What was a well-disposed man to do if, as these men say, they had real fears that the parties who were pretending to work were prepared to attack them? I admit that very probably these men acted most unwisely and in excess of their duty, but it appears to me that something may be said in this case in mitigation of the extreme sentence which the law awards in cases of this kind. I will call attention to some cases. First, I will take *The Queen v. Gallagher*, which I call attention to because I think it is plainly distinguishable from the present. It was a case where the parties were charged with stealing sheep. There it appeared that for some time past the mountains adjoining Gweedore, in the County of Donegal, had been tenanted by Scotch and English settlers, who had imported a large number of sheep, of which a large number had been destroyed in the years 1856 and 1857. Many of the carcasses of the sheep had been found buried in bogs adjoining the mountains in a mutilated state; and at the Summer Assizes of 1857 a presentment for the value of the sheep had been passed by the grand jury and stated, and the amount of the presentment directed to be levied off the district in which the sheep were destroyed. The only evidence against the prisoners were several informations made by an approver, in one of which he stated that certain persons named Coll had told him that their reason for killing the sheep was to hunt the Scotchmen out of the country that the people might have the mountains to themselves again. The Court refused an application to admit the prisoners to bail, and Crampton, J. said—"This is not an ordinary case of sheep-stealing or sheep killing in which, no doubt, the prisoners might be admitted to bail; but it appears by the affidavit of the Crown solicitor that there is a deep-laid and wide-spread conspiracy to injure these persons who are not indigenous to the county of Donegal, and to 'hunt them out of the country' by a wholesale system of destruction to their property. I quite agree in the view of my Lord Chief Justice, that we should by no means arrive at any likely probability of these persons appearing to take their trial if they were admitted to bail. The bails themselves might be members of this very conspiracy, and the Crown may have no means of ascertaining that fact. The presentment by the grand jury is a strong presumption of the existence of such a conspiracy; and so far from being a due administration of justice, it would be ancillary to defeating the ends of justice if we were to grant this motion." I do not find anything of that kind here. No doubt, there were tumults in Belfast, but I do not find that there was any wide-spread conspiracy for hunting any

people out of Belfast. I only cite the case to show the difference between it and this one. The Court say that if it was an ordinary case that fact would not have prevented the Court from interfering to admit the parties to bail; but because it has the ingredient of a wide-spread conspiracy to hunt Scotchmen out of Donegal the Court think it right not to interfere. Something of the same kind was another case, *The Queen v. McCartie* (the Phoenix case). There the parties were indicted under the Treason Felony Act. It was a deep-laid conspiracy that had extended through the counties of Cork and of Kerry. One of the parties was found guilty and sentenced. Another came here to be admitted to bail. I thought then, and think still, that when there was such a deep laid conspiracy—such a process of dismemberment of society—this Court would have neglected its duty if it had admitted the parties to bail. It is a case very different from the present. But there is a case, *The Queen v. Scaife*, which has been re-echoed in this country, and which ought to be a guiding principle. The case I refer to in this country is *The Queen v. Woods* (9 Ir. C. L. Rep. 71). There Napier and Ross S. Moore applied to have the prisoners admitted to bail. The charge against the prisoners was of manslaughter, and they were apprehended on a coroner's warrant, which we know must have been founded on the verdict of a jury, and that asserted the guilt of the party. The circumstances of the case are not given in the report by any formal statement, but I gather them from Mr. Brewster's on behalf of the Crown, which I shall read:—"The depositions are what we chiefly rely on to resist this application. Here a multitude of persons assemble, the majority of whom are armed; and will it be said that because some of them are unarmed they are not guilty of a felony? That statute enabling magistrates to take bail empowers them to do so when there is reasonable cause to doubt the guilt of the party. From the depositions here there can be no doubt of guilt." The Court then consisted of two members only, but two that I can never name without a feeling of respect for their position and learning as judges and their character as men—Mr. Justice Crampton and Mr. Justice Burton. Burton, J. says—"The question in this case is, whether those persons are to remain in custody until their trial? They are charged with, and intended to be indicted for, manslaughter, a verdict having been found against them to that effect by a coroner's jury; and the application is now made that they may be discharged from custody and admitted to give bail upon the grounds, first, that they are not really guilty of the offence for which they stand charged; and, secondly, this being a case of manslaughter, they have it in their power to give full and sufficient security to meet the charge brought against them. They say that it is at least doubtful whether they can be convicted; and they state matters tending to show that they did not take a part in this transaction; and then they also rely on the fact of their having been a considerable time in custody, and the injuries their families would sustain if they are detained longer. From the first I was of opinion that there could be no serious objection against this application on substantial bail being given for their appear-

ance. I apprehend that must be such bail as, reasonably speaking, the Crown cannot object to; and the Court ought to be satisfied that by granting the application there is no danger of the prisoner not appearing on the trial. There is no doubt of the jurisdiction of the Court to admit persons to bail under proper circumstances, although a verdict of a coroner's jury be found against them. And my brother Crampton is of opinion with myself, that upon reasonable terms these persons may be admitted to bail. Upon all the authorities, more especially the authority of that case in 5 Jurist (*The Queen v. Scaife*), the ground of admitting or not admitting to bail is, whether there is a danger of the party not being amenable when the trial takes place. I am satisfied that there are sufficient grounds in this case to send up an indictment for manslaughter; but that is no reason for their not being discharged from custody upon giving bail in such an amount as, morally speaking, may prevent any danger of their not being forthcoming at the trial." Thus this learned judge, notwithstanding the verdict of a coroner's jury, was of opinion that there was no serious objection to the application; and Crampton, J., who concurred in the judgment of the Court in *The Queen v. Gallagher*, says,—"I have felt considerable difficulty in arriving at a conclusion in this case. If I thought that any established rule or principle were trenching on I would not concur in the rule now made. I think it of the utmost importance that the rules of the Court should be adhered to; but in considering the depositions before us, in my opinion, we outrage no principle in admitting these parties to bail; that is, such bail as shall satisfy the Crown. Now, I take the principle of bail to be a security that the accused party should be forthcoming for trial in order that justice may be done. Imprisonment before trial is merely for that purpose; it was never contemplated that it was to be for punishment; and when the Court are satisfied that the party charged will be brought to trial, whenever that end can be had without sending parties to prison, bail should be received; but, subject to this qualification, that when the enormity of the offence is such that a mere private security will not be sufficient, then the Court will not allow bail. Magistrates are not permitted by statute law to bail a party when there is a strong presumption of guilt. In England the law is otherwise, for there a jurisdiction is given to magistrates to bail parties even when the evidence is positive; but that law has not been extended to Ireland; and this court always exercises a jurisdiction on the subject. The finding of the jury is, that these parties are guilty of manslaughter. If it were a charge of a more serious character I should not join in admitting them to bail. But can we, in exercising the authority of the Court, afford sufficient security to the Crown that those parties will be amenable to justice? I think we can. I see nothing to lead my mind to the conclusion that they will not abide their trial. I therefore agree with my brother Barton that the Crown stating the terms of the bail they require, the parties having complied with those terms ought to be admitted to bail." Now, I agree with that eminent judge; and, to use his language, I see nothing to lead my mind to the conclusion that these parties

shall not be forthcoming at their trial. I regard the confinement of these persons from September to March as unnecessary, as a great grievance to the liberty of the subject, and as I am perfectly convinced that there is no doubt of the persons being forthcoming upon this subject, and they offering what appears to me to be a reasonable amount of bail, that they would not do their utmost to save their bail harmless, and appear at their trial. Considering the circumstances of the case and the means of the parties, and coming to the conclusion that they would be forthcoming, I feel no doubt in differing from judges for whom I have such a respect—a respect almost equal to that which I have for my own judgment—and being of that opinion, I must give expression to it.

O'BRIEN, J.—In this case I agree with my brother Fitzgerald. It is unnecessary for me to go minutely or at any length into the facts of the case. It has been fully stated by my brother Hayes, and I agree that this case is to be dealt with on the supposition that the facts in the depositions will be established; and of course it is most desirable to avoid pronouncing any opinion one way or other as to what the result of the trial may be. It is enough to see do the facts in the informations, if not displaced, constitute such a case as if uncontradicted would amount to an offence. Then what is the nature of the offence that would be so established and the punishment not only that the law gives, because that would include a very wide margin; but are the facts of the case as they appear on the informations such as to render the offence of that aggravated character that would call not for the severest punishment, but for a severe and substantial punishment, so severe that it would endanger the certainty of the prisoner appearing at his trial? Those are the principles laid down by the authorities, as to which there is no controversy. As to one matter, I must abstain from going into it, namely, the conduct of parties prior to this date, and upon the greater guilt of either party I pronounce no opinion; it is sufficient to say that the facts appearing in the affidavits, if true, disclose a case of outrageous violation of the law, which, if proved against any party, I trust they may be exemplarily punished. But I should be sorry to consider the case on the supposition that private individuals on whom no attack was made were to be considered as warranted in taking the law so far into their own hands by defending the party to which they belong, or punishing another party. I abstain altogether from going into that case; I think it is not our province to do so. It is sufficient that the affidavits before us do not show that either of the prisoners was personally assailed or their families injured, or that they were obliged in self-defence to take the law into their own hands; that being so, I trust I have not gone more than is necessary into the consideration of the case. I think this is not a case that if proved would call on the judge to inflict only a moderate punishment. It does not appear that either of the parties were attacked on the same day. It appears that one of them at one time knelt down, and at another time fired, I think, four or five times. The same with Cowan. It is enough to say that to see that the offence was one

which if not displaced would be a very serious state of facts. Then going to the authorities, I shall refer first to some of those to which Mr. Whiteside referred us yesterday. One is *The Queen v. Badger* (4 Q.B. 468), and the other, *Linsford v. Fitzroy* (13 Q.B. 240). The first was the case of a criminal information against magistrates for not taking bail. The other was an action against a justice for the same reason. In both the charge upon which bail was refused was a misdemeanour. Here it is felony of a high character. In *The Queen v. Badger* the Court decided that the magistrates acted wrongly, and what was their offence? They agreed to take bail, but refused to take that which was offered on the ground that the opinions of those who offered the bail were the same as those of the prisoners. They admitted that the case was one for bail, and they acted on a clearly erroneous principle. On that account the Court held that they acted wrongly, and they made them pay the costs of the application for a criminal information, although they discharged the rule which had been obtained. In the other case the charge was misdemeanour also; and there an action was brought for the magistrate refusing bail. The jury found he did it not maliciously; and the Court held it was a judicial act, and that the action did not lie at all. Well, there are two other cases which have no application here; one is *Fitzpatrick's case* (1 Salk. 103), in which a prisoner was bailed. This was apparently a very strong case, but there was an element in it that there was no prosecution, and that a session had passed. There is no pretence that the Crown was guilty of any *laches* here. The other was *Marriott's case* (1 Salk. 104), in which the charge was forgery of indorsements on exchequer bills; but the prisoner was bailed on *habeas corpus*, because the offence was only a great misdemeanour. But really that case of *The Queen v. Scaife* would show that in cases of misdemeanour the rule is not confined at all, and that cases might arise in which bail might be refused. Reference was made to the case of the Phoenix prisoners. There there were two classes of prisoners, the Kerry prisoners and the Cork prisoners. I do not mean to say that that case is analogous to this, but that nothing that was done there can be called in aid of the present application. The Court refused the application of the Kerry prisoners to be admitted to bail, but as to the Cork prisoners the case was different. The men were put on their trial, and the case was postponed at the instance of the Crown without any reason being assigned for it; and for that reason it was that Mr. Justice Perrin and myself held that they should be admitted to bail, and we decided that the Kerry prisoners should not be so admitted. Well, *The Queen v. Woods* is deserving of observation. But on looking at that it would appear that though the prisoners formed part of an assembly, the majority of whom were armed, they were not themselves armed. In that case the prisoners were indicted for manslaughter. Of course they might be liable to the charge, even though they were not themselves armed, and did not use fire arms. But is that analogous to the case of men who deliberately kneel down and take aim several times at others? I think the case is different in

all its circumstances. I do not wish to go farther than is necessary into the facts of the case. I think that if the case made on the depositions is established to the satisfaction of a jury, the offence is a very serious one. If it is at all in the power of the prisoner to displace them I trust he may do so, but I am bound to consider that the depositions may be sustained, and I concur in the judgment of my brother Fitzgerald.

LEFROY, C.J.—I agree with my brothers O'Brien and Fitzgerald; and if I were to take any other course I should place myself in the unpleasant predicament of having to eat up my own words, or, perhaps, a more difficult thing, to swallow the principles on which I had acted on so many other occasions. I am indebted to my two brothers for being enabled to take that short view of the case, because they have laid before the Court the principles on which I acted in those cases, and the grounds upon which I held the same doctrine upon which I am now about to act. In one of the principal cases, the case of the sheep-stealers in Donegal, the great principle on which the Court acted was this: that the outrage in the case involved a great public principle. It concerned the public; and the outrages here concern the public. I am indebted to the industry of my brother Hayes, who has gone through the documents fully, for bringing before the Court the fact that this was a case in which the actors on both sides consisted of two outrageous mobs which involved all quiet and innocent parties in confusion, and reduced the town of Belfast itself almost to the condition of a state of siege, for no man could go abroad without incurring danger, such was the outrageous conduct of the mobs, and such the confusion in which they involved the town. The case was argued here, but failed signally when we come to look at the documents; the only case attempted was that this proceeding was in self-defence. It was anything but self-defence, for the principal act was done not in self-defence but in retribution and vengeance for outrages which were committed the day before. Is it possible that where there is a state of civilization—where there are laws—it shall be allowed to parties to take into their hands the measure of retribution which they shall be entitled to administer for wrongs actually done to them even? I can very well understand in a state of uncivilization, I can understand that any two parties in the island of Ceylon or among the red Indians in America, might be allowed such an indulgence to vindicate and effect a retribution for the wrongs they have suffered by taking into their own hands the punishment of their adversaries. What else is this case? The day before this outrage for which these parties are in prison, the outrage which they sought to avenge occurred. The very act by which they seek to avenge it is itself a felony; and under these circumstances, when upon an examination of the witnesses by the magistrates, upon evidence taken in the presence of those who now complain of being committed to custody, the magistrates have come to the opinion—they having before them the witnesses, they having had the opportunity of judging how the testimony was given, which we have not, the party having the opportunity of administering any question to their accusers, the magistrates having these means—those magistrates have

deliberately come to the conclusion that this was not a case for bail, I say we should forget not only the principles on which we have before acted, and on which we ought to act, but that we should violate all those principles if in such a case we were to annul the order of the magistrates and order the parties to be admitted to bail; and under all the circumstances of the case, it appearing that it was a case in which every man concerned in these outrages on one side or the other—every man who took a part in these outrages—committed an offence against the public, not merely against those against whom he was guilty of the individual felony, but against the public, I think we should violate the duty which we owe to the public and render the security of her Majesty's subjects perfectly precarious if we were to act as we would by granting the application. I therefore clearly concur in the opinion of my brothers that these parties must remain in custody.

## Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

CARNEGIE, APPELLANT, UMPHREYS, RESPONDENT.

*Practice—Setting down case stated for argument—*  
20 & 21 Vict., c. 43.

*Where the appellant omitted to set down a case stated for argument, the Court, on the application of the respondent, ordered it to be set down.*

Serjeant Sullivan applied to have this case set down by the Court. It was a case stated by the magistrates. The appellant had omitted to set it down. This was a course sometimes adopted when there was no case on the merits. There is a section in 20 & 21 Vict., c. 43, giving the judges general powers.

*The Court ordered the case to be set down.*

Waters, on a subsequent day, appeared for the respondent.—The case stated that a policeman went in uniform into the house, and found 24 men and 18 women; that he warned the appellant he was breaking the law, and he said he did not care. The appellant did not appear.

*Conviction affirmed. Costs given.*

O'LEARY v. LORD LOFTUS.—April, 16, 1864.

*Renewal of writ of summons and plaint—C. L. P. Act, 1853, s. 28.*

*An application on the 15th December to renew a writ of summons and plaint which issued on the 15th June, is a day late.*

Exham, Q.C., who had previously moved the motion before Keogh, J., applied to set aside the service of

the summons and plaint, and the order made by Ball, J.—On the 15th of June, 1863, the writ issued. On the 15th of December, 1863, Ball, J., made an order renewing the writ. It was contended that the order was a nullity, because the writ was spent, and the application was a day late.—C. L. P. Act, 1853, s. 28; *Anonymous* (1 Hurlstone & Coltman, 664); *Nazen v. Wade* (31 L. J., N. S., Q. B., 5). Keogh, J., had hesitated about setting aside the order made by Ball, J. The defendant pleaded under protest.

The motion was not opposed.

*Motion granted.*

PALLISER v. REDMOND.—April 16, 1864.

*Setting aside defences.*

*A defence to an action on a cheque that it was drawn by defendant, as chairman of a certain company, to be paid out of the funds of the said company and not out of the funds of defendant; nor was the defendant to be liable in his individual capacity for the payment of said cheque, of which plaintiff had notice, was directed to be amended.*

O'Reardon, in this case, moved to set aside the second paragraph of the defence. The action was brought upon a cheque. The plea was as follows:—"And as to the second count the defendant says, that the cheque therein mentioned was drawn by defendant as Chairman of a certain company called the Wexford Harbour Embankment Company, to be paid out of the funds of the said company, and not out of the funds of defendant, nor was the defendant to be liable in his individual capacity for the payment of said cheque, of which plaintiff had notice." That may mean a different cheque altogether, or it may mean a collateral agreement. If the latter, the defence should say it was in writing. It says, "of which the plaintiff had notice;" but it does not say when he had notice. The defendant may set up the defence either that he did not draw the cheque or that there was an agreement. The defence does not identify the cheque. It ought to say the party had notice when he took the cheque. [*Monahan, C. J.*—Is there any authority that if an agreement be pleaded it must be said to be in writing?] *Neville v. Hyland* (3 Ir. C. L. R. 238).

*Ryan, contra.*—The Court has anticipated the only point that could have been made, that the agreement might be with other parties, the instrument having passed through different hands, but this is not a negotiable instrument. [*Christian, J.*—The word "agreement" is not in the plea. It is quite consistent with the allegation of notice that he did not agree when he accepted the cheque. Cannot he say he did agree?] That would rather be matter of demurrer. [*Monahan, C. J.*—What is the meaning of the plea?] That the defendant was not to be liable on the cheque, and that the plaintiff knew that when he took the cheque. [*Christian, J.*—Why not say that there was an agreement?]

MONAHAN, C. J.—We think this plea must be amended; if there was an agreement, let it be said so; and if a written one, let it be said so.

*Rule accordingly.*

WOODS v. ARMSTRONG.—April 18, 1864.

*Pleading.*

*In an action upon a guaranty the first count of the summons and plaint, after setting out the guaranty stated, that after said promise the said J. F. for the carrying on of his aforesaid house of business, gave orders to the plaintiffs to supply to him certain goods for his said house of business; that is to say, certain teas, grocery, and other goods, at certain prices, amounting in the whole to £190 ls. 9d., to be paid at the expiration of the period of credit usual in the trade in respect of such goods, and according to the usual course of such trade and such payments, till the expiration of such period of credit, to be secured by such bills of exchange or promissory notes as in such trade usual in respect of such goods; and afterwards, whilst the said guaranty and promise was in force against defendant, and before the same was recalled, the plaintiffs, under the aforesaid promise, supplied the said goods to the said J. F. upon the aforesaid terms; and although the aforesaid periods of credit have expired, and although all things have happened, &c. necessary to entitle the plaintiffs, &c., yet the said J. F. has not, nor has the defendant, paid the said sum, &c. The fifth defence pleaded by the defendant was as follows:—That after such goods were supplied respectively as alleged, it was agreed by and between said plaintiffs and said J. F. without the consent or knowledge of the defendant, for good and valuable consideration to the plaintiffs in that behalf, that the plaintiffs should give time to the said J. F. for payment of the prices thereof respectively, and forbear to sue him for the said prices; and each of them for a certain time, in respect of each of them respectively agreed or between them, such time of forbearance in respect of each of them being longer than the plaintiffs ought to have given the said J. F. for the payment of said prices respectively, according to the meaning of defendant's alleged property and guaranty; and in pursuance of the said agreement, and without the consent or knowledge of the defendant, the plaintiffs gave time to the said J. F. and forbore to sue him for the prices of said goods, or any of them, during the times respectively so agreed on as aforesaid. Upon application by the plaintiff to set aside this defence, the Court made no rule on the motion.*

*Palles* applied that the fifth and seventh defences pleaded in this case might be set aside.\*—The first count of the summons and plaint complained that the plaintiffs, at the time of the promise hereinafter mentioned were merchants trading under the style and

firm of Adam Woods & Co., and one John Ferguson was a general merchant and dealer in groceries, having an establishment at Upper George's-street, Kingstown, in the County of Dublin, and the defendant, by a certain promise in writing signed by defendant, and addressed to plaintiffs, promised the plaintiffs in the words and figures following, that is to say—"10th April, 1863.—Gentlemen (meaning the plaintiffs), I (meaning the defendant) beg leave to inform you (meaning plaintiffs) that at the request of Mr. John Ferguson, of Upper George's-street, Kingstown, who has lately opened an establishment of general merchant and dealer in groceries of all kinds, that I (meaning defendant) have consented to give you (meaning plaintiffs) a general guaranty for a sum not exceeding £200 for any orders he (meaning said John Ferguson) may give you for the carrying on of his (meaning said John Ferguson's) house of business at Kingstown, and for the goods you (meaning the plaintiffs) may supply him (meaning said John Ferguson) under this letter of agreement. This guaranty to be in force against me (meaning defendant) till recalled, reserving the right to do so when occasion shall require, and on notice to you (meaning plaintiffs). I remain, Gentlemen, your very obedient servant, John Tew Armstrong. Messrs. A. Woods and Co., Temple-lane, Dublin." And that after said promise the said John Ferguson, for the carrying on of his aforesaid house of business at Kingstown, gave orders to the plaintiffs to supply to him certain goods for his said house of business—that is to say, certain teas, grocery and other goods, at certain prices, amounting in the whole to £190 ls. 9d., to be paid at the expiration of the period of credit usual in the trade in respect of such goods, and according to the usual course of such trade and such payments, till the expiration of such period of credit, to be secured by such bills of exchange or promissory notes as in such trade usual in respect of such goods; and afterwards, whilst the said guaranty and promise was in force against defendant, and before the same was recalled, the plaintiffs, under the aforesaid promise, supplied the said goods to the said John Ferguson upon the aforesaid terms; and although the aforesaid periods of credit have expired, and although all things have happened, times elapsed, and conditions been performed necessary to entitle the plaintiffs to payment for the said goods, and to maintain this action for the breach hereinafter alleged, yet the said John Ferguson has not, nor has the defendant, although requested, paid the said sum, or any part thereof, to the plaintiffs, and same remains due and unpaid to them. The second count complained that the defendant promised the plaintiffs, as in first count stated, and that afterwards the said John Ferguson, for the carrying on of his said house of business at Kingstown, gave orders to the plaintiffs to supply to him, said John Ferguson, certain goods for the said house of business, at certain prices, and afterwards, whilst the said guaranty and promise was in force against the defendant, and before the same was recalled, the plaintiffs, on the faith of the said promise of the defendant, supplied the said goods to the said John Ferguson; and although all things happened, times elapsed, and conditions were performed necessary to entitle the plaintiffs to payment of the price of the said goods, and to

\* See the subsequent argument in this case, reported 9 Ir. Jur., N. S., p. 292.

maintain this action for the breach hereinafter alleged, yet neither the said John Ferguson nor the defendant (although requested) paid the said price to the plaintiffs, but, on the contrary, £190 1s. 9d., part thereof, still remains due to plaintiffs. The third count complained that the defendant, in consideration that the plaintiffs would sell and deliver goods to one John Ferguson, guaranteed and promised the plaintiffs to be responsible to the plaintiffs for the due payment of the price of the said goods to the extent of £200; and the plaintiffs accordingly sold and delivered goods to the said John Ferguson at and for certain prices amounting in the whole to £190 1s. 9d.; and all conditions were performed, times elapsed, and things happened necessary to entitle the plaintiffs to be paid the said sum of £190 1s. 9d., and to maintain this action, yet neither the said John Ferguson nor the defendant has paid the said sum of £190 1s. 9d., and the same remains due and owing to the plaintiffs, the particulars whereof are endorsed hereon. The fifth defence was as follows:—That after such goods were supplied respectively, as alleged, it was agreed by and between said plaintiffs and said John Ferguson, without the consent or knowledge of the defendant, for good and valuable consideration to the plaintiffs in that behalf, that the plaintiffs should give time to the said John Ferguson for payment of the prices thereof respectively, and forbear to sue him for the said prices and each of them for a certain time, in respect of each of them respectively agreed on between them, such time of forbearance in respect of each of them being longer than the plaintiffs ought to have given the said John Ferguson for the payment of said prices respectively according to the meaning of defendant's alleged promise and guaranty, and in pursuance of the said agreement, and without the consent or knowledge of the defendant, the plaintiffs gave time to the said John Ferguson, and forbore to sue him for the prices of said goods, or any of them, during the times respectively so agreed on as aforesaid. The seventh defence, which was pleaded to the second and third counts, stated that no goods were supplied, or sold and delivered, according to the guaranty and promise of defendant in said paragraphs respectively alleged, or either of them. The defendant can raise two questions under the fifth defence—1. That the period for which we gave credit was longer than the time usual in the trade; or, secondly, that we gave time which did not exceed time usual in the trade. The defendant ought to have pleaded that the time we gave was longer than the time usual in the trade, and if that be so, he is entitled to recover. If he means to raise the point, that we ought not to have given any time, that ought to be by demurrer. [Monahan, C. J.—Does not the plea admit that you might have given some time?] It puts the nature of the language of the guaranty in issue. This is the ordinary plea put in on a guaranty where there is no time to be given: it is taken from Bullen and Leake. The defendant has no right to introduce into the seventh defence the words “according to the guaranty and promise of defendant.” This is double, as traversing the fact of supplying, and as traversing the mode of supplying. The construction of the guarantee ought to be matter of demurrer.

*M'Mechan contra.*—Any embarrassment arises from

the plaintiff and not from the defence. The question is, which of the two parties should demur, there being a question which ought to be tried on demurrer.

*Palles in reply.*—There is no dispute as to the law. It is said there is no averment in the plaintiff that bills were given. If not, there is another which would be equally fatal, if we are wrong—that by the contract on which we sold the goods we did give time until the expiration of the period usual in the trade. Whether bills of exchange were or were not given, the contract was one whereby the price was not to be paid until the expiration of the credit. If the plaintiff were in the ordinary form the plea would be good, it being the ordinary plea. [Keogh, J.—For anything that is in the plaintiff, Ferguson may have paid the bills and you have the money in your pocket.] [Monahan, C. J.—You will not put your plaintiff in the ordinary form.] It is the object of the C. L. P. Act that these questions should be raised upon demurrer, without the expense of going to trial.

*No rule.*

BLAKENEY v. PALMER.—June 13, 1864.

*C. L. P. Act, 1856, sections 6 & 7.*—“Matters of mere account.”

*The mere existence of one or two items over and above the matters of account constituting a cause of action would not prevent the Court from having the power to refer the case to the Master under secs. 6 & 7 of the C. L. P. Act, 1856—(per Christian, J.)*

*Byrne*, for the defendant, moved that this case might be referred to the Master. The action was brought to recover £1,039 10s. The defendant had traversed the cause of action, and pleaded a plea of payment and a plea of set off. The fourth replication pleaded to the plea of set off alleges payment of the alleged set off, and it consists of fifty-two items, and closes with other sums, the particulars of which are within the knowledge of the defendant. C. L. P. Act, 1856, sections 6, 7. [Monahan, C. J.—There is one item as to whether certain work was to be performed gratuitously. That is not a matter of account.] The words of the section are “wholly or in part.” The replication in reference to the work and labour deals with only a small part of it. [Monahan, C. J.—I think there are some cases in England deciding that you cannot refer a case to a Master where there is anything besides a matter of account.] [Christian, J.—Look at the seventh section: that shows you a case like this can only be dealt with under the sixth section.] Then under that section the Court might send so much of the matter. I would ask that all but this which is conversant with the work and labour should be sent to the Master, and the work and labour be tried by a judge and jury. [Christian, J.—On looking at the seventh section, I think it is not dependent on the party consenting whether the Court will send to a master, that word “consent” referring to “judge.”] [Keogh, J.—What would be the



effect here? The Court would have to make another order to send a question before a jury. They say on the other side there is no such thing as a mere account.] The answer to a portion of the set off is a traverse—that no money was received for the use of the defendant, as alleged, &c.

**Carton contra.**—The plaintiff's affidavit states that this is for the purpose of delaying the payment of a claim justly due to her, and that with the exception of £200, or £300 at most, the entire of the sums were remitted out of other sums, and are wholly irrespective of the set off.

**MONAHAN, C. J.**—We have power to send this, if it be a proper case; but it would be wild to send half of this to be dealt with by the Master and half by the judge and jury.

**CHRISTIAN, J.**—Assenting that there are not grounds to send this case to the Master, I do not think the mere existence of one or two items over and above the matters of account would prevent the Court from having the power to send it to the Master. I think that is the very case the Legislature intended to provide for in the sixth and seventh sections. I concur in thinking that the whole complexion of this case is not such as would warrant its being sent.

**MONAHAN, C. J.**—I did not think it necessary to go into the grounds. I have no doubt that the Court have the power, in a proper case, to send it; but this is not such a case, and I think it will be much easier tried by a judge than by the Master.

**BALL, J.**—I am not satisfied of the *bona fides*, and therefore think it is not a case to be sent.

*Motion refused.*

## Court of Exchequer.

Reported by Valentine J. Coppinger, Esq. Barrister-at-Law.

**MOYNAHAN v. BARRY.**—24th & 25th Jan., 1865.

*New trial motion—Evidence of nature of tenancy—Document less than thirty years old.*

*Where on the trial of the issue whether the lands were plaintiff's lands, as alleged, the plaintiff had given prima facie proof of a tenancy from year to year subsisting in him, and the defendant, for the purpose of displacing that case, and showing that the interest of the former tenant, under whom the plaintiff claimed, had expired with his life, having first proved that A (the former tenant) had entered into possession at a certain period twenty-eight years before, and during her life paid a certain rent, tendered in evidence a document purporting to be a proposal, bearing the said date, for the holding of the premises for the term of her natural life, at the said rent, and purporting to have affixed thereto said A's mark, and duly accepted by the then landlord; and although evidence had been given of the deceased landlord's signature, and that the said documents were found among his papers, yet as none had been given of said A's mark, and said*

*evidence was received at the trial, subject to objection, Held—that such document was not admissible as evidence for the defendant, either as an ancient document or as a declaration against interest, and a new trial was therefore granted.*

*Quære.—If evidence had been given to show the impossibility of proving the document by living testimony, would the document have then been admissible?*

THIS was an action tried at the last Summer Assizes for the county of Cork, before Mr. Justice Fitzgerald. The summons and plaint contained two counts, one in trespass *quare clausum fregit*, and another for malicious prosecution. Upon the pleadings three issues were knit, the important one being, whether the lands in the writ of summons and plaint mentioned were plaintiff's lands, as alleged. As to the title to the possession of lands, the case for the plaintiff was that the late Mrs. Moynahan (then Mrs. Crotty), his mother, had, in October, 1840, taken the said lands at a rent of £3 from the late Mr. Richard Barry, and that some time previous to her death the Cork and Youghal Railway Company having taken a portion of the lands, the rent was reduced to £2. She died on 10th October, 1863, leaving one son, the plaintiff, and an elder daughter, by the former marriage. Plaintiff continued to live in the house, his sister coming there from time to time, up to the time of the alleged trespass. Some rent which had accrued due during the lifetime of their mother had been paid by plaintiff's sister after her death. The case for the defendant was that the plaintiff's mother had been tenant for her own life, and no further, at a rent of £3 (subsequently reduced to £2), under a proposal signed by her, and accepted in October, 1840, by Mr. Richard Barry. That said Richard was dead, and that his estate was now vested in his sisters, Johanna and Mary Barry; and that defendant, as their agent, entered on the lands on the 16th March, 1864, having previously got possession from the plaintiff's sister. If it could be established that the tenancy terminated with the life of the widow, it was clear that the plaintiff's case must fail. A proposal of 1840, purporting to be signed by Mary Crotty, by her mark, was proposed to be given in evidence, but no evidence was given of her having so signed it. The acceptance at the foot was signed by Richard Barry, and witnessed by a man named Keeffe. *Keeffe was not produced*; but R. Barry's handwriting was proved. The document was also proved to have been found among Richard Barry's papers. A rent-book was produced, commencing with the year of the reduction, in which there appeared entries of the payment of the rent by Mrs. Moynahan, otherwise Crotty, up to 1863. Under those circumstances, the counsel for the plaintiff objected to the proposal being given in evidence. The learned judge, however, admitted it, taking a note of the objection; and upon the jury finding that the tenancy of Mrs. Moynahan was under the accepted proposal, directed them to enter a verdict for the defendant on the trespass count. A conditional order for a new trial, on the ground of the improper admission of this evidence having been previously obtained,

*Chatterton*, Q.C. (with him *Green*) now appeared in support of the verdict. Our difficulty arose from our not being able to prove the actual affixing of Mrs. Crotty's mark by her. The jury found it to have been an accepted proposal. Supposing, however, that it had never been signed by the tenant, yet if possession were given under it, it would regulate the terms of the tenancy. [*Fitzgerald*, B.—Tenancy is admitted: the only question is, what kind was that tenancy?] The objection is as to the admissibility, and not to the effect, of certain evidence. The jury have found that it was the document under which the woman entered, and the question is whether or not there was legal evidence to go to a jury that it was under that document that she did enter. [*Fitzgerald*, B.—There is no doubt that in an action of ejectment this evidence would have been admissible. A similar question has been recently considered by this Court in *Hutchins v. Vaughan*, which went to the Exchequer Chamber.] The question then will be whether or not there is any evidence of any kind to go to a jury establishing the connexion. [*Pigot*, C.B.—There was evidence of the tenancy, but not of a tenancy under that document.] *Doe v. Coleman* (3 C. B., p. 622); *Braithwaite v. Hitchcock* (10 M & W. p. 494.) The fact of the possession having been given to a party who is named the tenant in the document is what I base my case upon. There was no objection taken to the judge's charge. The whole question is, whether or not it was admissible at the time received, or was rendered admissible by anything that afterwards happened. In *Hutchins v. Vaughan* it was decided that the document required contract, and there was no contract.

*Exham contra*.—The first count is in trespass, and the case turns upon this—did the tenancy terminate with the death of the woman or not? Payment of rent establishes the tenancy from year to year; the onus was, therefore, thrown upon the other side of displacing that evidence. It is true that a document more than thirty years old, and coming from the proper quarter, may be received in evidence without the signature being proved; but this document was not thirty years old, and, therefore, did not come within the exception.—See *Doe v. Strattan* (4 Bing., p. 446); *Braithwaite v. Hitchcock* (10 M. & W., p. 494).

*O'Riordan* with him.—As to the nature and extent of the rule admitting documents of thirty years old without proof—See *Doe v. Pulman* (3 Q.B. p. 622). *Clarkson v. Woodhouse*, cited in *Bateson v. Green* (5 Term. R. p. 412); *Pomfret v. Smith* (7 Brown, P.O. p. 169), and the cases on the subject collected in the last edition of Taylor on Evidence. [*Pigot*, C.B.—Might it not be argued that in order to bring it within the exception of documents beyond living memory, it would be sufficient to satisfy the Court of the impossibility of producing living witnesses?] In this case there was no evidence to that effect.—*West v. Davies* (7 East. p. 322.) It is to be observed that in all the cases the instrument thus admitted was executed by the lessee himself, and of course, therefore, those who took under him are bound by it. Again, the mark, or alleged signature, such as it is, is above the condition which you will observe at the foot of the alleged proposal, and therefore there is no evidence of the contract.

*Green* (with *Chatterton*, Q.C.) in reply.—The document is admissible as against the interest of the landlord. See Phillips on Evidence, p. 533. [*Pigot*, C.B.—A declaration against interest cannot be quoted in favor of the person deriving under the person who makes the declaration, or of any person in privity with him.] *Braithwaite v. Hitchcock* (10 M & W. 494) [*Pigot*, C.B.—Where is the evidence referring Mrs. Crotty's entry into possession of the premises to the document, if the facts be quite consistent with a tenancy from year to year?] The case in Brown's Parliamentary Cases does not seem in accordance with *Doe v. Pallen*. As to the count for malicious prosecution, see *Johnson v. Sutton* (1 T. R., p. 493).

*Pigot*, C.B.—The evidence, to the admission of which objection was taken, was not received as evidence of an act of ownership, for it is evident that the object in producing it was to prove the contract. *The Sussex Peerage case* (11 Cl. & Fin.) long since recognised the general proposition, that declarations made by persons since deceased against their pecuniary or proprietary interest are admissible as evidence; but the instances in which the rule has been held to apply have always been cases where the act was not the act of the person under whom the party suing derived. The admission of the entries in the book of a deceased rector as evidence is entirely of an exceptional character, and the principle has not been extended. The case of *Braithwaite v. Hitchcock* has been cited to show that the entry of the tenant into possession of the premises, at the time of the admitted execution of the instrument by the deceased landlord, was sufficient to regulate the terms of the tenancy so as to make it terminate with the tenant's life. Some words of Lord Abinger seem to imply this; but it is to be observed that in the case before him there was evidence connecting the letting with the instrument; and although I called for authority upon the subject, no other case supporting that view has been cited in the argument. No evidence has been put before us that the witness Keeffe is dead. If anything of that kind had been shown, a question of importance might have arisen. No such evidence has, however, been given, and it is, therefore, quite unnecessary for us to enunciate any opinion upon the point. As to the other points that have been urged in the argument, I need only say that it is absurd to suppose that we could uphold the verdict upon any other ground than that upon which the verdict of the jury was manifestly found. It is, therefore, clear that the verdict upon the trespass count cannot stand; and as for the other portion of the case, I may say that it is a well settled principle that we cannot set aside a verdict as to one part and maintain it as to the other.

*Cause shown disallowed, each party to abide his own costs.*

## Landed Estates Court

Reported by C. J. Manning, Esq.

[BEFORE JUDGE HARGREAVE.]

IN THE MATTER OF MATTHEW S. CASSAN, OWNER;  
JAMES TYRRELL, PETITIONER.

January 28, 1865.

*A petitioner having a charge on the fee of lands ordered to be sold, and also a charge on the life estate in the said lands, is not bound to accept an offer to pay off the amount of his charges on the fee, but is entitled to go on with proceedings to a sale. As between an owner who is tenant for life and a petitioner who has an incumbrance on that life estate, the prior and better right to redeem the charges on the fee belongs to the incumbrancer.*

JAMES TYRRELL, the petitioner in this matter, obtained a judgment in the Court of Common Pleas in Ireland against the said Matthew S. Cassan for the sum of £267; and on the 28th of January 1862, registered same as a mortgage against the estate of the said M. S. Cassan in certain lands, and on the 28th day of November, 1862, filed his petition in the Landed Estates Court in Ireland, praying a sale of the life estate of the said M. S. Cassan in said lands: on the 18th day of March, 1863, the Hon. Judge Hargreave made an absolute order in said matter, whereby he ordered "that the estate and interest of the said Matthew S. Cassan, under and by virtue of a certain deed of the 28th May, 1855," (that is to say, his life estate, subject to the trusts of said deed) in all said lands and premises known as the Sheffield estate, with the mansion-house and demesne thereof (being the lands firstly and secondly granted by a certain indenture of the 29th of May, 1845), and the fee of the houses and premises in the precincts of Maryborough, being the Maryborough estate, should be sold for the purpose of discharging the incumbrances thereon. The rents and profits of said lands and premises proved insufficient for keeping down the interest on the several incumbrances in said deed of the 28th of May, 1855, mentioned, and the said life estate, subject to the trusts of the said deed, was of very little value. The said James Tyrrell, on the 28th day of November, 1862, presented his petition to the Court of Chancery in Ireland on foot of the said judgment, £267, praying that the life estate of the said M. S. Cassan in said lands should be sold for payment of said judgment, and for the appointment of a receiver in the meantime, but declined to take a decree on said petition for a sale of said land; and by an order in said matter, dated the 28th of May, 1862, a receiver was appointed over the mansion-house and house division of said lands; and by a further order in said matter, made the 6th day of November, 1862, the said mansion-house and house division were let to the owner under the Court, at the occupation rent of £90 a year. On the 13th day of April, 1864, the said James Tyrrell procured an assignment to him from Robert Samuel Palmer of a judgment for £300, in favour of Richard Evans, in the schedule to

said deed of the 28th of May, 1855, mentioned (which judgment had by deed dated the 11th of July, 1855, been assigned to the said Robert Samuel Palmer). The said James Tyrrell, on the day of presented a further petition to the Landed Estates Court in Ireland, claiming as an incumbrancer on foot of said last-mentioned judgment so purchased, and praying for a sale of the fee of the said Sheffield and Maryborough estates; and the Hon. Judge Hargreave made an absolute order in said matter on the 2nd day of June, 1864, whereby he ordered "that the fee-simple estate of the said Matthew S. Cassan in all said lands should be sold for the purpose of discharging the incumbrances thereon." The said James Tyrrell subsequently procured two judgments for £700 and £300, of Trinity Term, 1849, and Michaelmas Term, 1849, to be assigned to him; and then the owner obtained a person willing to take an assignment of said three judgments for £800, £700, and £300 respectively; and by a deed of agreement, dated the 27th day of December, 1864, made between the said Matthew S. Cassan, of the one part, and Edmond Lombard Swan, of the other part, the said Edmond L. Swan agreed to pay off the said James Tyrrell the amount due on said three judgments for principal, interest, and costs, upon his assigning said judgments and a policy of insurance collateral therewith to the said Edmond L. Swan. All interest then due to the said James Tyrrell on foot of the said three judgments charged upon the fee of said lands had been paid; and by an indenture of release, bearing date the 9th day of December, 1864, and made between said Cassan and the said James Tyrrell and several other parties, the said James Tyrrell released all interest due to him on foot of said three judgments, and acknowledged to have received the same. The said Cassan, by a written consent, bearing date the 11th day of July, 1864, had obtained the consent of all the other incumbrancers, save the said James Tyrrell, that said proceedings should be stayed, and, in pursuance of notice, bearing date the 15th day of December, 1864, moved the Honourable Judge Hargreave that said proceedings, under said order of the 2nd of June, 1864, for the sale of the fee of said lands, should be stayed, Cassan undertaking, within three weeks, to pay to the said James Tyrrell the full amount of his said three judgments for £300, £700, and £300 respectively, charged upon the fee of said lands, with all interest and costs, up to the day of payment, on the said James Tyrrell assigning said judgments and a policy of assurance for £1000 collateral therewith, to the said Edmond Lombard Swan; and Cassan also undertaking to pay the petitioner's costs in reference to all proceedings on foot of the judgments so to be assigned within one fortnight after the same should be taxed, and in default thereof the said James Tyrrell to be at liberty to proceed with the sale of said lands. The owner, before the hearing of said motion, also made an offer in writing, through his solicitor, to the said James Tyrrell, to pay him the sum of £400 in full for debt and costs on foot of his judgment for £267 charged on the life estate of the owner in said lands, there being at that time the sum of £306 due thereon for principal and interest, and to make the payment of said

sum of £400 a condition upon which said proceedings should be stayed.

R. W. Gamble appeared for the owner.

Flanagan, Q.C., and Ferguson, appeared for the petitioner.

JUDGE HARGREAVE.—The application in this case is on behalf of the owner to stay the petitioner's proceedings to sell the fee on being paid off his charges which affect the fee, being two judgments for £300 and £700. The petitioner has also a charge affecting the owner's life estate, and under such circumstances he objects to the proceedings being stayed; and I am of opinion that he is entitled to go on with the sale. I am unable to discover any advantage which the owner can derive by procuring a person to take assignments of petitioner's judgments on the fee; for even if the petitioner could be compelled to assign those judgments, which is not quite clear, yet, as an incumbrancer on the life estate, he would possess an immediate right to redeem these charges and to require them to be re-assigned to himself. As between the owner as tenant for life and the petitioner, who has an incumbrance on that life estate, it appears to me that the prior and better right to redeem the charges on the fee belongs to the incumbrancer. The owner has, no doubt, the power of redeeming the mortgages and judgments which affect the fee; but he is not entitled to use that power to prejudice one who has a charge on the very interest which gives the owner the power of redemption. The owner, before he is at liberty to cause these charges to be redeemed, must first pay off the charge on the life estate; for so long as that charge remains the owner of it has the prior right to take an assignment of the charges on the fee. The application would be of a different character if it proposed to pay off the judgments on the fee and have them satisfied, for that is a right which a debtor always possesses; but if he intends to require the petitioner to assign these charges the petitioner is entitled to refuse to do so, if by such assignment he prejudices himself at the instance and for the benefit of his own debtor. Independently therefore of the question whether an order for sale once made ought to be discharged where such a proceeding is injurious to any person interested in the estate, I think the application cannot be sustained, and must be refused, with costs.

#### [BEFORE JUDGE HARGREAVE.]

IN THE MATTER OF THE ESTATE OF ELLEN JOHNSTON, OWNER; R. GRAY AND ANOTHER, PETITIONERS.

*Mortgage of leasehold estate by executor—Devastavit.*

*A sale or mortgage of a leasehold estate by an executor is not impeachable unless the mortgage is privy or party to a fraud or devastavit by that executor. It is a devastavit when an executor or an executrix deals with assets for any purpose not connected with the administration of the testator's estate.*

*An executrix cannot carry on a partnership business with her testator's assets, nor can she raise capital for that business by mortgaging her deceased husband's property. Such a proceeding constitutes a devastavit, and the Court will dismiss a petition filed by a mortgagee to raise his charge.*

By a lease dated 8th January, 1838, Kildahl and others demised to Thomas Johnston the shop and premises No. 14 Upper Sackville-street, for 900 years, at a rent of £139 7s. 8d. On Thomas Johnston's death the lease became vested by his will in Ellen Johnston, his widow. On the 13th March, 1860, Ellen Johnston mortgaged to the petitioners to secure the repayment of any sums that might become due by the firm of "Johnston and Mayston" to the petitioners, not exceeding £2,000 and interest; and on the 18th January, 1862, Ellen Johnston, by endorsement on the mortgage, covenanted that the premises should stand as security for £3,000 and interest; and by a letter of deposit dated 29th November, 1862, Ellen Johnston and Samuel Mayston deposited with the petitioners the lease as a security for £500; and by deed dated 6th February, 1863, Ellen Johnston and Samuel Mayston covenanted with the petitioners that the premises should stand as a further security for all sums due by them to the creditors of the owner of Mayston. The sum of £1,896 11s. 2d. was due to the petitioners on the mortgages up to 12th July, 1864. A conditional order for sale was made on 20th July, 1864. George Joseph Johnston, the eldest son of Ellen and her late husband Thomas, now shewed cause against making the order absolute. His affidavit stated that, on the death of Thomas Johnston, Ellen entered into possession and carried on the business with Mayston till September, 1863, when the partnership was dissolved, and Mayston alone occupied the premises as tenant to Ellen Johnston; that until after the said last mentioned month of February, 1864, he never knew or heard of any of the mortgages under which the petitioners claimed to sell the premises, and he first heard of them upon the occasion of the failure in business of Mayston in February, 1864, and that the mortgages were executed by Ellen Johnston wholly without his knowledge, and without the knowledge of his brother and sisters, and that he or they never acquiesced or in any manner ratified same; and that Ellen Johnston had no power under the will in any manner to charge, incumber, or dispose of the said premises, or any part thereof, for her own benefit, or to dispose of same otherwise than as directed by the will; and that she was a mere trustee for the benefit of the children and grandchildren of the said Thomas Johnston, save to the extent of a life estate therein, to which Ellen Johnston was entitled under the will; and that the petitioners were at the time of the execution of the said mortgage fully aware of the contents and provisions of the will of Thomas Johnston, and of the rights of Ellen, and of the children respectively, and took the said mortgage, with full notice of the rights of the said parties.

*Copy will of Thomas Johnston, dated 30th day of April, 1856; proved 29th day of June, 1859.*

"This is the last will and testament of one Thomas Johnston, of Sackville-street, in the city of Dublin,

silk mercer:—I give and bequeath to my dear wife, Ellen Johnston, otherwise Rees, all my right, title and interest in and to my premises known as No. 14 Upper Sackville-street, in the city of Dublin, in which I now carry on business in partnership with Mr. Samuel Mayston, with all my other property of every nature and kind whatsoever and wheresoever, and which I now am or may hereafter become possessed of or entitled to, to be divided amongst my children and grandchildren at her death, or sooner, if she think fit, as to her may seem most for their advantage; and I appoint my said dear wife sole executrix of this my will. In witness whereof I have hereunto set my hand this thirtieth day of April, in the year of our Lord, one thousand eight hundred and fifty-six.

(Signed) "THOMAS JOHNSTON."

Probate granted to Mrs. Ellen Johnston, sole executrix, on the 6th day of August, 1859.

Testatrix died 29th June, 1859.

The affidavit of the petitioner, Robert Gray, of Temple-hill, in the county of Dublin, stated that the late Thomas Johnston, the husband of owner, was in his lifetime indebted in large sums of money to petitioners, who were bankers, for money lent to the firm of Johnston and Mayston, the latter of whom was son-in-law of said Thomas Johnston; that at the death of the said Thomas Johnston, petitioners having held, as security, the lease of the house in Sackville-street, and also certain policies of insurance on his life, the proceeds of the policies were sufficient to pay the debt so due by said Thomas Johnston and his partner, and accordingly such debt was fully discharged; but the proceeds of the policies being thus absorbed, said Ellen Johnston was left without the means of support for herself and her family, except by continuing and carrying on, in conjunction with said Samuel Mayston, the trade which her deceased husband had with said Mayston carried on before his death; that for the purpose of supporting herself and family, the owner, Mrs. Johnston, as such executrix as aforesaid, entered into partnership, by deed dated in 1859, with said Mr. Samuel Mayston, under the previous style and firm of Johnston and Mayston; and in doing so she considered that, having been entrusted with full power of appointment over her late husband's estate, she thus best carried out the directions in her husband's will; that from the date of said partnership said Ellen Johnston drew from the firm, from time to time, large sums of money, amounting in the whole to the sum of £3,549 7s. 10d., as appears by an account furnished from the partnership books by Mr. William J. White, the accountant employed by the trustees of said Samuel Mayston's estate; and that, in fact, the amount so received by said Ellen Johnston greatly exceeded the whole value of the house in Sackville-street; that said Ellen Johnston, trading as such executrix, and said Samuel Mayston, trading in partnership, as aforesaid, required pecuniary assistance from petitioners, not only in discharging trade bills, but in actual cash advances for payment of their acceptances in England and France; and petitioners declined making such loans or advances without the security of the premises vested in the said owner as such executrix, and that without such advances to carry on said

business, said Ellen Johnston, as such executrix, would have been deprived of the sole means of maintenance of herself and family, and of their education and advancement in life; and that under such circumstances she and the said Samuel Mayston, as an assenting party, executed the indentures of mortgage in the petition mentioned; that the said firm were at the end of the year 1862 compelled to stop payment, a result attributed in part to the very large sums of money drawn, as aforesaid, by said Ellen Johnston, and petitioners accepted a composition of 13s. 4d. in the pound, but without prejudice to their mortgage securities which they received from the owner, and petitioners secured to the other creditors of the firm the last payment of such composition, taking from Mrs. Johnston an indemnity mortgage on the premises, so far as they were available, after payment of prior charges; that in September, 1863, the said partnership was dissolved, the said Samuel Mayston having agreed with owner to take the said premises at a rent of £450 a-year, and also agreeing to indemnify her against the liabilities of the firm; but said Samuel Mayston having failed in payment of his last instalment, his estate was vested in trustees for the benefit of his creditors, and the premises were surrendered to said owner, and petitioners were obliged to pay the said instalment so secured by them, and they submitted that said premises should be sold to pay them, as far as the produce will extend, the balance due to them, on the grounds that said Ellen Johnston had, under her husband's will, full power to mortgage his leasehold premises, and uncontrolled power of appointment among her children and grandchildren, and that she and such of her children and grandchildren as required it were benefited by the partnership, and received out of the estate far more than they could have done by a sale of said premises, subject to owner's life estate therein; that the said owner supported and educated, and advanced such of her children as needed it, out of the monies so received by her from said partnership concern; and that such disposal of said monies by the owner should be considered as the exercise by her of the power given by her deceased husband; and the petitioners therefore submitted that they had a charge against the premises to the extent of the sums advanced.

*Warren, Q. C., and Byrne, for petitioners.*—Respondent, as executrix, had full power at law and in equity to make an absolute disposition of testator's assets; and the petitioners must be parties to some fraud or *devastavit* by her, otherwise the transaction is unimpeachable.—*Nugent v. Gifford* (1 Atk., 463); *Cole v. Miles* (10 Ha., 179); *M'Leod v. Drummond* (17 Ves., 152); *Scott v. Tyler* (2 Br. Ch. Ca., 431); *Hill v. Simpson* (7 Ves., 151); *Raby v. Ridehalgh* (7 De Gex., M'N. & G., 104).

*Serjeant Sullivan, and Purcell, Q. C. for respondent.*—Ellen Johnston, as executrix, was not warranted in carrying on the partnership business with her testator's assets, still less of entering into a new partnership. In the absence of express authority an executor cannot carry on the trade of the testator, except for the purpose of winding it up.—*Kirkman v. Booth* (11 Beav., 173); *Collinson v. Lister* (20

Beav., 356); *M'Nally v. Acton* (4 De Gex., M'N. & G., 744); *M'Leod v. Drummond* (17 Ves., 152); *Walker v. Taylor* (8 Jur., N.S., 681); *Wilson v. Moore* (M. & K., 126); *Haynes v. Foreshore* (11 Hare, 93, 99).

HARGREAVE, J.—The law has, I think, been properly stated on both sides—that a sale or mortgage of a leasehold estate by an executor is not impeachable, unless the mortgagee is privy or party to a fraud or devastavit by the executor. The question, therefore, is, whether these mortgages constitute a devastavit, and whether the mortgagee knew they had that character. Now, it is a devastavit whenever the executor deals with assets for purposes not connected with the administration of the testator's estate. Mrs. Johnston was fully entitled, if she wished, to go into a new partnership with Mayston, after her husband's death; but she was not entitled to use, for any purpose of that business, any assets of the testator, nor could she legitimately raise capital for that business by pledging her deceased husband's property. I, therefore, think that these mortgages were acts of waste, even although they may have been made in the hope of ultimately benefitting the legatees. The question remains, whether the mortgagee was aware of the mode in which Mrs. Johnston intended to apply the money raised by the mortgage. It appears from Mr. Gray's affidavit that all Mrs. Johnston's own debts to Mr. Gray had been fully paid off, but that Mrs. Johnston was left without means of supporting herself or family, excepting by carrying on the business in partnership with Mr. Mayston. This proves clearly that Mr. Gray knew of the objects for which the money was raised, and that he, therefore, cannot rely on Mrs. Johnston's title as executrix, which alone can sustain this petition. This petition must, therefore, be dismissed without prejudice to any petition to sell Mrs. Johnston's own interest, or any interest which he may consider her to have acquired by advances to testator's children or grandchildren.

## Court of Chancery.

Reported by Oliver J. Burke, Esq., Barrister-at-Law

BONYNGE v. FINUCANE—April 27, 28; May 1.

*Estate in quasi Tail—Deed—Executing parties to.*

J. R., by his will made in 1807, charged certain estates *par autre vie*, of which he was seized, with several annuities and other incumbrances, and subject thereto he devised said estates to trustees to permit his son James to receive the rents, &c., for his life, and on failure of issue of said James, remainder to his son John for life; and on failure of issue of said John, to his daughters Eliza and Ellen, and to his grandson J. N. B., as tenants in com-

mon in quasi tail.—By indenture of 20th January, 1827, the said James and John assigned to P. C. as much as in them, or either of them lay, the said lands upon the trusts therein declared. Subsequently P. C., then owner of the mere legal estate, by indenture of marriage settlement bearing date the 22nd October, 1837, conveyed said lands to trustees upon trust for P. C. for life, remainder to his daughter for life, with remainder over to the children of the marriage.—J. N. B., who was equitable tenant in quasi tail in remainder to one-third of said lands under said will, was an executing, though not a granting party to this settlement. Held—that P. C., the owner of the legal estate, and J. N. B., the equitable tenant in quasi tail of one-third of said lands in remainder having joined in said conveyance, same was a sufficient bar of the quasi entail of said one-third, and that J. N. B., who was an executing, though not a granting party to said deed, had conveyed thereby his estate as effectually as if he had been a granting party.

THIS was a cause petition, and prayed "for a declaration that the petitioner was entitled to one equal undivided third part of the lands of Ballylean and Gurtnacurra, and that certain renewals of a lease thereof, and especially the renewal to one Pierce Carrick, and any subsequent renewal thereof, and also the fee-farm grant of said lands are subject to petitioner's rights, and were taken in trust for petitioners as to one-third part of said lands; and that petitioner's right in said lands, and also the right of the persons entitled to the other individual shares of said lands, may be ascertained and declared, and that the trusts of a certain deed of October, 1827, may be carried into execution; and that, if necessary, an account may be taken of the rents and profits of the several lands and premises, and of the other trust funds comprised therein; and that Lucinda Finucane and all other proper parties may be decreed to convey to petitioner her share of said lands and premises, freed from all incumbrances created by said Pierce Carrick, or any person deriving through him, and subject only to one-third of the fee-farm rent payable thereout: and that said Lucinda Finucane and the other respondents may be ordered to bring into Court and lodge, for the purpose of this suit, the said fee-farm grant and other the title deeds of said lands in their possession; and that for that purpose a commission of partition may be had of said lands, and that petitioner may be put into possession of her share of said lands, and that said Lucinda Finucane may be ordered to account, as far as relates to petitioner's one-third share thereof, from the date of the death of John North Bonyng; and that so much of the rents and profits thereof to which petitioner is entitled may be ordered to be paid by said Lucinda Finucane; and that a receiver may be appointed," &c. The facts of the case, as stated in the petition, are these:—The Rev. Darat M'Mahon, by indenture of lease bearing date the 30th June, 1785, demised unto James Roche, of Ennis, in the county of Clare, his heirs and assigns, the townlands of Ballylean East, containing by estimation 142 acres; and also the townlands of Gurtnacurra, containing 97 acres, both

situate in the barony of Clanderalaw, and county of Clare, for the lives in said lease mentioned, with covenant for perpetual renewal, at the yearly rent of £60, and subject to a renewal fine of £30 (Irish), at the fall of each life. That the said James Roche, by his last will and testament, bearing date the 21st of March, 1807, amongst others, devised and bequeathed "all the rest, residua, and remainder of all my real freehold and personal estate not heretofore particularly limited, disposed of or ordered to my said wife, Lucinda Roche, and to my friend and relative, Charles Mahon, Esq., and to the survivors of them, and to the heirs of such survivors, in trust, that they, out of the rents and profits, do raise and pay the following legacies to the following persons hereinafter named, with the legal interest for the same, to be computed from the time of my death—that is to say, to my said wife, Lucinda Roche, the sum of £200 sterling, to be disposed of as she shall think fit; and to my daughter Eliza, on the day of her marriage, with the consent of my said wife (if living), £400 sterling; to my daughter Ellen the like amount of £400; to my grandson, John Hickey, to be paid him on his attaining the age of twenty-one years, £100 sterling; to my daughter, Mrs. Hickey, an annuity or yearly sum of £20 sterling, to be paid to her yearly and every year, by two equal portions—every 1st May and 1st November—during the term of her natural life; to my son, John Roche, an annuity of £20 during his life; and from and after the death of my said son John, the said last-mentioned annuity to be paid and payable to any children he may leave at the time of his death, to be paid in equal shares and proportions to the survivor of them. I leave to my dearly beloved Lucy Martin, my wife's niece, the sum of £50;—to the payment of which said several legacies and annuities to my said wife, my said daughter, Mrs. Hickey, and to my son John, and to my grandson, John Hickey, and the legacy to the said Lucy Martin, I desire and direct my said trustees to apply the residue of my personal estate so to them devised and subject to said legacies and annuities, to be levied and raised out of my real and freehold estate so to them devised, and subject to the payment of the said legacies and annuities I devise and direct that my said trustees and the survivor of them, and the heirs of such survivor, shall permit and suffer my son James Roche to receive and take, for the term of his natural life, the rents and issues of my said real and freehold estate not hereinbefore specially limited, disposed of, or devised, subject to said charges; and after my said son James's death, I give, devise, and bequeath my said real and freehold estates to any issues of my said son James, in such shares and proportions as my said son James shall appoint; and in failure of any issue of my said son James, I give, devise, and bequeath all my real and freehold estates not hereinbefore specifically disposed of or devised, to my son John for and during the term of his natural life, and from and after his death to his issue, in such shares and proportions as he should think proper; and in failure of issue of my said son John, I devise the same to my daughters Eliza and Ellen, and to my grandson, John Bonyngue, share and share alike, and to their issue after their respective deaths, as tenants in common."

The will then closed, giving the several devisees, as they should get into possession, leasing powers. Testator afterwards added a codicil to said will, dated 5th January, 1808, and he directed that the said trustees should permit and suffer his said wife, Lucy Roche, to receive the rents, issues and profits of said farm and lands of Ballylean for the period of three years, and from thenceforth to revert to the uses in said will mentioned, and to no other use or purpose whatsoever.

The petition then stated the death of said testator in 1817 leaving his said two sons, John and James, and said two daughters, Eliza and Ellen, and his said grandson, John North Bonyngue, and also his wife Lucinda, who thereupon entered into the receipt of the rents and profits of the lands of Ballylean and Gurtnacurra, which then yielded a profit rent of about £300 yearly, and she also entered into the receipt of the rents of other lands devised by said will. On the 21st March, 1822, the said lease of said lands of Ballylean and Gurtnacurra was renewed for the lives in indenture of renewal mentioned.—On the 20th January, 1827, by indenture of trust made between said James Roche and John Roche, of the first part, Lucinda Roche (their mother), of the second part, and Pierce Carrick (husband of the said Eliza Roche), of the third part, reciting the will of the said James Roche, and that upon a settlement of accounts then taken between the said Lucinda Roche and her sons, the following items were due and owing on foot of said legacies in said will mentioned—viz., to John Hickey, £212 18s. 5d.; to Lucy Martin, £106 9s. 2d.; and to the said Lucinda Roche, £500, on foot of the legacy so bequeathed to the said Eliza Roche (then Mrs. Carrick), she, the said Lucinda, having, as therein recited, paid the amount thereof with her own proper money, and which then, as in said deed stated, remained due off the said James Roche's property to the said Lucinda; and there also remained due a principal sum of £400 to the said Lucinda Roche, on foot of the legacy bequeathed to the said Ellen Roche, the said Lucinda having paid and advanced the same to the said Ellen Roche, then Ellen Tuohy; and said deed further recited that the said James Roche, in order to end litigation then pending, had agreed to assign the several premises devised by the said James Roche for payment of said legacies and securities to the said Pierce Carrick, upon the trusts thereafter declared, and by said deed it was witnessed that the said James Roche and John Roche, in order to pay off and satisfy the said legacies and sums and interest, as therein mentioned, did thereby assign as much as in them or either of them lay, or they lawfully might or could, unto the said Pierce Carrick, in his possession being, as then recited, the said farm and lands of Ballylean and Gurtnacurra, with other lands (being the lands devised by said James Roche, and appointed for payment of the said legacies and annuities) upon the several trusts—namely, in the first instance, that out of the issues and profits of said premises, the said Pierce Carrick should pay the head rents and fines, and next to pay the said several three annuities; and after payment thereof then in trust that the said James Roche should receive an annuity of £84 for his life, and after payment



thereof the residue of the rents, issues and profits should be applied in payment of the costs of the proceedings therein mentioned, which were made chargeable on said lands, as therein mentioned, and subject thereto in trust, to pay said legacy of £100 to said John Hickey, with interest, as therein mentioned; and then in trust to pay said Lucinda Roche, or her executors, &c., the principal sum of £500 so bequeathed to the said Eliza, and so paid or advanced by the said Lucinda; and the said principal sum of £400 so bequeathed the said Ellen Tuohy, in like manner advanced by the said Lucinda, with interest on said last-mentioned sums respectively, as therein mentioned, "and when said several costs and legacies, and all interest due thereon, should be fully paid and satisfied; then said premises are to go to the uses directed by the will of the said James Roche, deceased;" and upon the further trust, that in case the said John Roche should happen to survive the said James Roche, and that the said costs and legacies, and the interest of the same, should not be then paid off and fully satisfied, then that an additional annuity of £30 should be paid to the said John Roche during his life, and all said incumbrances and the interest thereof should be fully paid; and after the decease of the said John Roche, then the premises to go "and enure to the uses, intents and purposes, as directed by the said James Roche, deceased's will and codicil;" and it was further recited in said deed, that Lucinda Roche was indebted to the said Pierce Carrick in the sum of £900, for money advanced to her, and paid to her use, and that the said Pierce Carrick had agreed to take an assignment of said Lucinda Roche's claims on foot of the said legacies of £500 and £400, and it was also further witnessed that in consideration of the sum of £900 the said Lucinda Roche did grant unto the said Pierce Carrick the hereinbefore-mentioned legacies of £500 and £400, and the sums so due in respect thereof; and the said James Roche, and John Roche, and Lucinda Roche, did thereby covenant with the said Pierce Carrick that the said legacies were then justly due to the said Lucinda. That said indenture was duly registered; that James Roche died in 1817, and Lucinda died in 1836, leaving John, her heir-at-law, her survivor. On the execution of said deed Pierce Carrick entered into possession of said lands, and into the receipt of the rents thereof, and so remained in such possession until 1846.

The petition next stated an indenture of 22nd Oct. 1837, being the marriage settlement of Lucinda, the daughter of Pierce Carrick; which indenture was made between Michael Finucane, of the first part; Pierce Carrick and Lucinda Carrick, his only child, of the second part; Cornelius O'Brien and Francis M'Namara, of the third part; and John North Bonyng and Andrew Stackpoole, of the fourth part; whereby the said Pierce Carrick conveyed, or purported to convey, all his interest in the lands of Ballylean and Gurtacurra, and several other lands, to the said Cornelius O'Brien and Francis M'Namara, upon certain trusts being for Pierce Carrick, for life; and after his death to Lucinda Carrick, for life; and after her death to Michael Finucane, for his life; and after his death to the first and other sons of said marriage in *quasi* tail—After the death

of James Roche the lease was renewed to said Pierce Carrick and his heirs, for the two surviving lives, and the life so added. Said Pierce being seised and possessed of considerable real and personal property, died in 1846, leaving his wife, Eliza Carrick, otherwise Roche, and Lucinda Finucane, otherwise Carrick, his only child and heiress-at-law, him surviving. The petition then stated that James Roche, the younger, died without leaving issue surviving him, and without having done any act to affect in any way or bar the entail in said lands; whereupon his brother, John Roche, became entitled, it was charged, under the provisions of the trust deed of 20th January, 1827, to said lands, and to the payment of the several charges in said deed mentioned, and subject to the provisions thereof, for the estate therein devised to him by the said will of his father, the said James Roche. Said John died 7th January, 1853, unmarried and without ever having lawful issue, intestate and without having barred or in any way disposed of the estate or interest he had in the said lands; and the petition charged that upon the death of the said John Roche the ultimate remainder in said lands (by said will devised to the said testator's daughters, Eliza and Ellen, and John North Bonyng, and their issue) vested in possession, subject to the charges and provisions created by or mentioned in said trust deed of January, 1827. Eliza Carrick died in 1857, leaving Lucinda Finucane her heir-at-law, to whom she bequeathed all her real and personal property by will, with the exception of the one-third of the portion which, on John dying without issue, she devised unto Elizabeth Finucane. The petition then stated that the petitioner was daughter of John North Bonyng, who in 1852, on the occasion of his marriage, by indenture of settlement conveyed, amongst other lands, all his right and interest to all the lands and premises to which he was entitled under the said will of James Roche the elder, upon the trusts therein mentioned, viz., to the use of himself for life, with remainder to the issue of the marriage, subject to a jointure to his wife of £150 a year. Said John North Bonyng died in 1852, leaving his widow and only child, his heir-at-law, him surviving, to which child he devised his property. The petition having then stated that from the death of Pierce Carrick, Lucinda Finucane had been in the exclusive possession of the lands of Ballylean and Gurtacurra, and had ever since received the rents, and that she now pretended she was absolutely entitled thereto, concluded with the prayer given above.

The case made by the respondents was shortly this, that the said deed of 1837 was executed by the petitioner's father in contemplation of the then intended marriage of his first cousin Lucinda Roche, that neither Lucinda, nor those acting for her, had any notice of the said deed of 1827; that registration was not notice, and that any rights that the said petitioner's father had, under this deed of 1827, to these lands, or under the will of James Roche to these lands, he had parted with, and further, that the execution of that deed was a barring of the *quasi* entail, and that therefore the undivided one-third part of John North Bonyng became subject to the trusts of the marriage settlement of 1837.

*John Edward Walsh, Q.C., Chatterton, Q.C., and*

*Creagh*, were for the petitioner.—Under the will of James Roche, John North Bonyng, was entitled to an estate tail in remainder upon the death of his two uncles without issue, *Roddy v. Fitzgerald* (6 H. C. L. 823). The registration of the deed of 1827 was ample notice to the petitioner's father of the position of these lands under that deed, and under the Irish Registration Act (6 Anne, ch. 2), an equity in a grant which is registered, will prevail against the right even of a *bona fide* purchaser to whom the original grantor had subsequently sold part of the property comprised in the registered deed—*Mill v. Hill* (3 H. L. 828); this deed of 1827 then takes priority of the deed of 1837—*Bushell v. Bushell* (1 Sch. & Lef. 90) *Drew v. Lord Norbury* (3 Jones & Lat. 267). The respondents, Lucinda and Michael Finucane, before the execution of the deed of 1837, were bound to make inquiries in the Registry Office as to the existence of any prior deeds, *Penny v. Watts* (1 Mac. N. & Gor. 150); had they done so they must have found the said deed of 20th Jan. 1827. If, then, the Court be of opinion that Michael Finucane or wife had any notice whatever of the prior settlement or state of the property, it will be held that such notice was sufficient to put them on inquiry, and the Court will then set aside the conveyance of 1837—*Taylor v. Baker* (5 Price, 306); and it was gross negligence not to have searched the registry and found the deed of 1827—*In re Olden* (9 Ir. Jur. N.S. 1); *Carter v. Carter* (3 Kay & John, 617); but apart from the question of notice, the case really comes to this, can a tenant in tail, or in *quasi* tail, do any act to cut off those in remainder without barring the entail, and no act being done by the tenant in tail, John North Bonyng, to bar the entail, the conveyance of 1837 can have no force or effect as against the petitioner. It is true that Bonyng never granted anything by deed of 1837; he was but an executing party thereto.

*Brewster, Q.C., Warren, Q.C., and Cree* appeared for the respondents.—Under the will of James Roche the elder, James Roche the younger, and his brother John were devisees successively of estates in *quasi* tail in those several lands; and on failure of issue of both James and John then testator's two daughters, Eliza Carrick, Ellen Tonley, and his grandson John North Bonyng were to take, and, in fact, did take, (James and John having never married) the said lands as tenants in common in *quasi* tail. On the occasion of the intermarriage of Eliza Carrick's daughter, Lucinda Carrick, with Michael Finucane, the indenture of 1837 was executed; and John North Bonyng, the petitioner, was one of the executing parties to that deed, whereby Pierce Carrick, said Lucinda's father, did convey and assign the lands of Ballylean and Gurtnacurra and other lands to the trustees of said settlement for Pierce Carrick for life, and after his death to his daughter Lucinda Carrick for life, and after her death to her then intended husband, Michael Finucane, for life, and after his death to the issue of the said then intended marriage. Said deed of 1837 was for valuable consideration, and by John North Bonyng becoming a party to said deed, he became an assenting party to the conveyance, and therefore he conveyed all his right and title to said lands; and

further, this conveyance operated as a bar to the *quasi* entail, and, consequently, his whole estate in *quasi* fee passed by that deed of 1837; upon this last point, *Allen v. Allen* (2 Dr. & War. 307, 4 Ir. Eq. 472), and *Norton v. Frecker* (1 Atk. 525), are the leading cases.—Having disposed of the question of barring the entail and conveyance, little else remains to be considered. It does not appear that the respondent had any notice of the deed of 1827: registration is not notice—*Bushell v. Bushell* (1 Sch. & Lef. 90), where the marginal note says: "The registry of deeds under the Registry Act, 6 Anne, ch. 2, is not notice," but under this deed, after the paying off of the annuities and charges the lands enure thereunder to the uses of the will of James Roche, whereby the petitioner's estate is left unaltered, namely, an estate tail in remainder was in the petitioner's father John North Bonyng; which estate in *quasi* tail was enlarged into a *quasi* fee by the deed of 1837.

THE LORD CHANCELLOR.—This case, which appears to involve more questions than one, in reality resolves itself into one, and that one question is—what is the effect of the deed of 1837; that deed did not in any way allude to the previous deed of the 20th of January, 1827, under which Pierce Carrick was appointed trustee, with power to convey the entire estate, and that deed of 1837 did convey the entire estate in such a way that nothing less than the whole estate passed, nor was it intended that less should pass than the whole. It was contended that, in truth, Pierce Carrick had only the beneficial interest in this estate so far as the sums of £400 and £500 charged upon the lands, and that the deed of 1827 was but a conveyance to Carrick for the purpose of liquidating those charges, and that as soon as the several charges should have been liquidated, then the lands should enure to the uses of Mr. Roche's will; that, in fact, Mr. Carrick took nothing whatever, save so far as was necessary for the purposes of paying the several charges thereout, and that, therefore, he had nothing that he could part with by the deed of 1837, except those several pecuniary charges, which might or might not be a fit subject for bargain on Lucinda's marriage;—that deed of 1837, however, is an absolute legal conveyance, and there is no allusion whatever to a trust estate, nor does that deed treat those lands as such; Pierce Carrick, on the contrary, treats them as if they were his own freehold estate. Now it is perfectly true that this property substantially vested in John Roche in tail, with remainder to his sisters and John North Bonyng in equal proportions in tail. Pierce Carrick had nothing to grant except the pecuniary charges, yet in this deed there is no allusion to any interest of a limited character; it is impossible to suppose that this lady and her friends were not under the impression that those lands were the freehold estate of Pierce Carrick; there was nothing to awaken their suspicions, nothing to make them believe that John North Bonyng had any estate whatever, in the lands which were the subject of the settlement of 1837, to which settlement John North Bonyng was a party, an executing party. Mr. Carrick had the legal estate in the lands, but his beneficial interest therein was limited. We have, therefore, to do with the estate of another person. Mr. Bonyng then having

this equitable remainder in quasi tail, became an executing party to this conveyance, and it is utterly impossible to conjecture that he was not well acquainted with the nature of his property and title, and it must be presumed that he had full knowledge of the contents of this deed, to which he was an executing party, and it must also be presumed that the deed was perused either by himself or by his legal advisers. Well, that casts upon the petitioner the burden of shewing that John North Bonyng was deceived, he was, I repeat, an executing party to that deed, and must be assumed to have known all that was in it. Mr. Carrick, who had nothing to convey, was joined by the owner of the equitable estate tail, both parties to the same deed. The question now becomes a very simple one. What is the effect of a person, tenant in *quasi* tail, becoming an executing party to a deed of this kind though not a conveying party? I think that his assent to the deed will be implied. Such an act would be in law an absolute conveyance—*Thomas v. Cooke* (2 B. & Ald. 119) goes to show what surrender by act and operation of law is of chattel interests; as if a landlord, with the assent of his tenant, who was lessee, accepted a third party as his tenant, then although there was no surrender in writing of the original tenant's interest, yet was his interest surrendered by act and operation of law, although there was no note or surrender in writing. In *Lynch v. Lynch* (6 Ir. Law Rep. 131) we carried that doctrine of surrender by operation of law further. In that case a lessee, *per autre vie*, assented to a new letting by the landlord of a part of the demised premises to a tenant who went into possession accordingly, but there was no surrender in writing of the interest of the tenant; and it was there held that the doctrine applies to freehold estates as well as to chattel interests. In this case now under consideration we have not alone the assent of the tenant in tail, but we have him actually joining in the conveyance. It is laid down in 2 Bac. Ab. Estate, 572 (and it will be remembered that Mr. Bonyng was not in possession in 1837, so that anything he conveyed must have been in remainder), that "when tenant for life, and he in reversion, join in the conveyance; and the conveyance has a different operation as the feoffment is with or without deed; for if it be without deed, then this is construed to be a surrender of the estate for life, and the feoffment of him in reversion, for no other interpretation can make the feoffment effectual; for if the estate passes from the tenant for life to the feoffee, it will be a forfeiture of his estate, whereof he in reversion may take advantage, notwithstanding his joining, for he having only the reversion had nothing to do with the freehold, and by consequence could make no feoffment or livery; and it cannot be a grant or confirmation of him in reversion for want of a deed; therefore, to make it effectual, it is construed the surrender of the tenant for life, and the feoffment of him in reversion. But if tenant for life and he in reversion join in a feoffment by deed, then each passes only his own estate: the tenant for life the freehold in possession, and he in reversion his reversion; and this cannot be a forfeiture, because he in reversion joined in a proper conveyance to transfer his reversion, and having passed it to another, has no interest left to entitle him

to take advantage of the forfeiture if it was one." It must be taken then that Bonyng being an executing party, conveyed his estate as effectually by the deed of 1837 as if he were a conveying party. What then was the operation of this conveyance? A *quasi* tenant in tail in remainder cannot, without the concurrence of the tenant for life, defeat the subsequent remainder. But if he alien with the consent of the tenant for life, or obtain a renewal with his concurrence, or if the tenant for life procures a renewal and then conveys to the tenant in *quasi* tail, this is sufficient to bar the *quasi* entail. This was the decision in *Allen v. Allen* (2 Dr. & War. 307; 4 Ir. Eq. 472). That case decides that a *quasi* tenant in tail in possession of property of this description has full power to bar the entail and remainder over by any act *inter vivos* without reference to any technicality whatsoever. Sir Edward Sugden in that case says, at p. 327 of 2 Dr. & W., that "a tenant in *quasi* tail need not declare his intention of barring the *quasi* entail;" that it is sufficient, if he do any act, which would vest in him a new or different estate, that the existence of prior incumbrances creates no impediment whatever, and that a tenant in *quasi* tail, for the purposes of alienation, stands in the position of a person who has the whole estate and absolute dominion. John North Bonyng then did, by that deed of 1837, defeat all subsequent remainders, and did so with the consent of Pierce Carrick who was also a party to that deed, and who was owner of the legal estate under the deed of 1827, whereby James Roche and John Roche each conveyed to him all their estate in these lands. In *Norton v. Frecker* (1 Atk. 525; West. 203), Lord Hardwicke decided that a conveyance by a tenant for life, with the concurrence of the remainder-man, barred the *quasi* entail, and that articles even of agreement by a tenant in tail would bind the property. This, then, was a conveyance for valuable consideration by the owner of the legal estate, Mr. Carrick, joined by and acquiesced in by Bonyng, the owner of the estate in *quasi* tail. Mr. Bonyng then barred his estate in *quasi* tail, and therefore it was open to him to do as he pleased in relation to this estate, which then became his. It appears to me then that there is no ground for this petition, and that it must be dismissed with costs.



## Court of Queen's Bench.

[Reported by William Woodcock, Esq., Barrister-at-Law.]

GORRIE AND OTHERS v. WOODLEY.—Nov. 14; Dec. 13, 1864.

*Guarantee—Consideration—Terms of foreign law.*

A guarantee was entered into in the following terms: "R. M. and Son, gentlemen, considering that you have employed W. F. as your agent, I hereby agree, and bind, and oblige, as cautioner for the whole intromissions, actings and doings of the said W. F., as your agent, it being understood, however, that the above cautionary obligation is not to exceed the sum of £100 sterling. I am, gentlemen, your obedient servant, F. H. W." Held—first, that the consideration disclosed on the face of the guarantee

was a concurrent, and not a past, consideration, and that, therefore, the contract was a valid one. Secondly, that, though in the terms of the Scotch law, it was yet sufficiently intelligible of itself without words to interpret it.

The parties to whom the guarantee was given were named as "R. M. and Son." In the summons and plaint the plaintiffs were described as "W. G., U. H. and J. P., trading as R. M. and Son." Held—that the names of the plaintiffs sufficiently appeared on the face of the guarantee.

DEMURRER:—The second count of the summons and plaint complained that an agreement in writing was made by and between the plaintiffs and the defendant in the words and figures following, that is to say:—"Haymount House, Carrigtwobill, March 12th, 1864. R. Meiklejohn and Son—Gentlemen—Considering that you have employed William Fitzmaurice as your agent, I hereby agree, and bind, and oblige, as cautioner for the whole intromissions, actings, and doings of the said William Fitzmaurice, as your agent, it being understood, however, that the above cautionary obligation is not to exceed the sum of £100 sterling. I am, gentlemen, your obedient servant, Francis H. Woodley." And the plaintiffs averred that the persons in the said agreement described as R. Meiklejohn and Son were the plaintiffs, and the person therein described as Francis H. Woodley was the defendant, and that the plaintiffs did employ and appoint the said William Fitzmaurice as their agent; and afterwards, from time to time, while he was so acting as their agent, in the course of his employment as such agent, supplied to the said William Fitzmaurice, in his capacity as agent as aforesaid, goods on credit, and there was now due to the plaintiffs from him as such agent, on account of the said goods, the sum of £98 10s. 7d.; and all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiffs to maintain this action, yet neither the said William Fitzmaurice nor the defendant had paid the said sum to plaintiffs.

To this count the defendant demurred, saying that the said count did not disclose any cause of action good in substance, because it was not averred therein, nor did it appear thereby, that there was any consideration for the supposed agreement or promise of the defendant; and the consideration therein appearing (if any) was a past and executed consideration, and not founded upon any request expressed or implied, and was not capable of supporting the alleged promise or agreement; and also because the agreement therein stated was insensible and unintelligible, and the terms thereof did not make a contract of guarantee, or were so intended by the parties; and also because it appeared by said count that there was not a sufficient memorandum or note in writing of said agreement; and also because it did not appear that the defendant had notice of the goods mentioned having been supplied to the said Fitzmaurice; and because the breach alleged was not within the supposed agreement, and the defendant ought not to be affected thereby. The following points were noted for argument by the defendant:—1. That there is no consideration shewn for the alleged promise of the de-

fendant, and the consideration (if any) is a past and executed consideration, not founded upon any request, and not capable of supporting the promise. 2. That the terms of the writing therein mentioned are insensible and unintelligible, and do not make any contract. 3. That such terms are those of a foreign law, and their meaning, or the intention of the parties to create a contract of guarantee, is not shewn by the count. 4. That there is no sufficient memorandum or note in writing of the supposed contract, the names of the plaintiffs not being contained therein. 5. That the alleged agreement does not extend to or comprehend the supposed breach. 6. That it does not appear the defendant had any notice of the goods being supplied to the principal, and it is not shewn that he knew of the nature or course of the agency business, or that the delivery of goods on credit to the principal was within the course of said business, and that as a surety he ought not to be affected by the alleged breach.

It is necessary to state that in the title of the summons and plaint the plaintiffs were described as Wm. Gorrie, of Banghaline House, Ferry, Edinburgh; Charles Hartland, of Alloa, and James Peebles, of Alloa, brewers, trading as Robert Meiklejohn and Son.

W. O'Brien, in support of the demurrer.—The consideration which appears here is an executed consideration, and it is a principle that such a consideration will not support a promise unless moved by a previous request, expressed or implied.—*Hunt v. Bate* (Dyer, 272); *Lamplugh v. Braithwaite* (1 Sm. L. C. 118); *Bradford v. Roulston* (8 Ir. C. L. Rep. 468). Then the contract here is in the terms of a foreign law, and there is nothing to show what is the meaning of those terms; they are therefore, unintelligible.—*Di Sora v. Philipps* (2 N. R. 553). The names of the parties to the guarantee do not appear on the face of the instrument in such a way as to bind the defendants. The guarantee is addressed to Messrs. R. Meiklejohn and Son. Those are not the plaintiffs. The names of both parties must appear on the face of the guarantee. *Williams v. Lake* (6 Jur. N. S., 45, S. C.; 1 L. T., N. S., 56.)

*Waters* for the plaintiffs.—This is not the case of a past, but of a concurrent consideration. The instrument must receive a construction which will sustain it, not one which will make it a nullity. *Steele v. Hos* (14 Q. B., 431); so also *Bainbridge v. Wade* (16 Q. B., 89); *Hoad v. Grace* (7 H. and N., 494). As to the guarantee being in the terms of a foreign law, every one of the words used in it is perfectly intelligible. The names of the parties appear sufficiently on the face of the guarantee. It is addressed to R. Meiklejohn and Son; and the plaintiffs are in the title of the summons and plaint described as trading under that name; and there is an averment that the persons described in the guarantee as R. Meiklejohn and Son are the plaintiffs.

O'Brien replied.

*Cur. ad vult.*

Dec. 13.—LEFROY, C. J.—In this case we are all of opinion that the demurrer should be overruled. It was an action of contract founded upon an agreement that in consideration of a party being appointed agent to

the plaintiffs, the defendant would become his security for whatever defaults should occur in the course of his agency. Several objections were taken. One was that the contract was in the terms of a foreign law, because it was in the terms of the Scotch law, in consequence of which it was insisted that there should be something in the nature of an explanation of the meaning of this very law, and that without that it was unintelligible. However, the main objection, and the only one that deserves to be weighed, was the consideration stated in the agreement was a past and executed consideration. It appears, however, that a principle has been established by the authorities which we were referred to, that if it appears that there is enough to show that the consideration (though apparently a past consideration) was in truth and in reality a consideration concurrent with the promise upon which the party was sued, or engagement under which he made himself liable, the agreement will be good. Here the words were, "Considering that you have employed William Fitzmaurice your agent, I agree to be his cautioner for the whole amount of his defaults." The very term itself "considering"—what does that mean? It implies a consideration, and means "in consideration that you have appointed him your agent." Well; but it would have been no consideration if the appointment of the agent had not been at least concurrent and forming the consideration for the contract of the other party making himself liable. One of the rules laid down is that if it is possible to give a document a construction which shall support it, it shall receive that construction, because it is not to be imagined that the parties would go through a form which would be invalid for want of a consideration, for it would have no consideration if it was a past consideration. So, taking the very words "considering," &c., I think that the construction which the language would warrant is—"In consideration and upon the consideration of your appointing him your agent, I will be a guarantee for his faithful conduct; and finding that you have appointed him, in pursuance of my agreement, I now become his cautioner." In short, as one of the cases puts it, it would depend upon the circumstance which party was speaking, whether the same thing would not appear a past transaction or a transaction in reference to an antecedent agreement. One says, "If you appoint him as agent I will be accountable." The other says, "You have agreed to be his cautioner, and I have appointed him." Several cases have been cited in which that has been the principle of construction, and it is founded on this, that the parties are not to be implied to have made a nugatory contract, which would be no contract, and, therefore, the reasonable construction is to give the contract that construction which would uphold it. These grounds would appear to me to sustain the order to overrule the demurrer.

O'BRIEN, J.—In this case I concur with my Lord Chief Justice. A demurrer was taken to the second count of the summons and plaint which states the cause of action by inserting in its terms the document on which the action is grounded. Now, as to one or two of the grounds of the demurrer, it is only necessary to mention them to dispose of them. One has

been already spoken to by my Lord Chief Justice—that founded on the contract being in a foreign language. It is enough to read the document to see that this word "intromission" is inserted with other words, and that the document is sufficiently intelligible. Well, the next ground of demurrer is that the name of the plaintiff is not given in it. It is this, that the document is directed to Messrs. Meiklejohn and Son, while the action is brought by Messrs. Gorrie, Hartland and Peebles, trading under the name and firm of Meiklejohn and Son. With every respect for the ingenuity of the counsel who took the objection, I think the objection answers itself. As to the other objection, it was very well argued by counsel on both sides; and I felt disposed at first to come to the opposite conclusion from that at which I have arrived; but on considering the authorities which were referred to, I have no hesitation in coming to the conclusion that the summons and plaint discloses a sufficient cause of action. The objection is, that the consideration on the face of the document is a past consideration. Of course, being a guarantee, it is necessary that there should be a consideration stated, and that that consideration should be concurrent or future, and should not be past, unless it was stated that it moved or arose from a request, and consequently the plaintiff was obliged to argue that it was a concurrent consideration. Now, in the case in 14 Q. B., 431, the words were, "In consideration of your having resigned the office of deacon and your connection with the Baptist Church at —, I hereby agree to hold myself responsible to you for the payment of the sum of £150, due to the Rev. J. E. by the Baptist Church," &c. The words here are, "Considering that you have employed William Fitzmaurice as your agent, I hereby agree," &c. Why, really the documents, so far as this question is concerned, are almost identical, and there Patteson, J., states, "We think that the words in their ordinary acceptation are capable of expressing either a past or a concurrent consideration; and as on one construction the instrument is void, the other is adopted, which makes it valid," and then he goes on to explain this by saying that really it is according to the mind of the party, and who speaks, whether it is concurrent or not. "The expression," he says, "that a promise is founded upon a consideration conveys the notion that the consideration precedes the promise in the mind of the party making the promise—he promises, because the consideration exists; and this form of expression is shewn by the authorities to have been frequently used when the consideration and the promise are concurrent. Each side of a contract is a consideration or promise, according to the party speaking of it; and if each party were to put into writing his own promise, each side of the contract would in turn appear to have preceded the other, though both formed one agreement. The plaintiff might write, 'You having guaranteed, I resign;' and the defendant, 'You having resigned, I guarantee.' So are the authorities." Here it might be on one side, "You having guaranteed, I appoint;" and on the other, "You having appointed, I guarantee." But there was another ground which was put by the plaintiff, in which I confess I think there is considerable weight. This employment of

agent is more or less a continuing employment. There is an ambiguity in the promise stated in the summons and plaint, whether it means a guarantee for all sums that accrued due by the agent to the plaintiff, whether they were before or after the day named in the document. That might formerly have been a ground of special demurrer. But they are abolished. The insertion of one word would have set the whole thing right. Then looking at the document, is it confined to the past liabilities of the agent? We were referred to the case of *Hoad v. Grace* (7 H. & N., 494), where the guarantee was, "Gentlemen—As Mr. Davis informs me, you require some person as guarantee for goods supplied to him by you in his business, I have no objection to act as such for payment of your account." Now, the Court upon demurrer there—the action was brought by the plaintiff without referring to the document, and the defendant set forth the document, and the plaintiff demurred—the Court held that they were warranted in construing the words "goods supplied" as "goods to be supplied;" and that though the word "account" was used as shewing an existing debt, they were at liberty to say that that was to mean payment of an account whenever it should be furnished. Then, we have *Bainbridge v. Wade* (16 Q. B., 89), in which the words were "I hereby guarantee the payment of any sum or sums of money due to you" from the person named, "the amount not to exceed at any time the sum of £100." The Court there held that though in the earlier words there was nothing distinctly applying to the future, yet having regard to the subsequent words, the debt referred to was clearly a future debt. We have the very same thing here. On both these grounds I have no hesitation in coming to the conclusion that the second count discloses a good cause of action. As to the last objection, the statement in the summons and plaint of the manner in which the debt accrued:—There is this statement in the summons and plaint, that the goods were supplied in the course of his employment as such agent. If in point of fact the goods he supplied were something *dehors* the office of agency, it was open to the defendant to traverse.

HAYES, J.—I concur in the decision and the grounds which have been given for it. One of the objections taken to this pleading is, that the contract has not been set out according to its legal effect, but has been set out *in hæc verba*, and that it is in a foreign language, and is unintelligible to us. Now, on that point I think I may refer to the language of Joy, C.B., in *Dawson v. Baldwin* (H. & J., at p. 31), where he says, "it is not necessary to state the legal effect of a covenant if that be apparent from the words. If it be presented to the Court that this is the covenant on which the party sues, it is not necessary also to aver that it is that which the Court sees it must be." So here we are referred to our common sense; and though this is a Scotch document, it does not present the difficulties which the defendant seems to think. Now, as to the construction, we may look, not only to the words of the contract, but to the situation of the parties as appearing on the plaint, and which must be taken as true. It is true that the words in the guarantee which say, "Considering that

you have appointed," might be understood, standing by themselves, as referring to a by-gone transaction. But when I find that in the next section the pleader says that the plaintiff was employed as agent, I am led to the conclusion that the guarantee and the employment were portions of the same transaction, and that it was not till he filled the character of agent that the goods were supplied. I am, therefore, of opinion that the demurrer should be overruled.

FITZGERALD, J., concurred.

## Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

MILLWARD v. ROBINSON.—Nov., 1864.

*Setting aside defences—General traverses of readiness and willingness.—C. L. P. Act, 1853.*

*Where the summons and plaint, in addition to the averment of the performance of conditions precedent, averred readiness and willingness in the plaintiff, the Court refused to set aside a defence which traversed the readiness and willingness generally.*

Devitt moved to set aside a defence. The action was brought upon a contract for a loan, the summons and plaint stating the agreement for the loan, and averring that the plaintiff had in all things fulfilled the agreement, and was at all times ready and willing to do everything on his part remaining to be done, in order to entitle him to have the agreement performed; and in a subsequent part averring also, in the form required by the C. L. P. Act, the performance of conditions precedent. There were several defences traversing the performance of the conditions in several particulars. The defence sought to be set aside is pleaded in addition to these, and states that the plaintiff was not at all times ready and willing to do all things remaining to be done, as in the plaint alleged. This defence does not state the particulars in which it is alleged that the plaintiff was not ready and willing, as required by the 66th section of the C. L. P. Act.

S. Ferguson, Q.C. and Gamble, in support of the plea.—The plaintiff did not rest satisfied with the general averment of performance of conditions precedent, as under the statute, but went further to aver particularly his readiness and willingness to do all things necessary to be done. This was a material averment, and could not be left untraversed. It would of itself have been sufficient ground of action.—*De Medina v. Norman* (9 M. & W., 820). If untraversed, the plaintiff would be entitled to recover. The case cited shows that under the practice in England there should be an issue upon it, under a plea of the general issue. The defence, therefore, would be incomplete without traversing it. The section of the C. L. P. Act does not apply, as it only refers to averment of non performance of conditions precedent. There is no non-performance here averred of any act: it is a traverse of the readiness and willingness, and not a traverse of the performance.

*Motion refused.*

NAGLE, COMPLAINANT; MURRAY, DEFENDANT.

Nov. 3.

*Certiorari issued after judgment.*

The complainant summoned the defendant for overholding premises before the divisional magistrate, who issued a warrant for their recovery. Subsequently to the date of the warrant the defendant caused a writ of certiorari to be issued from the Court of Common Pleas. The Court upon motion by the complainant quashed the certiorari.

J. A. Curran, jun., moved to quash a writ of certiorari because obtained after judgment. The complainant had summoned the defendant as an overholding tenant of premises situated at No. 33 Merchant's-quay, Dublin, before the divisional magistrates of Exchange-court, one of whom issued a warrant for the recovery of the premises.

J. A. Phillips contra.—The affidavits show that the 24th section of the 14 & 15 Vic. c. 92 does not apply, because our case is—that the justices had no jurisdiction to entertain the case. If one of the parties denies the right of the justices to entertain the case, they are bound to enter into that question as a preliminary. If our case be true, the complainant was a trespasser. There is a *bona fide* question of title. The Court will lean in favour of giving certiorari in this case.—LIVINGE'S Justice of the Peace.

J. A. Curran, jun. in reply.—I do not dispute the law laid down by Mr. Phillips, but it applies to the Court of Queen's Bench quashing a conviction. [Christian, J.—If it be true that the Court of Queen's Bench has a power overruling every enactment to quash the proceedings if there was not jurisdiction, why should there not be a similar power in this Court? What is the Court of Common Pleas to do with a certiorari if it comes to the conclusion that the proceedings were *coram non judice*? They cannot go on trying a case.] There is a power of proceeding *de novo*. [It appeared that the warrant was signed on the 24th August, and the certiorari obtained on the 30th August.]

MONAHAN, C.J.—In this case the justices made an order and issued a warrant.

CHRISTIAN, J.—It is not necessary to give any decision on the point, whether if the magistrates had acted without jurisdiction or exceeded their jurisdiction it would be a case within the 24th section.

*Certiorari quashed.*

O'REILLY v. MERCER.—April, 1865.

*Surrender by operation of law—Validity of warrant to distrain.*

In an action of trover for the conversion of household furniture, the defendant justified the taking under a distress for rent, under a lease made by him to the assignees of the plaintiff, who was a bankrupt. At

the trial it was proved that a fortnight before the distress the manager of the assignee's office wrote to the agent to the bankruptcy, desiring him to communicate to the landlord that they would give up possession, provided the estate were freed from any claim for rent, and that this letter came to the knowledge of the person acting for the defendant's solicitor. The clerk of the agent to the bankruptcy proved that about ten days previously to the distress he received the keys of the premises from his employer, that he might show them to the defendant's son and the person acting for the defendant's solicitor, and that he did show the premises accordingly. The person acting for the defendant and his solicitor proved that on the morning of the day on which the distress was made, he got the keys of the house from the agent to the bankruptcy, that he might let the bailiffs in to distrain, and that on that day he gave them to the bailiffs to let themselves in. The agent to the bankruptcy was not produced. Held—That the judge was right in refusing to leave to the jury the question whether or not the premises were surrendered previously to the distress, and in directing a verdict for the defendant.

A warrant "to enter and distrain all that and those the plot of ground, &c.; and the distresses to take, &c.; and the same to dispose of according to law, to satisfy the sum of, &c., due and payable out of said premises by M. M. C., H. J., and J. K., the tenants thereof," &c., is not informal under 9 and 10 Vic., c. 111, sec. 12.

THIS was an action of trover for the conversion of household furniture. The plaint contained one count. The defendant traversed the conversion and the property, and also justified under a distress for rent for three quarters of a year, ending the 25th day of June, 1864, under a lease made on the 28th day of July, 1863, by him to the assignees of the plaintiff, who was a bankrupt. The distress was made on the 24th of September, 1864. At the trial, before Monahan, C.J., the plaintiff deposed that he had been previously in possession of the premises, under an assignment of an original lease, dated the 20th of January, 1857; he became bankrupt on the 19th of September, 1862; on the 23rd of July, 1864, the messenger of the Bankrupt Court took possession. Mr. Breen, the manager of the Official Assignee's office, proved that he wrote the following letter to Mr. Clay, the agent to the bankruptcy:—"Dublin, 10th day of September, 1864. *In re O'Reilly*. William Keating Clay, Esq. Dear sir,—You will please communicate with the landlord, and inform him that we claim no interest in the house in South Richmond-street, and will give him possession, provided he frees the estate from any claim for rent. I understand that there is a quantity of bankrupt's or other parties' furniture on the premises. Your's respectfully (Signed), T. Breen." Mr. Breen deposed that he instructed Mr. Clay to give up the premises to the landlord. Mr. Robert Casey was then acting for the landlord, Mr. Mercer. Mr. Smith, a bailiff, deposed that he was in possession of the house, 22 Richmond-street, from July until the 13th of September, when he left possession, and by direction of the Official



Assignees left the keys at Mr. Clay's office. Thomas Hunter, clerk to Wm. Keating Clay, Esq. deposed that on the 14th or 15th of September last he went to the house, 22 South Richmond-street. That Mr. Dowling, acting for Mr. Casey, and Mr. Mercer, the defendant's son, were with him. That he opened the doors and went through the premises; that they went to look at the premises; that Clay gave him the keys to show the premises to Mercer and his attorney's clerk. Mr. Dowling proved that he, acting for Mr. Casey and Mr. Mercer, got the keys of the house from Mr. Clay on the morning of the 24th September, before the distress was made, that he might let in the bailiffs to distrain, and had kept the keys ever since for Mr. Mercer; that Mr. Mercer was now in possession; that on the morning of the 24th he, Dowling, gave the keys to the bailiffs to let themselves in. Plaintiff also tendered in evidence a document, signed by Mr. Dowling on the 24th of September, 1864, on the occasion of taking the keys from Mr. Clay, which his Lordship rejected for want of a stamp. The defendant produced and proved the lease of the 28th July, 1863, and the warrant of distress of the 15th September, 1864; and also the following letter from Mr. Evans, a clerk in the Official Assignee's office:—"Official Assignee's office, 21st September, 1864. R. Casey, Esq. Dear sir,—Mr. Murphy has written to me the following:—'I understand from Mr. Breen that Mr. Clay gave possession of the house to the landlord. It should have been done at once when decided on. The landlord can avail himself of any legal right he has to the furniture without any interference on our part.' Yours truly (Signed) H. Evans." The plaintiff's counsel objected to the warrant, on the grounds that it did not comply with the requirements of the statute, and especially did not name the persons or tenants to be distrained. The judge overruled the objection. The plaintiff insisted that in case the warrant was illegal or not according to the statute he was entitled to a direction. The plaintiff asked for a direction upon the ground that the giving up of the keys by the agent for the assignees to the agent for the landlord, followed by retention of those keys, and possession ever since retained, constituted a surrender by operation of law before the distress was made, and that there was evidence the surrender took place under an agreement of the landlord to forgive the assignees the rent, and that consequently the relation of landlord and tenant did not exist at the time of the distress, and that the distress was therefore illegal. His Lordship refused so to direct. The plaintiff then asked him to leave to the jury, as a question of fact, whether or not the premises were in fact surrendered on the morning of the 24th, or at any time previous to the distress. His Lordship refused so to do, but directed a verdict for the defendant, on the ground that there was no evidence of any surrender. The plaintiff obtained a conditional order that the verdict had for the defendant be set aside, on the ground of misdirection by his Lordship in directing a verdict for the defendant, and in not leaving to the jury the facts; and the question, as a question of fact, whether or not the premises were in fact surrendered at any time previous to the distress; and on the further ground of not ruling that the warrant of distress did not com-

ply with the requisites mentioned in section 12 of the 9th and 10th Vic., c. 111. Against this—

*Palles*, Q.C. (with him *Sidney*, Q.C.) showed cause. A parol agreement that there shall be a surrender, or anything amounting to a surrender, is wanting here. The agreement was—that we were to go in at once and be at liberty to distrain. *Woodfall's Landlord & Tenant*, 261; *Doe d. Gray v. Stanion* (1 M. & W. 695); *Tarte v. Darby* (15 M. & W. 601); *Griffith v. Hodges* (1 C. & P. 419), shows that mere entry by the landlord is not sufficient. The original agreement must be looked to to see the nature of the entry—*Foquet v. Moor* (7 Exch. 870); *Bessell v. Landsberg* (7 Q.B. 638). Surrender by operation of law is exceptional in our jurisprudence; and the facts must amount to something creating an estoppel, as, for example, if a new lease be executed the party is estopped from denying that the old lease is surrendered. Another case is when it is between the landlord and the tenant, and there must be an agreement. If there be that, and then possession, he is estopped from denying the surrender; but that is entirely on the ground of agreement. Here there is possession but no agreement.

*Heron*, Q.C. and *M. Morris*, Q.C., contra.—The cases cited are applicable to this case. They prove that in every case similar to this the question has been left to the jury. Our objection is—that there being letters and there being parol evidence, there being these two elements, the question ought to have been left to the jury, and that the judge should not have decided on the contradictory evidence that there was no evidence of surrender by operation of law. Surrender by operation of law is anything which amounts to an agreement on the part of the tenant to abandon possession, and on the part of the landlord to resume possession provided there be possession following. The assignees are in possession up to the 13th September by their bailiff. They then give the key to Clay, their attorney, that he might abandon the possession. Before the day of the distress, the keys remaining with Clay, Mercer, the defendant's son, Dowling, and Hunter go to the premises, as they say, to inspect them. *Quo animo* they went there was a question for the jury; that is, even if the transaction of the 24th was out of the case. On the morning of the 24th the keys are given. From then until now they have been in the possession of the landlord. In *Phené v. Popplewell* (12 C. B., N. S., 340), Erle, C. J. says—"Anything which amounts to an agreement on the part of the tenant to abandon, and on the part of the landlord to resume possession of the premises amounts to a surrender by operation of law."—*Lynch v. Lynch* (6 Ir. Law Rep. 131). Whether there was the intention or not, if the acts amount to a surrender it is a question for the jury *quo animo* they were done.—*Viner*, Surrender, H. 2.—*Natchbold v. Porter* (2 Ver. 112). The keys were given up in pursuance of the agreement to surrender, but if that is not evident we are entitled to get the opinion of a jury on it. [*Monahan*, C.J.—What is the evidence that Mercer or any one of them entered into possession for the purpose of taking possession *quá* landlord? what is the evidence binding Mercer?] *Lloyd v. Acton* (6 Man. & Gr. 672). [*Monahan*,

O.J.—The only question is as to the application of the facts.] [*Christian, J.*—Surrender by operation of law is the result of the taking possession, and the agreement under which the taking possession occurs; but if the agreement be something more, must it not be held that that is not a surrender by operation of law? However, that is assuming what may not be in fact, for the letter of the 24th Sept. was excluded.]—*Wickhead v. Clifford* (5 Taunt. 518). [*Monahan, C.J.*—I thought when you did not produce Clay, who gave the key, there was no evidence.] Dowling's evidence states, "It was agreed we were to get a conveyance of the interest in the lease. We did not get the conveyance, as Mercer became the purchaser." [*Monahan, C.J.*—What evidence, except the evidence of Dowling, is there of the circumstances under which the keys were accepted? Clay would be the competent witness to detail the circumstances under which they were given up. What is there but the evidence of Dowling, and he says he got the keys for a particular purpose. If Clay were produced and said he gave them for another purpose, there would then be a question for the jury, but he was not produced.] The warrant to enter and distrain should have named the person in possession whose goods were to be distrained—9 & 10 Vic. c. 111, s. 12. This is not an authority to distrain James, the assignee. [*Christian, J.*—Is not a warrant to distrain Blackacre, of which A. B. is tenant, a warrant to distrain A. B.?] *Sidney, Q.C.* in reply.—*Phene v. Popplewell* is an authority in our favour. The first evidence in connection with the alleged surrender is the letter of the 10th September,—“You will please communicate with the landlord, and inform him that we claim no interest,” &c. That was instructions to their own attorney of the terms on which they would give us the premises; viz., that we should exonerate them from the rent of three quarters. On the 13th or 14th September Clay's clerk goes with us to examine the premises. Was that to take a surrender or to see if we would accept the proposal made on the 10th? Young Mercer's evidence is, “My only directions were—to take the keys for the purpose of making the distress.” There is no doubt that Clay was willing to surrender the premises. Disposing of Mercer's evidence, the next thing is the letter of 21st September, from the official assignees to Casey. What is the evidence in reference to the keys? Dowling says he got the keys from Clay that he might let in the bailiffs to distrain. Clay is not called. There is no conflict of evidence.

*MONAHAN, C.J.*—We have considered the case as carefully as we can. The only question is—whether there was evidence that I ought to have submitted to the jury of Dowling's accepting the keys under circumstances which made it amount to a surrender. O'Reilly was in this position, that he was obliged to produce somebody to show the circumstances. All the assignees wanted was to get rid of their own liability. Evidently there was a suggestion that if the landlord could get the property on the premises it was no concern of theirs. The only person to prove the matter of fact was Clay, whose hand handed over the keys, or Mercer, or the man who actually received them; for what occurred at the moment of the re-

ceipt is what should characterize the effect of the handing the keys. If handed for one purpose it showed a surrender, if handed for another it did not. The man produced proved he got them not to accept a surrender but for the purpose of distraining; and in accordance with that he went with the bailiffs and let them in. We are of opinion there was not sufficient evidence to send to the jury. We think that that was not the object with which the keys were given. We must discharge this rule.

*Heron, Q.C.* applied for leave to appeal.

*MONAHAN, C.J.*—There is no disagreement, and it is not a case for appeal.

*Rule discharged.*

*NORR*—The following is a copy of the warrant objected to:—“I, Robert Mercer, of No. 15 Lower Gloucester-street, in the city of Dublin, and of Maritime Lodge, Monkstown, in the county of Dublin, solicitor, do hereby direct and empower Luke Flanagan, of No. 2 Chancery-place, in the city of Dublin, law agent, and Thomas Nolan, of No. 8 Church-lane, in the said city of Dublin, law messenger, for me and in my name within twenty days from the date hereof to enter and distrain all that and those the plot of ground, dwelling-house, and premises known as No. 22 South Richmond-street, and which premises were formerly held by John Lynch, situate in the parish of St. Peter's, and county of the city of Dublin; and the distress and distresses then and there found to take, lead, drive, and carry away, and the same to dispose of according to law to satisfy the sum of £35 10s., being three quarters' rent due and payable out of said premises by Michael Murphy, Charles Henry James, and Joseph Kelly, the tenants thereof, up to and for the 25th day of June, 1864, together with the costs and charges of such distress.”

## Court of Probate.

Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.

*KELLY v. DUNBAR; CLIBBORN, A MINOR, INTERVENIENT.*—April 24, 28; May 4.

*New trial—Intervient minor—No plea—Compromise—Issue.*

*The plaintiff, as executor and residuary legatee, propounded a will of 4th November, 1863, and the defendants impeached by their pleas only the residuary and executorial clauses. The intervenient was cited to see proceedings, being a legatee in a former will; and he appeared by solicitor, but did not plead. The question for trial was as to the validity of the will of 1863, or any and what part of it. At the trial the plaintiff and defendants compromised the case; and by consent a verdict was taken in favor of the will, except the residuary and executorial clauses. The jury expressed a strong opinion against the whole will. A curator having been duly appointed for the minor, the Court, on his motion, set aside the verdict as to the rest of the will, and directed a new trial on terms. Held also, that the issue should have been amended by confining it to the residuary and executorial clauses.*

Held also—That a verdict, had by consent, cannot be set aside on the ground of being against evidence. Also—That service of a citation on a minor, by serving his father or proper guardian is valid and will bind the minor.

A CONDITIONAL order had been obtained by the curator of the minor on the 6th of February last, to set aside the verdict which had been had for the validity of the will of Mrs. Seale, except the residuary and executorial clauses, on the grounds of misdirection of the judge, impropriety of the jury, surprise, and being against the weight of evidence. The plaintiff, as residuary legatee and executor in the will, had propounded a will of the 4th November, 1863. The defendants, as legatees in that will, and also as next of kin by their plea impeached only the residuary and executorial clauses. Citations to see proceedings were served by the defendant on all the legatees in a former will, and amongst them on the minor—the intervenient, who appeared on the 24th November by solicitor (not by curator), but did not plead. The issue was settled on the 26th November, and the question to be tried was directed to be—whether the paper writing dated the 4th November, 1863, or any and what part of it, was the last will of the deceased. The trial was had on the 8th December, and following days; and though the Court on several occasions offered leave to the minor to apply for leave to plead, no application was made. A compromise was on the 5th day of the trial had between the plaintiff and the defendants agreeing to a verdict establishing the will, except as to the residuary and executorial clauses. The jury with great reluctance gave a verdict accordingly, but announced their opinion to be against the entire will.

*Whiteside*, Q.C., (with him *Bull*, Q.C.) for the defendants, now showed cause against the conditional order.—The intervenient had the fullest information of the exact question to be tried and raised by the pleadings. The citation served on him recited the pleas, and a notice was served with the citation apprizing him of the precise purpose for which it was served, viz., to give him as a legatee in a former will an opportunity, if he pleased, to impeach the will of 1863, but he did not avail himself of the opportunity, and therefore he could not now be heard alleging surprise. Though the question was general as to the will of 1863 the pleadings were specially pointed to the residuary and executorial clauses, and therefore the Court was right in confining the jury to those clauses only.—*Narracott v. Narracott* (33 L. J. Pr. & Mat. 132); *Donegal v. Donegal* (3 Phillim. 370); *White v. White* (31 L. J. Pr. 215).

*Dr. Elrington* and *Falkiner* for Miss Graydon, a legatee in the second will.—As no plea had been filed impeaching that will generally, Miss Graydon did not intervene or plead, and she would now be prejudiced by a new trial. Though the issue was general, the practice is to confine at the trial the party to the case made by pleas.—*Miller*, Pr. Pr. 141. On the question of surprise they cited *Scott v. Scott* (33 L. J. Pr. & Met. 1); *Smith v. McGonagall* (2 I. L. R. 269, 271); *Harrison v. Harrison* (9 Pri. 89); *White v. S. E. Co.* (10 W. R. 564); *Miller v. Miller* (2 S. & T. 243); *Cahill v. Hartnett* (10 I. C. L. R. 439);

*O'Grady v. Dwyer* (Ib. 440); *Cooke v. Berry* (1 Wils. 98).

*Dr. Townsend*, Q.C., for the plaintiff, intimated that in any event he was bound by the compromise, and would not further interfere.

*May*, 4.—*KEATINGE*, J.—The conditional order of the 6th February, 1865, was taken on four grounds, viz., misdirection of the judge, irregularity on the part of the jury, surprise, and that the verdict was against the weight of evidence. The first two, however, resolve themselves into the same point. The suit was instituted by the plaintiff as executor of Mrs. Jane Catherine Seale, to establish a will dated the 4th November, 1863, by which he was also appointed residuary legatee. The defendants were nieces and next of kin, and also legatees in that will; and persons named Graydon were also legatees; they were relations not of the deceased, but of the Dunbars. If there were no other will, the interest of the defendants was to put the plaintiff on proof of that will; but there was another will of the 14th February, 1860, in which the Dunbars and others who were legatees in the later will were also legatees. But the Graydons were not legatees in that will; and if the residuary clause was struck out of the will of 1863, it would be more for the interest of the Dunbars to have that will established than the other. They therefore pleaded only to that clause that it was procured by undue influence on the part of the plaintiff. There was no plea of want of testamentary capacity. On the 14th November the motion to fix the mode of trial stood over to the 26th November in order to give time to cite the legatees in the former will who did not get legacies in the later one, or who got smaller legacies. Amongst them *Clibborn*, the minor of five years of age, was cited by service on his father; and his father and mother also were cited, the latter being a legatee in the first will for £500, but in the last for only £200. No one appeared except the minor, his father and mother, who all appeared by the same solicitor, but the minor had no curator, and that appearance therefore could not be recognized. But the father and mother were bound by the service had on them; and if they did not plead and dispute the validity of the will of 1863, a decree in favour of it would have barred their rights. The citation served on the legatees was very specially framed; it recited the pleadings, and informed the parties that the only plea on the record was that of the defendant, and was only pointed at the residuary and executorial clauses; and with the citation a notice was also served apprizing them that the motion to fix the mode of trial was pending, and that it stood over to give them an opportunity of impeaching if they pleased the will of 1863. So that everything was done by the Dunbars to give the intervenient an opportunity of pleading and of questioning that will. When the Probate Act first came into operation, I took into consideration, with the members of the Bar who were accustomed to practise in the Court, the 41st, 42nd, and 43rd sections of the Act of 1857, and the best mode of carrying into effect the clauses relating to trial by jury; and I arrived at the conclusion that I was at liberty, when a testamentary paper was in controversy, to frame an issue in general terms, whether the paper

writing, or any and what part, was the last will of the deceased, but to confine at the trial the parties in evidence to matters alleged in their respective pleadings. This met the approval of the Bar, and has been without objection acted on down to the present time. On the 26th November the motion to fix the mode of trial was moved, and the order made that it should be tried by a special jury; and the question was settled, whether the paper writing of the 4th November, 1863, or any and what part thereof, was the last will and testament of the deceased. That order was, in my opinion, erroneous, and was more extensive than was warranted by the pleadings. From recollection, I think the reason that it was so framed was to enable the legatees under the will of 1860, if they intervened and pleaded, to dispute the will of 1863, so as to render an amendment of the issue unnecessary. It was suggested by the counsel for the defendant that the order was right, and that no decree establishing the will could be made unless the issue was in that form. But I think that such a position is not correct, as parties who had any right under a will had full power of entering a caveat to prevent administration or probate being taken out without their knowledge; and here the minor had similar powers. Generally the Court is bound by the admissions in the pleadings; and in England the issues were taken on the matters alleged by the pleas. In this country the issues are different, and in this case I think the proper way would have been to amend the record by confining the issues to the residuary and executorial clauses. The hearing began on the 8th Nov. The minor appeared by counsel; but I was not, up to that time, nor until the motion to set aside the verdict informed that no guardian *ad litem* had been appointed. At the trial no motion was pressed for leave to plead on the part of the minor. At the conclusion of the address of the defendant's counsel, a compromise was agreed to between the plaintiff and defendants. The verdict of the jury was by my directions, though with great reluctance on the part of the jury, who expressed their opinion against the whole will, establishing the will, save as to the residuary and executorial clauses, which were condemned. I attach great importance to the opinion of the jury so expressed as to the will, in the preparation of which the plaintiff and his wife took an active part. As this case may be relied on as an authority in other cases, I think it right to say that I consider a minor is entitled to no more indulgence than an adult, if properly served with citation. Minors should be served so as to secure a proper attention to their interests; but if they are duly served, in my opinion they will be bound as adults in other cases. As to the grounds of the conditional order:—1st, as to the misdirection, I think that I had, with the consent of the parties, a right to direct a verdict, and that if the jury refused to find it, I could have ordered it to be entered on the record; but it should be remembered, that the issue was too large. 2nd. As to surprise. It may be admitted that the minor's solicitor was surprised, but it did not continue beyond the first day of the trial. After that he was guilty of *laches* in not applying for leave to plead. The remaining ground is that the verdict was against the weight of evidence; but the

verdict having been taken on consent, no such ground can be relied on. The real question is, whether a verdict found by consent is for ever to bind the minor. In my opinion, I ought to put the minor in the same position as if the issue had been confined to the residuary and executorial clauses. If it had, I would not have prevented the legatees in the former will from disputing the entire will of 1863. So far as the residuary and executorial clauses, the verdict will not be disturbed; but as to the rest of the will, I direct the conditional order to be made absolute on terms—viz., that the costs of the motion, when taxed, be paid, within a week after taxation, to the defendants by the curator of the minor, and that £150 be within that time lodged by the curator as security for the costs of the defendants. In default thereof, the motion to be refused with costs.

*Order accordingly.*

STUBBER, PETITIONER; STUBBER, RESPONDENT.

*Revocation of letters of administration, with will annexed—Residuary legatee—Costs.*

*It is no ground for impeaching a grant of administration with a will annexed, granted to a residuary legatee, on the renunciation of the executor, that the grant was in terms to the residuary legatee named in the will, the residuary legatee not being specifically named in that exact character; but being in law and construction residuary legatee, and the grant being forty-five years old.*

*Where a grant expires by the death of the administrator, it is unnecessary to apply to revoke it.*

*Where charges of fabrication and fraud were made in a petition, and failed, the petition was dismissed with costs.*

Dowse, Q.C., moved a petition, filed for the purpose of having two grants made by the Prerogative Court revoked—viz., one granted on the 15th November, 1820, to the Rev. Sewell Stubber, the sole surviving brother and heir-at-law of Robert Stubber, of his goods, with his will annexed. The other was a grant *de bonis non*, granted on the death of Sewell Stubber, of Robert's unadministered goods, granted to the respondent, S. Mallard Stubber, which he got in 1844, as being administrator with the will annexed of Sewell Stubber. The latter grant he got in 1825, as a residuary legatee in his will. Robert Stubber had made his will in June, 1818, and a codicil in January, 1820, and he died in the same year. The will limited tenancies for life to several persons, and the Rev. S. Stubber was the second of the tenants for life; and the will provided that in the event of the then next brother of the testator (who was first tenant for life) dying before the testator, the next tenant for life should be residuary legatee. The first tenant for life did die in the testator's life, and so the Rev. Sewell Stubber became residuary legatee; and on the renunciation of the executor, letters of administration

of the goods of Robert Stubber were granted to Sewell, describing him in the grant as the residuary legatee named in the will. In 1825, on Sewell Stubber's death, the respondent, S. Mallard Stubber, one of the residuary legatees in his will, obtained a grant of administration with his will annexed, on the renunciation of the executors; and in 1844 he also, as the personal representative of Sewell Stubber, got a grant *de bonis non* to Robert Stubber. The first grant was noted on the margin as to the assets as under £3,500. In 1863 a petition was presented by the petitioner to revoke the grant of 1825 to Sewell Stubber's will, and by arrangement and consent it was revoked, and a new one given to the petitioner. The present petition charged that a fabricated will of Robert Stubber had been brought into the Registry, and that a subsequent one existed, in which Sewell Stubber's name may have been mentioned as residuary legatee; it also impeached the renunciations as fabricated, and charged misapplication and suppression of assets, and refusal to account; and it also relied on the endorsement of the first grant, in which the word "codicil" was interlined.

J. A. Phillips (with Douse) cited *Goods of Smith* (31 L. J. Pr., 187).

Drs. Battersby Q.C., and Ball, contra.

KEATINGE, J.—The petition filed in this case is in all its parts unfounded. It suggests that in 1820 a fabricated will of the late Robert Stubber was brought into the Prerogative Court, and that a grant of administration with that document annexed was made to the Rev. Sewell Stubber, who was residuary legatee; and a formal objection is also made, that taking the document to be a genuine will, he was not named in it as the residuary legatee. The facts are these:—The will of Robert Stubber was conversant principally with real estate. The Rev. Sewell Stubber was named in it the *second* tenant for life; another brother was named the first; and the will contained a proviso that if the first tenant for life died before the testator, then the next tenant for life should be the residuary legatee. Well, the first brother died before the testator, and then Sewell Stubber became in law and in fact the residuary legatee. He was named in the will as tenant for life, and as such he in law became residuary legatee, so that even in terms the grant was correct. I admit that if in a few days after the grant had issued the attention of the parties or the proctor had been drawn to the circumstances, perhaps the grant would have been amended; but the grant substantially and truly describes the grantee, because he was residuary legatee in the will, and was named in the will as tenant for life. That is a matter of special demurrer. Sewell Stubber died in 1822 or 1824, and that administration fell to the ground; and part of the application is to set aside that which has met a natural death. It also calls on the Court to set aside the administration which the respondent, S. Mallard Stubber, obtained in 1825 to the will of Sewell Stubber, who was tenant for life under Robert's will, and which grant he got as residuary legatee. They say he was not a next of kin, but he was a residuary legatee and the others were *mors*. In 1844, when some assets of Robert's were discovered in La Touche's bank, he got a grant *de bonis non* to Robert Stubber's goods, and it is alleged

that the assets were suppressed, that only £20 was accounted for. But there is no evidence at all of any suppression. Then in 1863 a petition, similar to the present, with a variety of serious charges, is presented, and it was answered. I refused all relief, and the matter was arranged. That petition was withdrawn, and a short one, without the offensive charges, substituted; and on terms the grant to Sewell Stubber's will was revoked, and a new one given to the petitioner. Now they ask the Court to take away from the respondent the grant *de bonis non* to Robert Stubber's assets. True he got that grant as residuary legatee. He no longer fills that character: another person has got it; but he does not answer the respondent's affidavit as to the purpose for which that grant was required; and I am called on to assume that there is a vast amount of property of Robert Stubber's still to be administered, and that the respondent is throwing obstacles and difficulties in the way. I called on counsel several times to point out where any of such immense assets were, or of what they consisted, but I could get no account of any, and I therefore assume that none whatever exist. Sewell Stubber, on getting his grant, thereby became the owner of all Robert's residue; and Sewell Stubber is represented by the petitioner, and can have full relief elsewhere, if assets exist. Then it was alleged that the renunciations were fabricated, and on examination of them in Court, the petitioner's counsel admitted that they had no semblance of fabrication. Charges of that kind should be made with great caution. On the whole, I am of opinion that I can grant no part of the relief prayed by this petition, and I therefore dismiss the petition with costs.

MURPHY v. MURPHY.

*Practice—Notice under the 46th General Rule of 1865.*

*The notice to be given under the 46th General Rule of 1865, that the defendant only intends to cross-examine the witnesses to be produced by the plaintiff in support of the will, applies to cases where other pleas besides that of undue execution had been pleaded, such as want of capacity and undue influence.*

*The cause was on a subsequent day heard before the Court itself, and the will was decreed for; and the defendant was excused from costs. His lordship again intimating his opinion that the rule applied to such cases.*

Carton, for the plaintiff, moved to fix the mode of trial, and asked to have the question in this case tried by the Court with a common jury of the city of Dublin. The plaintiff, as executrix in a will, had in her declaration propounded that document as the last will of the deceased. The defendant had pleaded to the declaration, undue execution, want of testamentary capacity, and undue influence on the part of the plaintiff and others assisting her; and had also given with those pleas, notice pursuant to the 46th

Rule (1865), that the defendant intended only to cross examine the witnesses produced in support of the will, both as to the due execution of the will and also as to the testamentary capacity of the testator, and whether the execution of the will was procured by any undue influence, as in the plea in that respect was alleged. Counsel for the plaintiff contended that the notice was unusual and improper. It had hitherto been confined to cases where the formal execution of the will only was denied; and in this case the plaintiff would be prejudiced, unless every witness should be produced who could know anything of the facts. The defendant is merely attempting by this notice to avoid the liability to costs, but had reserved the right of disputing the will on every ground pleaded.

*Dr. Townsend, Q.C.*, for the defendant.—If the defendant had not pleaded the two latter pleas, the Court would not allow him to cross examine to the subject matter of them. The defendant has no witnesses to produce, and he so apprizes the plaintiff, who will, of course, produce such as he thinks necessary. The 46th Rule must be taken to have some meaning or utility, and its meaning clearly is to enable a party giving the notice to make out a case by cross-examination. The liability to costs is specially reserved by the rule; but the defendant has a right to be satisfied respecting all the circumstances attending the making of the will.

*KEATINGE, J.*—The 46th Rule has been adopted here from the corresponding rule in England. There is no doubt that the notice in question may be given with several pleas as well as with one; but the question of costs will always remain for the hearing. It seems that the object of the rule was to enable a party to make out his case by cross-examination of his adversaries' witnesses, which, by the practice of the Ecclesiastical Courts, could not be done but by special leave of the Court, when the cross-examining party had not pleaded (*Clements v. Rhodes*, 3 Add., 37). I, therefore, do not think that there is any objection to the notice, of which I can dispose at present. The case was, by consent, ordered to be tried by the Court without a jury.

*Order accordingly.*

*NOTE*—It should be observed that the former rule—the 24th of April, 1861—was, that the party opposing a will might with his *pleas* give notice, &c.; whereas the new 46th Rule is in the singular number—with a *copy of his plea*; but it is obvious from the 43rd and other rules that the word "*plea*" is intended to mean the *entire pleading* of the party filing it.

IN THE GOODS OF EDWARD DEAN FREEMAN HAMILTON, A SUPPOSED DECEASED.—May 3.

*Administration—Presumption of death—Survivorship—Advertisements.*

A bachelor who had in 1836 gone to Australia, had not been heard of for fifteen years. He had corresponded with his family in Ireland regularly up to the year 1849. His father died in 1853, intestate, and administration had been taken to his

goods. No advertisements had been had enquiring for the son; but an affidavit was made by a person in Australia, rendering it almost certain that he was dead. The Court granted administration of his goods to his brother, one of his next of kin, under the 78th section of the Probate Act, the father's administrator consenting, and did not require advertisements.

IN 1817 the Honorable Sackville Hamilton, made his will, and gave the residue of his personal estate to his two sons, Henry and Robert Sackville, for their lives, and on their deaths the whole to go to the children of Robert Sackville Hamilton equally; and he appointed his son Henry his sole executor. The testator soon afterwards died, and Henry his son proved his will; and he also made his will, and appointed his wife, the Honorable Penelope Hamilton, his sole executrix. On his death his widow proved his will; and she also made her will, and appointed Mr. Stewart her sole executor, who on her death also proved her will. Henry and Sackville Robert Hamilton were dead; and the latter died intestate in 1853, and left four children. His daughter Arabella administered to his goods. Edward Dean Freeman Hamilton, one of his sons, in 1836, emigrated to Australia, and corresponded regularly with his father during his life, and with his brothers and sister down to 1849. D. F. Hamilton had been engaged as an overseer of cattle, but had become very intemperate in his habits and broken in health; and on account of some misconduct he was advised to go to California; and in April, 1850, he sailed for California, with a letter of introduction from Mr. Singleton to a friend of his, Mr. Tate, in California, to whom he was to apply for advice and assistance; but he never had applied to him, nor had he ever written to his friend, Mr. Singleton, as, if alive, he would probably have done. The share of the residue lodged in the Court of Chancery by Mr. Stewart to the credit of E. D. F. Hamilton was nearly £800. No advertisements had been inserted in the papers. Arabella, the administratrix of the father, consented. Mr. Singleton had deposed to these facts.

*Dr. Miller* now applied on behalf of a brother for administration to the goods of Edward D. F. Hamilton, supposing him to be dead.—*Goods of Peck* (2 S. & Tr. 506). In that case no administration had been taken to the father, and the Court nevertheless made the grant. Here the administratrix of the father consents. Sir C. Cresswell considered that sufficient.

*KEATINGE, J.*—I think that a case has been made out that the death may be assumed. The presumption is—that he was dead, on the lapse of seven years from 1850. I think that advertisements may be dispensed with. It is impossible to say whether the father survived, but his personal representative consents. Justifying security must be given. The applicant may swear to the death of the supposed deceased to the best of his belief, and not positively.

*Order accordingly.*

## Court of Bankruptcy & Insolvency.

[Reported by John Levy, Esq., Barrister-at-Law.]

[BEFORE BERWICK, J.]

IN RE THE BAGNALSTOWN AND WEXFORD RAILWAY COMPANY; EX PARTE, JOHN JOSEPH BAGNAL.

*Registering a judgment as a statutable mortgage against a railway company made bankrupt—Statutable mortgage in Ireland, eligit in England.*

*Where the creditor of a railway company sues the company for a debt due to him as a contractor for the execution of railway works and obtains a judgment against them, and registers that judgment as a statutable mortgage under the Judgment Mortgage Act, 13 & 14 Vic. cap. 29,—if the company then are declared bankrupt the Court will declare such statutable mortgage a valid charge upon the lands and premises of the company purchased for the purpose of constructing a railway thereon.*

*Although the Judgment Mortgage Act uses the word "person" as owner of property to be effected by a judgment mortgage, yet all the Judgment Acts are in pari materia, and to be read as one code, the property of a body corporate is, as regards a judgment mortgage, to be treated as the property of an individual. The remedy of judgment creditors in England by eligit is analogous to that in Ireland by judgment mortgage.*

THE fact of a railway company having been adjudicated bankrupt created considerable interest; and then a proceeding to make the lands on which a railway is constructed the subject of a statutable mortgage as if they were the property of any individual debtor, increased the interest that seemed to exist. The creditor in this case was Mr. Bagnal, a railway contractor, who constructed a portion of the railway, and to whom a sum of about five thousand pounds was due. He sued the company and obtained a judgment which, it appeared, he was able to register as a statutable mortgage, and he now sought to have the judgment of the Court declaring that mortgage a valid charge on the lands and premises upon which the rails were laid, and which were otherwise occupied for railway purposes. The bond holders as well as the unsecured creditors objected to this claim, and contended that Mr. Bagnal should come in as an ordinary creditor. The Court directed that he should file a charge. The charge claimed priority as mortgages. The assignees filed a discharge denying any right of priority, and objecting on the various grounds which appear in the judgment of Judge Berwick.

J. T. Ball, Q.C., and Kernan, Q.C., were for Mr. Bagnal.

Pilkington, Q.C., and T. White, were for the assignees.

P. Martin was for unsecured creditors.

The facts appear in the following judgment:—

JUDGE BERWICK said—This case comes before me on the charge of Mr. John Joseph Bagnal, who claims to be entitled to a specific charge on the lands of the Bagnalstown and Wexford Railway Company by

virtue of a judgment against them, which was registered under the provisions of the 13 & 14 Vic. cap. 29. The judgment was obtained in Easter Term, 1863, for the sum of £5,342 17s. 3d. in an action brought on foot of a contract for the execution of works of the railway; and the creditor having filed an affidavit under the provisions of the 6th section of the Act, which was duly registered and entered, in which he sets forth that the Bagnalstown and Wexford Railway Company were seized of an estate in fee simple in possession of the several lands, tenements and hereditaments in the counties of Carlow and Wexford therein described. And he claimed by virtue of such registration to have a specific charge on the estate and interest of the company in these lands. To this charge the assignees have filed a discharge, whereby after objecting on formal grounds to the due registration of the judgment, they insist that the company was only seized of the lands in question as part of and for the purpose of the undertaking known as the Bagnalstown and Wexford Railway Company, and had not such an interest therein as would enable a judgment creditor to obtain a charge thereon by registering his judgment; and by their counsel they have argued that by the due construction of the Acts under which this railway was incorporated, and having regard to the general policy of the laws relating to railroads and the provisions therein which regulate and limit their power to raise money by mortgage, a judgment creditor would not derive any peculiar benefit by the registration of his judgment, and must rank with the other unsecured creditors of the company. The objection to the due registration of the judgment was founded upon an alleged defect of the affidavit by which the registration was effected. By the 6th section of the 13 & 14 Vic. cap. 29, it is, amongst other things, required that the affidavit should state the title, trade, and profession of the defendant or person whose estate is intended to be affected by the registration. It appears that the defendant is described therein as "The Bagnalstown and Wexford Railway Co." Now, in the absence of all authority on the subject, and I have been referred to none, it appears to me that this is a sufficient description of the trade and profession of the company, the Act of Parliament under which it is incorporated making the company carriers of goods and passengers; and indeed *ex vi termini*, a railway company is a trading and commercial company, and is known generally as such. The next objection of a technical nature was, that the Act only authorizes the entering of a judgment against the lands of which "the person" against whom the judgment entered was seized and possessed; and as the Act contained no interpretation clause extending the word "person" to bodies corporate, it was argued that it could not apply to corporations or corporate property. On looking, however, at the Act it appears to have been passed for the purpose of amending the law respecting judgments as enacted in the previous Acts therein referred to, of which the 5 & 6 Vic. cap. 105 is the principal, and finding in that Act the provision that the word "person" shall extend to and include bodies corporate; and as these Acts are all in *pari materia*, and form one code of



legislation on the subject of judgments, I am of opinion that they should be read and construed together as one system and explanatory of each other. I therefore think that this objection cannot be sustained. If this be so, and that the affidavit and its registration be according to due form, then by the 7th section of the Act the registration gives to the creditor an effectual charge on the lands, tenements, and hereditaments of which the defendant was seized at the time of the registration of the judgment, unless there be something in the particular Act by which this company is incorporated, or in the general policy of the laws regulating railway companies which are embodied therein, and which takes away from the creditor the rights which he otherwise had unquestionably acquired. Now, in the first place, it is argued that as the company has only by the Acts which incorporated it a limited power to raise money by mortgage, which, it is alleged, has been already exhausted, and as the charge now sought to be established is to have the effect of a mortgage, it must be considered in the light of an additional charge created by the company; and being in excess of their power, must be considered to be void. And I am told that if I hold thereon I sanction the company creating indirectly a charge on their property which they are prevented from doing directly; and that thus I open a door to fraud and evasion of the provisions of the Acts under which railway companies exist. Now, as to this objection, it is quite clear that in this case there is no pretence for saying that there is any collusion between the company and the creditor, or that this judgment was either in whole or in part for monies advanced or to be advanced to the company by this creditor. The entire claim is for a debt due for works done *bona fide* for the benefit of the company, and from which every shareholder of the company derived a direct and personal benefit. The mistake that pervades the argument appears to arise from confounding a mortgage, that is, a voluntary dealing for the loan or advance of money between the borrower and lender, with the case of a charge by judgment obtained through the medium of a hostile proceeding of a creditor against his debtor, which is by registration made through the instrumentality of this Act of Parliament; not a mortgage, but to have the effect of a mortgage so far as charging or affecting the lands of the debtor. And I think that independent of all authority one can see the distinction sufficiently to avoid confounding the voluntary debts of the company on raising money by charge on the undertaking, with the *involuntum* proceedings of a creditor against the company for a debt already due, with which the Legislature appears to have no intention to interfere, inasmuch as it did not come within the mischief to be guarded against. If the argument were pressed to its utmost limit, it must appear to preclude an honest creditor of the company from seeking to enforce his rights by a hostile proceeding against the property of the company. But, independent of principle, I think the case of *White v. The Carmarthen Railway Co.* (1 Hem. & Sm. Ch. Rep. 786) puts an end to this objection, for there the Vice-chancellor, on demurrer, decided that where a railway company, after exhausting their parliamentary borrowing powers, in the

form known as Lloyd's bonds, on an acknowledgment of debt and a covenant to pay interest on a future day, partly to a contractor and partly to persons who supplied the Parliamentary deposit. These facts would not justify the Court in declaring the bonds illegal, though it might be different if they were issued for the purpose of evading the borrowing powers of the company. It is next insisted that if I establish this debt as a specific charge on the lands of the company, it will defeat the whole policy of the laws which create and govern railway companies, because the result will be—that the creditor, by judgment, who registers his charge, will in such case have the power of entering into and taking possession of the lands and works of the company, and thus interfere with or deprive the public of the use of this public highway, which had been vested in the company for the purpose of public convenience; and if such were the necessary result, it would, I think, be a conclusive argument against the claim. But it appears to me that the whole argument is grounded on an assumption which is purely imaginary, and that no such necessary consequence exists or is to be apprehended. I am not asked in this case to say that the creditor has established a claim which gives him a specific charge against the lands of the company, to be enforced in such manner, and in such manner only as the Legislature and the nature of the property permit. Even in the case of a charge of this kind against the lands of an ordinary debtor, it does not follow that the lands subject to the charge can be specifically taken by the creditor for payment of his debt. The circumstances of the property at the time must be considered; and if there be prior legal charges or a dedication of the property to public purposes, the creditor will either have no legal right to interfere with the possession, or will be restrained from doing so. I think the whole misconception on this branch of the case, and the real position and right of the creditors will be best understood by looking at the English authorities on these cases, which appear to be perfectly analogous to the present. It is true that in England the power to register a judgment and thus create what is called a statutable mortgage, does not exist; but the right of a creditor by judgment to issue his *eligit* on his judgment, for which in Ireland the right to register his judgment and make it a specific charge on land is substituted, still continues; and the object of both proceedings being the same, namely, to give to a creditor by judgment the power to levy his debt from the lands of his debtor. I think the analogy between both cases is sufficiently exact to make the principles by which the law is governed in one country applicable to the proceedings in the other. Now, I have been referred to several cases by which proceedings by *eligit* have been adopted by creditors of railway companies in England, and in all such cases the same argument—that such proceedings were against the policy of the railway code—might be urged; and the argument has only been effective to this extent, to which, I have no doubt, it would be equally effective here, namely, that the creditor could not interfere with public rights or convenience, and must be satisfied with having obtained a charge against the lands and works of the company, and that his only

remedy would be to have a receiver appointed to collect the tolls of the company and apply them towards the discharge of his debt after providing for the maintenance of the railway, and due attention to public interest and convenience. The case of *Furness v. The Caterham Railway Company* (25 Beav. 614) and *Russell v. The East Anglican Railway Company* (6 Rail. and Can. Cas. 532) appear to demonstrate the right of a judgment creditor to issue an eligit against a railway company to enforce the payment of his debt. In England, where from the great extent of railways, the magnitude of the interests therein, and the attention paid to the convenience of a great commercial people, no private interest would be allowed to conflict for a moment with that of the public. I think on the whole I am justified in deciding that in this country the right of the creditor to register his judgment, and thus obtain a specific charge on the lands and works of the company, which is the legal substitute in this country of the writ of eligit, is, in my opinion, unaffected by either the general or particular railway laws; and I have no fear that the creditor will be permitted to enforce such right to the detriment of the public, although he will obtain a specific charge which will enable him to be paid his debt in the priority to which such charge will entitle him. I am therefore of opinion that I am bound to declare the charge proved so far as it seeks to have the judgment of the claimant declared to have been duly registered, and to be a specific lien on the lands and works of the company. The charge seeks to have a priority declared, which I cannot do, as I have not the parties before me who are interested in contesting that question. The claimant must have his costs with his demand, and the assignees are entitled to their costs as general costs in the matter.

### Court of Exchequer Chamber.

Reported by William Woodcock, Esq. Barrister-at-Law.

[BEFORE O'BRIEN, HAYES, AND FITZGERALD, JJ.,  
HUGHES AND FITZGERALD, BB.]

PARKINSON, APPELLANT, BROPHY, RESPONDENT.]

PARKINSON, APPELLANT, AIRD, RESPONDENT.

HAMILTON, APPELLANT, NEWCOMEN, RESPONDENT.

*Franchise—Notice of objection—Date.*

*The date required to be at the foot of a notice of objection under s. 26 of 13 & 14 Vic. c. 69, must be the true date of signing the notice; where, therefore, the notice was not served until after the date upon which it bears date it was held bad (Hayes, J. dissentiente.)*

THESE were appeals from the decisions of the revising barrister for the county of Dublin. In *Parkinson*, appellant, *Brophy*, respondent, the case stated was as follows:—At a court of revision for the county of Dublin held at Kilmainham, Michael Brophy, of No.

2 Windsor Cottages, on the supplemental list for the barony of Coolock, was objected to by Thomas Henry Parkinson on the list of voters for the county of Dublin. In the notice of objections given to the clerk of the peace the date was printed, and stated thus:—“Dated the 10th day of April, in the year 1864.” And in the notice given to the party objected to the date also in print was dated “this 10th day of August, 1864.” The supplemental list for the barony was duly published on or before the 22nd day of July. The notices were not signed by the objector until after the 10th day of August, but were signed by him between the 11th and the 20th of August, and before they were served. The notices were duly served on the persons objected to after the publication of the claimants lists and upon the clerk of the peace, and duly published by the latter. It was contended that the notices were insufficient; and I was of opinion as they had not been signed on the day they bore date, they were bad, and I retained the name of the claimant on the list. If I were mistaken, his name is to be expunged. There were several other cases similar in point of law to the foregoing, and I have consolidated them with this appeal, and they are to be governed by the decision in this case. A list of the names that may require to be expunged as appended to this appeal, and also the notice of objection to the clerk of the peace, and the counterpart of that to the person objected to. Dated this 25th October, 1864. (Signed) C. J. TRENCH, Chairman Quarter Sessions, County Dublin.

The following case was stated in *Parkinson*, appellant, *Aird*, respondent:—At a court of revision for the county of Dublin held at Kilmainham, William Aird, jun., on the claimant list for the barony of Rathdown, was objected to by Thomas Henry Parkinson on the list of voters for the county of Dublin. In the notice of objection given to the clerk of the peace, the date was printed and stated thus:—“Dated the 10th day of August, in the year 1864.” The list of claimants for the barony of Rathdown was published on the 11th August, the last day for its publication. The notices were not signed by the objector until after the 10th day of August, but were signed by him between the 11th and the 20th of August, and before they were served. The notices were duly served on the persons objected to after the publication of the claimant's lists, and upon the clerk of the peace, and duly published by the latter. It was contended that the notices were insufficient; and I was of opinion, as they had not been signed on the day they bore date, they were bad, and I retained the name of the claimants on the list. If I were mistaken, his name is to be expunged. There were several other cases similar in point of law to the foregoing, and I have consolidated them with this appeal, and they are to be governed by the decision in this case. A list of the names that may require to be expunged is appended to this appeal, and also the notice of objection to the clerk of the peace, and the counterpart of that to the person objected to. Dated this 25th day of October, 1864. (Signed) C. J. TRENCH, Chairman Quarter Sessions Co. Dublin.

In *Hamilton*, appellant, *Newcomen*, respondent, the case stated was as follows:—At a court of revision

for the county of Dublin held at Kilmainham, Thomas Arthur Newcomen in the C. list for the barony of Coolock, was objected to by Frederick Hamilton, on the list of voters for said county. In the notice of objection given to the clerk of the peace the date was printed and stated thus—"Dated the 13th day of August, 1864." The list of claimants for the said barony was published on the 11th August, the last day for its publication. The objector could not tell whether he had signed the notices on the 13th, the day of their date, or one or two days after. It was contended that the notices were insufficient; and I was of opinion that as they were not proved to be signed on the day they bear date, that they were "bad," and I retained the name of the claimant on the lists; if I were mistaken, his name is to be expunged. There were several other cases in point of law to the foregoing, and I have consolidated them with this appeal; and they are to be governed by the decision in this case. A list of the names that may require to be expunged is appended to this appeal, and also the notices of objection to the clerk of the peace, and the counterpart of that to the person objected to. Dated this 25th day of October, 1864. C. J. TRENCH, Chairman of the Quarter Sessions County Dublin.

*M'Donough, Q.C., and Chatterton, Q.C., for the appellants on the first two appeals, and for the respondent on the third.*—The notice *prima facie* must be taken as signed on the day on which it is dated. There is no provision in the st. 13 & 14 Vict., c. 69, that the objector must prove when he signed the notice. It is utterly immaterial what the date provided it is within certain limits. *Lewis v. Roberts* (31 L. J. 51); *Rawlins v. Bremen* (15 L. J., C. P. 145); *Samuel v. Hitchcock* (31 C. B., N. S. 8); *Beeden v. Hocken* (Man. G. & Sc. 19); *Toms v. Cuming* (7 M. & Gr., App. 29, 88); *Knowles v. Brookin* (1 Lutw. 461). The date may be any time after the 20th July, and before the 20th August. *Murphy's case* (3 Ir. C. L. R. 203); the notice has a date, which is a substantial compliance with the Act. The time of service of the notice is the essential point. If the dating is of importance, why does not the act of Parliament specify it, as in the case of signing? Brotherton on Qualification, 280.

The *Solicitor General* (Lawson) and *Serjeant Sullivan*, for the respondents in the first two appeals, and the appellant in the third.—The place of abode of the objector must be stated. *Curtis v. Rugby* (1 Keen & Grant, 475); *Rawlins v. Bremen* 31 L. J. C. P. It must be the place of abode at the time the notice is signed, and the date must, therefore, be the true one in order to fix the place of abode. *Melbourne v. Greenfield* (1 K. & Gr. 261). *Anderson v. Norton* (8 Sc. 583); *Broome's Legal Maxims*, 853. *Williams v. East India Company* (3 East, 199); *Beeden v. Hoskins* (1 Lutw. 526); *Avery v. Bowden* (6 El. & Bl. 972); *M'Mahon v. Leonard* (6 H. of L. 993); *Keys v. Collum* (7 Ir. C. L. R. 385); *Knowles v. Brookin* (1 Lut. 461)); *Best* on Presumption, p. 181; par. 133.

Dec. 3.—DEASY, B., delivered the judgment of the Court.—He said that these cases were appeals from the Chairman of the county of Dublin, who held that the notice of objection in each case was bad, as it did

not state the date; and the question which the Court had to decide was whether the notice was bad, as being dated on such days, but not signed then. He was of opinion that the decision of the Chairman was right. The question depended on the true construction of s. 36 of the st. 13 & 14 Vict. c. 69, and the form of objection, No. 12, given in the schedule A, the 26th section required the party objecting to serve on the person objected to "a notice according to the form numbered 12 in the said schedule A, or to the like effect, and every such notice of objection shall be signed by the party so objecting as aforesaid," and by sec. 118 the schedules were declared to be a part of the Act, and the form No. 12 of the schedule A contained at the foot these words: "Dated this day of

one thousand eight hundred and (signed.) A. B. of [place of abode] being now registered, or on the register of voters, or list of voters (as the case may be), for the county of ——" It was admitted by counsel for the appellant, that taking the schedule and the form together, the Act required that the notice should contain a date. That was different from dates—Co. Litt. 6 a—in a notice to quit, a date was not essential. But it was stated that it was not necessary that the notice should contain an accurate statement of the date, and that any date between the 20th July and the 20th August would be sufficient, as it was immaterial at what precise day in this interval the notice was served. He could not concur in that statement. When an Act of Parliament required that a document should state its date, that was the day it was signed, one would presume *prima facie* that it was for the purpose of giving the party notice of the exact date. The Court had not to deal with a case of mistake. The objector stated that in the first case he was positive that the notices were not signed on the date, and was enabled to say when it was signed. His lordship thought that in the absence of preponderating inconvenience they should require an exact compliance with the Act of Parliament, and that the party should state the exact day on which it was signed. The words "how registered" in the schedule, plainly applied to the date on which the notice was filled up, *Beeden v. Hoskins* (1st Lutw. 526); the Court of Common Pleas held that it was essential that the notice of objection should contain the year of our Lord in its dating. Wilde, C. J. here said: "I am not at liberty to entertain considerations of inconvenience, because I have no difficulty in collecting from the language of the statute that it was intended that the notices should be dated." In *Knowles v. Brookin* (Lutw. 461), it was held that the place of abode on the notice of objection should be, not that set opposite the name of the objector upon the list of voters, but his true place of abode as it was at the time of the serving the notice. That was again discussed in *Melbourne v. Greenfield* (Keen and Grant, 261); and Erle, C. J., in the case, at p. 274, said: "I am of opinion, that the words, taken, in their ordinary acceptation, would mean the present place of abode of the objector when he signs the notice. Crowder, J., at p. 277, said: "I cannot entertain a doubt that any man who finds that he is bound by the direction of an Act of Parliament to sign a notice thus—'A. B. of [place of abode]'—"

would understand the Act to mean, that the person was to sign and date the notice from the place of abode at which he is at the time of signing." Then, if the party objecting should state truly his place of abode at the time of signing the notice, it necessarily followed, his lordship thought, that the objector should state truly the time, including the day of the month on which he signed the notice. If not, how was the party to find out what was his true place of abode at the time of the signature, if the time was left at large within the limits here contended for. It had been contended that it was immaterial what was the date, provided it was within that limit. But his lordship thought that that was not the question for the Court. They should follow the Act and not discuss the reasons on which it was founded. Pendl, C. J., in *Knowles v. Brooking*: "I forbear to enter upon an examination of the relative convenience or inconvenience of either decision, not only because they appear to me to be nearly, if not quite, balanced, but because I think that unless there is some preponderance in that respect, our determination ought to rest upon the words of the statute itself." He, therefore, thought it unnecessary to assign reasons, but if it were necessary, it would not be difficult to do so. It might happen that a notice signed on the 20th July might not be served till the 19th August, and the party might go and find that no person lived at that place on the 23rd July, and go into Court on that and be turned round. The case No. 2 was an illustration of the objection. There the objection bore date the 10th August, 1864, and the list not published till the 11th, the party objected, on the ground that the notice was not signed till after the date, and the objector sought to get rid of the objection. His lordship expressed no opinion whether the objection was valid or not, as it was not before the Court, but he thought it conclusive. But, independently of the consideration of convenience or inconvenience, he rested his judgment on the words of the Act, the forms in the schedule, and the English decisions. He altogether disclaimed the doctrine and the principle of construction, that the Court should lean in favour of the franchise. He recognised no such principle upon questions before this Court, which, like all questions arising upon the construction of Acts of Parliament, should, he maintained, be decided according to the words of the Act. If it was the intention that persons having qualifications should be put on, it was equally the intention that those not having them should not. He was of opinion that the decision of the Chairman was right.

FITZGERALD and HUGHES, B.B., and FITZGERALD, J., concurred with Deasy, B.

HAYES, J.—It is quite plain that the notice should bear a certain date, but then the question arises whether the true date of the signature is material, so that any variance from the true date is fatal. To judge of the materiality of the dates, let us consider what were the objects of the Legislature. Two things are required—one, to give certainty of the person of the party objected to, and the other, of the person of the objector. It appears to me to be wholly immaterial what day the notice bears date. When, however, it is said for the respondent, that the date must not only be a perfect date, but the very date on which

the objection was in fact signed, I can see neither reason nor authority for that. The expression "true date," used by Tindal, C. J., is extra judicial.

O'BRIEN, J.—In all these cases I concur with the majority of the Court, and with the reasons given by Deasy, B., and it is unnecessary for me to go over his ground. As to the supposed hardship, I would refer to the observation of Wilde, C.J., in *Reenden v. Hoskin*, which shews that we are not to be influenced by considerations of hardships. In the same case Wilde, C.J., disclaims entering into a speculation why the Act required a date. Well, there was one matter which has been referred to which was pressed very much by Mr. M'Donogh in his argument. It was pressed by the Solicitor-General that as it was settled that place of abode at the time of service should be the time of signing that involves the consequence that the notice should bear the true date. Mr. M'Donogh was so pressed by that, that he had to say the objector should remain in the same place of residence from the date to the service. It is necessary just to mention that to see the inconvenience which would result from the construction put by Mr. M'Donogh on the Act. The decision is, therefore, that the decision should be affirmed. There is no distinction taken between the first and second cases. With regard to the third case we express our opinion that the notice of objection stands on the same ground, and that the decision of the Assistant Barrister must be affirmed, and the names remain as he left them, but as it was a case of difficulty and importance, we do not think there should be any costs.

SHEEHAN, APPELLANT, ATKINS, RESPONDENT.

#### *Franchise in cities—Objection—Lists of voters.*

*A person appearing upon the town clerk's list (No. 7, in schedule B. of 13 & 14 Vic. c. 69) of rated occupiers is a person appearing "upon any list of voters" within s. 36, and is therefore competent to object to any person appearing on any list of voters or claimants.*

THIS was an appeal from the revising barrister for the city of Cork. The case stated was as follows:—At the Court of Revision held by me at the city of Cork on the 19th day of October, 1864, it appeared that the appellant in August last served, through the post office of Cork, a notice of objection in the usual form on the respondent, by which he objected to the name of the respondent being retained on list No. 7 of persons entitled to vote in the election of members for the city of Cork. In that notice of objection he described himself of No. 25 Academy-street, in the list of voters for the city of Cork. The name of the objector was not inserted in any list of voters for the said city at the Court of Revision held there in September, 1863, and his name did not appear on the register or list of voters for the time being for the said city when he served his notice of objection in this matter; but the name of the appellant was returned on the town clerk's list (No. 7) of persons entitled to

vote in the city of Cork as rated occupiers. The list (No. 7) was prepared and published by the town clerk in July last, for the purpose of the present revision. It was insisted on the part of the appellant that as the name appeared on the said list (No. 7) he was qualified to object, and that such list was a list of voters within the meaning of the Act. I was called on, on behalf of the appellant, to investigate the respondent's qualification. On behalf of the respondent it was contended that, as the appellant was not a registered voter, he was not qualified to object, and to entertain such an objection would subject the respondent to the trouble of not only searching the list of voters for the time being for the said city, but also the lists prepared for revision, and that such was not the intention of the Act. That the appellant had not truly described himself by stating in his notice of objection that he was on the list of voters for said city; that if he had a right to object as being on list No. 7, he should have so described himself. I held the appellant was not, under the circumstances, qualified to object, and that his notice was inoperative; that even if his name appearing on list No. 7 qualified him to object, there was a misdescription, as he did not describe himself as on that list, but on the list of voters for said city. I held that the respondent was not objected to, and retained his name without any enquiry as to his qualification. The appellant gave notice of appeal, which I allowed. Should the Court be of opinion that the notice of objection was bad, the name of the respondent in this consolidated appeal should be retained on the several lists; but if the Court should be of opinion the appellant had a right to object, and that his notice of objection was sufficient, then the name of the respondent should be expunged from the several lists on which their names stand, according to lists hereto annexed. I came to the same decision against the same appellant upon similar notices of objection served by him upon the several persons whose names, with their qualifications, are set forth in the five lists marked respectively A, B, C, D, and E, annexed to this case; and I allowed appeals. The appeals in the cases in said lists depend on a similar state of facts and on the same points of law, and ought, in my opinion, to be consolidated, as the decision of the Court in *Thomas Atkins'* case will determine the cases of the other respondents hereby consolidated. The following is the form of objection in *Atkin's* case:—

## No. 15.

Form of notice of objection to be given to parties objected to.

To Mr. Thomas Atkins, Rutland-street.

I hereby give you notice that I object to your name being retained on the list (No. 7) of persons entitled to vote on the election of members for the city of Cork.

Dated this 15th day of August, 1864.

(Signed) BARTHOLOMEW SHEEHAN,  
Of No. 25 Academy-street, Cork,

On the list of voters for the city of Cork.

Dated this 25th day of October, 1864.

(Signed) D. R. KANE,

Chairman of the Court of Quarter Sessions for  
the county of Cork, East Riding, and  
Assistant Barrister for said Co. and Riding.

*Sir C. O'Loughlen, Q.C., Neligan, and Waters,*  
appeared for the appellant.

*Chatterton, Q.C., and Kaye,* for the respondent.

Dec. 14.—HAYES, J.—I look on the objection in this case as being correct, and as having been made by the proper person. The question turns on sec. 36 of the st. 13 & 14 Vic. c. 69, which gives the power of objecting to "every person whose name shall have been inserted in any list of voters for any such city, town, or borough." There is a difference between the cases of counties and that of towns and cities. As to the counties the Clerk of the Peace of every county in Ireland is before the 1st of June in every year to make out and cause to be printed or provided according to the form (number 14) in the schedule A to the Act annexed, a sufficient number of copies of such parts of the register of voters then in force for such county as shall relate to each barony of such county. He is then, with his precept, to send to the clerk of each union in the county one or more copies of such parts of the register of voters then in force for the county as shall relate to each barony, or part of each barony of such county, situate in the union of which he acts as clerk of the union. The clerk of the union is then, on or before the 8th of July, upon the copy of the register of each barony, or division of a barony of such county included with such union, to enter objections to the names of persons not entitled to be on the register then next to be made, in the manner prescribed by the Act, and the clerk of the union is to return to the clerk of the peace the copy of the register with these marginal additions. With this copy of the register he is also to transmit to the clerk of the peace, a supplemental list of all £12 rated occupiers of his union not already appearing on the copy of the register, excluding from it all such occupiers as have not, before the 1st of July, paid all poor-rates which had become payable previous to the 1st of January then last. These two lists, the copy of the register, and the supplemental list, are to be returned by him to the clerk of the peace. Having received them, the clerk of the peace is to publish them in the barony to which they relate. All persons claiming to be entitled to vote are to send their claim to the clerk of the peace, and he is to prepare and publish a list of these claimants, and then, by section 24, these three lists, the copy of the register for the time being, the supplemental list, and the list of claimants shall be deemed to be the list of voters of the barony for the county in which the barony may be situate "for the purposes hereinafter mentioned." One of those purposes is the purpose of revision by the chairman of the county. The Legislature then enacts, that any person being upon any of these lists may be objected to by any person "who shall be upon the register of voters for the time being for such county." With reference to a city or town the case is different. Copies of the register of voters in force are to be transmitted by the clerk of the peace to the town clerk, but after that the register is wholly laid aside, and is not made the basis of proceedings as in the county case. The preparation of the lists is confided to the town clerk. The clerks of the unions are to transmit to the town clerk lists of persons rated as occupiers of premises of

an annual value of £8 or upwards. Having received these the town clerk is, on or before the 20th July, 1851, to make out three lists of persons entitled to vote. The first is merely an alphabetical arrangement of the list of rated occupiers transmitted by the clerk of the union and of persons entitled to vote in respect of the inhabitancy of houses; the second is a list of all persons (except persons on the freemen's roll) who shall be entitled to vote by virtue of any other right whatever; the third is a list of persons on the freemen's roll. These three lists are to be signed and published by the town clerk on or before the 22nd of July. He is also to make out and publish lists of claimants. Then comes the 36th section on which the present question arises, which enacts, "that every person whose name shall have been inserted in any list of voters for any such city, town, or borough, may object to any other person as not having been entitled . . . on the 20th day of July next preceeding to have his name inserted in any list of voters or list of claimants for the said city, town, or borough. Now, it appears to me that the persons here referred to are not the persons on the registers of the preceding year which is not once referred to, nor are they the persons on the lists of claimants, but persons on any of the three lists of persons entitled to vote which I have mentioned. Any person on any of these lists may object to any other person. The 38th section enacts that the town clerk shall, on or before the 25th August, deliver to the clerk of the peace copies of "the said lists of voters made out by him as aforesaid," a copy of the list of persons who shall have claimed, and a copy of the lists of persons objected to, together with a copy of the register then in force, shewing that the term "list of voters," is quite distinct from the register of voters. So also the 49th section provides for the clerk of the peace, the town clerk, and the clerk of the union attending the Court of Revision, where the clerk of the peace is to produce copies of the register then in force, and the town clerk is to produce the several lists made by him. Upon all this, it appears to me that the decision of the revising barrister is wrong, and must be reversed.

*The other members of the Court concurred.*

J. P. LONGFIELD, APPELLANT; O'CONNOR, RESPONDENT.  
December 14.

*Amendment—Freehold franchise in Mallow—Stat.  
13 & 14 Vict., c. 69, s. 55.*

*A party appeared on the register of voters of the borough of Mallow as a £50 freeholder arising out of premises in the borough. It appeared that he had been on the register for several years in respect of a £50 freehold qualification, and that other voters were registered in respect of £20 freehold qualifications. It was proved that the qualifying premises were not, for some years previous to the 20th July last, of the yearly value of £50, but that they were of the annual value of £40. It was contended before the revising barrister that as the party*

*was entitled to a freehold of £20 out of the same premises, the qualification was sufficiently described, and that the description ought to be amended by changing the £50 freehold to £20 freehold. The revising barrister held that he could not make the proposed amendment, and on appeal it was held, that his decision was correct.*

THIS was an appeal from a decision of the revising barrister for the County of Cork. The case originally stated was as follows:—

"At the Court held at Mallow on the 17th day of October, 1864, for revising the lists of voters for the borough of Mallow, it appeared that the appellant was on the register as a £50 freeholder arising out of premises in the borough. The respondent, whose name was on the list of voters for said borough, objected to the appellant, and appeared in support of his objection, and examined the appellant, from whose evidence it appeared that he received out of the qualifying premises £52 10s. at one time, and that he had given abatements to the tenants, and for some time past only received £40 a year thereout, which was the amount of the rental. It was contended by the respondent that as the appellant had not the qualification in the amount as stated in the register, his name should be struck off. On the part of the appellant it was contended, that as he was entitled to a freehold of £20 out of the same premises, the qualification was sufficiently described, and that I ought amend the description by changing the £50 freehold to £20 freehold. I was of opinion I could not make the required amendment, and expunged the name. If the Court should be of opinion I was wrong, the name of the voter should be restored on the list of voters.

"D. R. KANE."

Upon the argument of this case the Court was of opinion that it should be sent back to the revising barrister, and accordingly ordered that it "should be sent back to the chairman to report to the Court what appeared before him in this case as to the existence and nature of the £20 and £50 freehold qualifications respectively, and whether it appeared before him in this case that there was any and what difference between them." Thereupon the chairman stated as follows:—

"In pursuance of the order made in this case on the 2nd December, whereby I was required to report what appeared before me in this case as to the existence and nature of the £20 and £50 freehold qualifications respectively, and whether it appeared before me in this case that there was any and what difference between them. I have to state for the information of the Court of Exchequer Chamber, that nothing appeared before me in reference to such qualifications, except that the appellant was on the register for several years in respect of a £50 freehold qualification, and that other voters were registered in respect of £20 freehold qualifications, but it did not appear when or under what Act the appellant was so registered, and it did not appear before me that there was any difference between the two qualifications. It was proved that the qualifying premises were not for some years prior to the 20th of July last of the annual value of £20. No other evidence was given in the case. It was sub-

mitted that the appellant was entitled to be on the register as a £20 freeholder, and that such was the proper qualification for a borough voter, and I was required to reduce the £50 qualification to that of £20. On the part of the respondent it was urged that the appellant should have sent in a notice of claim in respect of the £20 qualification, as he was not entitled to be on the register in respect of the qualification described in the list.

"D. R. KANE"

*Neligan and W. M. Johnson* in support of the decision of the revising barrister.—The proposed amendment was one which the assistant barrister was not competent to make.—Stat. 13 & 14 Vict., c. 69, s. 55. *Onions v. Bowdler* (5 C. B., 65,) is in point, and rules the present case.

*Charles Andrews, Q.C., and Leslie*, for the appellant, referred to *Cooper v. Ashfield* (Keane & Grant, 200).

O'BRIEN, J.—We are of opinion that the judgment of the revising barrister should be affirmed. The ground upon which I go is this:—The power of amendment is given to the revising barrister only in certain cases—namely, power is given to him by sect. 55 to correct mistakes, but "whenever the Christian name, or the place of abode, or the nature of the qualification, or the local or other description of the property of any person who shall be included in any such list, or the name of the occupying tenant thereof, shall be wholly omitted in any case where the same is by this Act directed to be specified therein, or if any person whose name is included in any such list, or his place of abode, or the nature or description of his qualification shall, in the judgment of the assistant barrister, be insufficiently described for the purpose of being identified, such assistant barrister shall expunge the name of every such person from such list, unless the matter or matters so omitted or insufficiently described be supplied to the satisfaction of such assistant barrister before he shall have completed the revision of such list, in which case he shall then and there insert the same in such list." This case does not come within that provision. However, the Act does not stop there, for it goes on to say, "Provided always, that whether any person shall be objected to or not, no evidence shall be given of any other qualification than that which is described in the list of voters or claim, as the case may be, nor shall the assistant barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same." We are told here that the proposed amendment is allowable, but it is very hard to say under what part of the section it would come. What are the facts here? There have been a £50 franchise and a £20 franchise recognised in this borough, for how long does not appear. *Prima facie* that would imply that there was some difference between them. The assistant barrister in his further case tells us that "the appellant was on the register for several years in respect of a £50 freehold qualification, and that other voters were registered in respect of £20 freehold qualifications, but it did not appear when, or under what Act the appellant was so registered." Then after one

or two other matters he says—"No other evidence was given in the case." That is to say, no evidence except as to the facts which he there finds. It appears to me that *prima facie* there was a difference between the two qualifications, and I therefore think that the decision ought to be affirmed.

FITZGERALD, J.—Though we have assumed, and I think properly, that this freehold franchise exists in Mallow, I desire to say that I express no opinion as to its existence.

O'BRIEN, J.—I wish to convey the same opinion. We deal with the present case on the assumption that the franchise exists, but we do not say whether it does so in fact exist.

The other judges concurred, with the exception of Hayes, J., who stated that, not having been present at the argument, he did not take any part in the present decision.

BRIEN v. FENTON.—Dec. 6, 14, 1864.

Claim—Signature of claimant.

*It is not necessary that a claim to be placed on the register should be signed by the claimant personally.*

THIS was an appeal from a decision of the Chairman of the County Wicklow. The case stated was as follows:—"John Brien was produced in Court, and claimed to be placed upon the register as a rated occupier. The claim was produced in open Court, and it was proved that it was not signed by the claimant, and there was no evidence that it was signed by his authority. The respondent thereupon required me to reject the claim, which I accordingly did. If the Court be of opinion that I was wrong in point of law, the names of the claimants are to be inserted; if I was right, their names are not to be inserted."

*The Solicitor-General (Lawson) and P. Keogh*, for the appellant, cited *M'Niff v. M'Ternan* (3 Ir. C. L. Rep. 186); *Hughes v. Barnett* (3 Ir. Jur., N.S., 244); *Davies v. Hopkins* (1 Keane & Grant, 118); *Macken v. Dunn* (4 Bingham, 722); *Broom's Legal Maxims*, 775.

*J. E. Walsh, Q.C., and Coates*, for the respondent, referred to *Neville v. Hamilton* (3 Ir. Jur., N. S., 145); *Toms v. Cuming* (7 M. & G., 77, 88).

Dec. 14.—FITZGERALD, B.—This case appears to us to be ruled by *Davies v. Hopkins* (Keane & Grant, 118), and the appeal must therefore be allowed.

The other judges concurred.

DOWNING, APPELLANT; MORPHY, RESPONDENT.—Dec. 1864; January 12, 1865.

*Franchise in boroughs—"Free burgesses" of Trales.*

*Free Burgesses of the borough of Trales elected and admitted after the Reform Act, do not possess any right to vote at the election of members of Parliament for that borough.*



THIS was a consolidated appeal from decisions of the chairman of the County of Kerry. The case stated was as follows:—

“At a Court held at Tralee, on the 19th day of October, 1864, for the revision of the list of voters for the borough of Tralee, the names of Thomas Blennerhassett, George Gun, and Pierce Chute, appeared on the list of persons entitled to vote as free burgesses at the election of a member for said borough, and notices of objection having been duly served upon the said several parties by Francis Creagh Downing, whose name appears in the list of voters for said borough, on behalf of the said objector it was urged that I should expunge the names of the said three several parties from the list of persons entitled to vote at the election of a member to serve in Parliament for the said borough of Tralee, on the grounds that their only claim or right to have their names retained on said list depended upon their admission as such free burgesses, as herein-after set forth; that said several admissions took place after the passing of the 2 & 3 W. 4, c. 88; that they were so admitted, not by reason of birth, marriage, or service, or any statute in force at the time of the passing of said Act; that therefore they never became legally entitled to vote at the election of a member to serve in Parliament for the said borough, and that no subsequent proceedings did or could set up, or ratify, or confirm a right, which in point of law never existed—namely, a right to have their respective names inserted in the list of persons entitled to vote at the election of a member to serve in Parliament for said borough of Tralee. In sustinment of the rights of the said voters, evidence was laid before me that the town of Tralee was incorporated by Royal Charter of King James the First, under the name of the provost, and free burgesses of the borough of Tralee, to consist of a provost and twelve free burgesses, to whom was granted the sole right of returning members to Parliament for the said borough; the burgesses were elected for life, with power to the surviving burgesses to fill vacancies which might occur from time to time, no peculiar qualification being required for such burgesses, by reason of birth, marriage, or service. The burgess roll of said borough was produced before me, by which it appeared that Thomas Blennerhassett and George Gun were respectively admitted free burgesses of said borough on the 6th day of June, 1835, and that the said Pierce Chute was admitted a free burgess on the 24th of June, 1836, and it further appeared by said roll that the said three several parties took the oaths and signed the roll; and it further appeared by the certificates respectively attached to said several admissions, that the stamp duties respectively payable by the said parties were duly paid, and said certificates further certified that said several parties were admitted by grace especial. It further appeared that search had been made for the corporate book containing the record of the proceedings of the corporation of Tralee, and that same could not be found. It further appeared that the said several parties continue to reside, and now reside, within seven statute miles of the usual polling place of said borough, and that they had been duly registered from seven years to seven years, as entitled to vote for a member of Parliament for said

borough, under the Act of the 2 & 3 Wm. 4, c. 88, and that on each occasion of such registration they respectively swore to residence within seven statute miles of the usual polling place of said borough; and it also was proved that they have been likewise duly registered under the Act of the 13 & 14 Vict., c. 69, and that their names are on the current register of voters of said borough. I held such evidence to be sufficient, and I declined to expunge the said several names of Thomas Blennerhassett, George Gun, and Pierce Chute, and retained same upon the list of voters for the said borough of Tralee. If I was right in so deciding, the names of the said Thomas Blennerhassett, George Gun, and Pierce Chute, are to remain on the list of voters for the said borough of Tralee; but if I was wrong in so deciding, the said three names are to be expunged from the list of voters.

#### COPY ENTRY ON THE ROLL.

Be it remembered that George Gun, Esq., of Spring Hill, being elected a free burgess of the borough on the 6th June, 1835, he this day took the oath, and repeated and subscribed the declaration pursuant to the Act of Parliament.

(Signed)

GEORGE GUN.

Tralee, June 6, 1835.

#### COPY CERTIFICATE OF ADMISSION.

George Gun, Esq., of Plover Hill, in the County of Kerry, is this day admitted a freeman of the corporation of Tralee by grace especial, having been duly elected a member of said corporation.

Dated this 6th day of June, 1835.

(Signed) JOHN WEEKES, Town Clerk.

#### COPY ON THE ROLL.

Be it remembered that Thomas Blennerhassett, Esq., of Shannavalla, being elected a free burgess of the borough on the 6th of June, 1835, he this day took the oath, and repeated and subscribed the declaration pursuant to the Act of Parliament.

(Signed) THOMAS BLANNERHASSETT.

June 6, 1835.

#### COPY CERTIFICATE OF ADMISSION.

Thomas Blennerhassett, Esq., of Shannavalla, in the County of Kerry is this day admitted a freeman of the corporation of Tralee by grace especial, having been duly elected a member of the said corporation.

Dated this 6th day of June, 1835.

(Signed) JOHN WEEKES, Town Clerk.

#### COPY ON THE ROLL.

Be it remembered that Pierce Chute, jun., Esq., of Tralee, being elected a free burgess of the borough on the 24th of June, 1836, he this day took the oath, repeated and subscribed the declaration pursuant to the Act of Parliament.

(Signed) PIERCE CHUTE, JUN.

#### COPY CERTIFICATE OF ADMISSION.

Pierce Chute, jun., Esq., of Tralee, in the County of Kerry, is this day admitted a freeman of the corporation of Tralee, by grace especial, having been duly elected a member of the said corporation.

Dated this 24th day of June, 1835.

(Signed) JOHN WEEKES, Town Clerk.

*The Solicitor-General (Lawson), Serjeant Sullivan, and Neligan*, for the appellant.—These names ought to be expunged. "Freemen" and "Burgesses" mean the same thing.—Johnson's Dictionary, *sub. voc.*; Madox, *Firma Burgi*. The Reform Act does not preserve existing rights in boroughs. If it preserved burgesses it must have preserved them as freemen. The word "burgess" does not occur in st. 13 & 14 Vict., c. 69. Sched. B. Nos. 2 and 3. of the 13 & 14 Vict., c. 69, are important. So also ss. 9 and 13 of the Reform Act, and Sched. C., Nos. 2 & 9.—*Williams v. Evans* (8 T. R. 246); *Croucher v. Brown* (2 M. & Gr.); *Gale v. Chubb* (4 M. & Gr.); *McKeon v. Bradford* (7 Ir. Jur. N.S. 179); *Howlett v. Tottenham* (8 Ir. Jur. N.S. 411).

*Charles Andrews, Q.C., and Kaye*, for the respondents.—These burgesses were not disfranchised by the Reform Act. The old occupation franchise was the only one abolished. 21 G. 2, c. 10 (Huds. on Elections, p. 66) shews that burgesses are distinct from freemen. *Molyneux's case* (Alc. Reg. Cas. 191) is decisive upon the question in this case. That was the decision of the twelve judges of Ireland.—*Rex v. Ponsonby* (Bro. P. C. 287); *Glennon's case* (Alc. 81); st. 2 & 3 W. 4, c. 88, ss. 7, 8, 9, 13, 55.

Jan. 12, 1865.—HAYES, J., delivered the judgment of the majority of the Court. He said that the Court had already held that non-resident burgesses could not vote, and in his opinion resident burgesses were not in any better position. Section 7 of the Reform Act had introduced a new class of voters, namely, the £10 householders. The next two sections introduced restrictions. Section 8 dealt with the small freehold franchise, prohibiting its being acquired for the future, and restricting it where acquired since March, 1831. Section 9 enacted that all freemen and persons who by reason of any corporate or other right were then entitled to vote at borough elections, and all persons who by reason of birth, marriage, or service, or any statute then in force, should be at any time thereafter admitted to their freedom should enjoy their right of voting unaffected by the Act, but so long only as they resided within seven miles of the borough. With respect to those who should become honorary freemen after the 1st March, 1831, they were under all circumstances deprived of the franchise. His Lordship was disposed to think that for the true interpretation of the statute, "burgesses" should not be considered as exactly equivalent to "freemen," but as persons who, by reason of a corporate right, were entitled to vote at the time of the passing of the Act, and would have continued so if it had not passed. The 13th section enacted that no person should be entitled to vote at any future election "unless such person shall have been qualified as aforesaid and duly registered." The negative words disfranchised all those whose rights were not specially saved by the 9th sect., and he was, therefore, of opinion that burgesses elected and admitted after the Reform Act, even though resident within the seven miles, did not thereby acquire a right to vote.

Fitzgerald, B., dissented, not feeling himself to be at liberty to decide in opposition to what had been

decided by the twelve judges in *Molyneux's case* (Alc. Reg. Cas. 191), and followed in *Tottenham's case* (2 Ir. C. L. Rep. 572).

## Court of Appeal in Chancery.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.

DOLPHIN v. ATLWARD—May 10.

*Practice—Enrolling Decree.*

*Although a decree be made by the Court of Appeal in Chancery, the application to enrol same must be made to the Court of Chancery.*

THIS was an application to the Court of Appeal in Chancery for an order to enrol a decree made by the same Court on the 11th May, 1863.

*Lawless, Q.C. (with Hyacinth Plunket)*, were in support of the motion.

*The Attorney-General (with him O'Flaherty)*, contra. This application is erroneous, it should have been made to the Lord Chancellor sitting in the Court of Chancery.

THE LORD CHANCELLOR—I am continually in the habit of signing orders like this sent to me from the Court of Appeal in Chancery. This application, without doubt, ought to be made to the Court of Chancery. Refuse the motion with costs.

IN THE MATTER OF THE ESTATE OF JAMES BRACKEN, AND OTHERS, OWNERS;—W. ELLAM AND OTHERS, TRUSTEES OF THE SECOND EQUITABLE PERMANENT BUILDING SOCIETY, PETITIONERS.—April 27.

*Solicitor and client.*

*A client may, at any time during the progress of a suit in the Landed Estates Court, change his solicitor, Judge Dobbs having decided otherwise.*

THIS case came before the Court on appeal from an order of Judge Dobbs. The appeal stated that the appellants on the 6th of April, 1864, presented a petition in the Landed Estates Court, Ireland, for sale of the premises mentioned therein, on foot of a mortgage granted to said trustees by one Mary Bracken, dated 1st October, 1862. That Messrs. Lawless and White, of the city of Dublin, then the Irish solicitors of said appellants, filed said petition, as solicitors for said society, and that they conducted the proceedings thereon up to the 20th of December. That the society wishing to change their solicitors, entered a resolution on the minutes as follows: "The chairman, Mr. John Price, and Mr. Bracken, having reported the result of their inquiries in Dublin, as to the position of the society, with the

various mortgagors, and its securities, it is now resolved that Mr. James Dillon Meldon, be instructed to act as the solicitor of the society, and take upon himself the carriage of all the proceedings now pending; and that he be instructed further to request Messrs. Lawless and White to hand over to him all deeds and documents in connection with the various securities, as well as all other papers in any way relating thereto"—signed by the chairman, two trustees, and by the secretary. This resolution was communicated to Messrs. Lawless and White, but they declined to comply with the terms thereof as to handing over such securities and other papers. Upon such refusal the present trustees caused a motion to be made in this matter before Judge Dobbs, one of the learned judges of the Landed Estates Court, that they should be at liberty to change Messrs. Lawless and White as their solicitors, and that the carriage of the proceedings in the matter of said estate should be transferred to said James Dillon Meldon, the then solicitor of appellants. Messrs. Lawless and White appeared by counsel and opposed said motion and his lordship by an order dated 21st July, 1865, refused said motion with costs, and from this order the present appeal is taken.

*William Smith*, in support of that appeal.—The order of Judge Dobbs was without precedent, such a doctrine is unknown that a petitioner may not, at any time he pleases change his solicitor. It is absurd to say that we must employ a solicitor with whom we have disagreed. If Judge Dobbs's order be allowed to stand we shall be compelled to have two solicitors, one of our own choosing to watch the other of Judge Dobbs's.

*Richey* in support of the order of the Court below. The order of Judge Dobbs was perfectly correct. It is in conformity with the practice of the Court. After the absolute order has been made in the matter of an incumbrancer's petition for sale in the Landed Estates Court, the solicitor for the petitioner then becomes a solicitor having the carriage of the proceedings which he is bound to conduct for the benefit of all parties having any interest in the estate.

THE LORD CHANCELLOR.—We are perfectly clear that the solicitor was agent of the party who retained him, and that solicitor was appointed on a retainer to an office of trust. Beyond a shadow of a doubt, it was open to the client to change his solicitor, and to dismiss his agent whenever he pleased. The order is plainly contrary to law.

*Order reversed.*

## Rolls Court.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law]

**THORPE v. BROWNE.**—April 20.

*Judgment Mortgage Acts, 13 & 14 Vict., c. 29, s. 6—21 & 22 Vict., c. 105, s. 1—Place of abode.*

*In an affidavit filed under the provisions of the 6th section of the 13 & 14 Vict., c. 29, for the purpose*

*of converting a judgment into a mortgage, a description of the defendant's last known place of abode as "formerly of Ballina Park, in the County of Wexford, and now in the city of Dublin."* Held insufficient, the Master of the Rolls, however, disapproving of the decision in *Fitzgerald's Estate* (11 Ir. Ch. 278), which constrained his Honor so to hold.

THIS was an application to the Master of the Rolls by way of appeal that the order made by Master Fitzgibbon bearing date the 3rd day of December, 1864, and signed the 25th Jan. 1865, may be varied, so far as same declares that the judgment obtained by the petitioner on the 18th Dec. 1850, in, or, as of Michaelmas Term in that year, in the Court of Exchequer as against George Humphreys Brown, formerly of Ballina Park, in the county of Wexford, Esq., in the sum of £4,400 sterling, besides £10 11s. 10d. for costs, has not been duly registered as a statutable mortgage in the Office of Registry of Deeds in Ireland, in pursuance of the statute for registering judgments, as affecting the lands of Craighmore, in the barony of Scarawash, in the County Wexford, and that said judgment is not a charge upon said lands, may be reversed, and that it may be declared that the judgment obtained by the petitioner on the said 18th of December, 1850, for the said sum of £4,400, besides £10 11s. 10d. has been duly registered as a statutable mortgage in the office for the registry of deeds in Ireland, in pursuance of the statute for Registry of Judgments as affecting said lands of Craighmore, otherwise Craighmon, and that this said judgment is a charge upon said lands. The Master decided that the affidavit to register the judgment as a mortgage was defective, on the ground that the residence of the defendant was not stated in the affidavit in manner required by the 13 & 14 Vict. c. 29. The following is the affidavit: "That he, this deponent, by name and description of Daniel Thorpe, of No. 39, Kildare-street, Dublin, attorney-at-law, did on the 18th day of December, in the year of our Lord, 1850, obtain a judgment in her Majesty's Court of Exchequer in Ireland, against the defendant in this cause, by the name and description of 'George Humphreys Brown, formerly of Ballina Park, in the county of Wexford and now in the city of Dublin, Esq.,' for the sum of £4,400 sterling, besides £10 11s. 10d. for costs, as by the records of the said Court may appear. This deponent further saith that to the best of his knowledge, information, and belief, the said defendant in this suit is, at the time of swearing this affidavit, seized and possessed of, or has disposing power, which he may, without the assent of any other persons, exercise for his own benefit over certain lands and hereditaments, and premises hereinafter mentioned, that is to say, all that and those, that part of the town and land of Graigmore, as formerly in the possession of William Booker and afterwards in the possession of John Brownrigg, or his under-tenants, being part of the Lordship of Clehamon, containing 400 acres, or thereabouts, being two-thirds of the lands and premises demised, for lives renewable for ever, by a certain indenture, bearing date the 12th day of January, 1793, situate in the barony of Scarawash,

parish of Kilrush and county of Wexford, deponent further saith that said judgment is still in full force, and virtue, and effect in law," &c., dated 7th January, 1851. The Petition of Appeal then stated that this affidavit was duly registered as a statutable mortgage, in the office of registering deeds, conveyances, and wills in Ireland, by depositing in such office an office copy of said affidavit, on the 8th January, 1851, affecting the said lands and hereditaments, that on the 1st July, 1859, petitioner filed a further affidavit in the said Court of Exchequer, as supplemental to said former affidavit (to remedy the informality, if any), therein, as required by the Act passed in the 21st and 22nd Vict., ch. 105, which affidavit was also duly registered as a statutable mortgage in like manner as the former, and which affidavit is in the terms following: "That deponent, on the 18th day of December, 1850, obtained a judgment in the Court of Exchequer against George H. Brown, the defendant in this suit, for the sum of £10 l. 10d. for costs, and deponent saith that on the 7th of January, 1851, he made an affidavit of the obtaining said judgment, for the purpose of having the same registered pursuant to the statute as a mortgage, to affect the town and lands of Graigmore, in the said affidavit stated to be in the barony of Scarawalsh, parish of Kilrush and county of Wexford, and that he caused said affidavit to be duly filed in this honourable Court on the 7th July, 1851. Deponent saith, he makes this affidavit as supplemental to said former affidavit to remedy the informality, (if any therein), as required by the 21st and 22nd Vict., ch. 105. Deponent saith, that said judgment was obtained by deponent on the 18th December, 1851, in her Majesty's Court of Exchequer for £4,400 sterling, besides £10 l. 10d. for costs, in a case then depending, entitled 'Samuel Thorpe, of Kildare-street, Dublin, attorney-at-law, plaintiff, George Humphreys Brown, formerly of Ballina Park, county of Wexford, and now of the city of Dublin, Esq., defendant.' Deponent saith his name is Daniel Thorpe, and he is the plaintiff who obtained said judgment, and that said judgment is still in full force, virtue, and effect, in law unreversed and unsatisfied, and that the deponent, at the time of obtaining the said judgment, was, and still is, a solicitor and attorney-at-law, and that his place of abode was, and still is, at No. 39, Kildare-street, in the county of the city of Dublin. And deponent saith, that the person whose estate is intended to be effected by the registration of said affidavit is George Humphreys Brown, and that the said George Humphreys Brown then was, and now is, without trade or profession, and that his usual and proper title is and was esquire, that his usual place of abode shortly previous to the obtaining of said judgment, and the swearing of said affidavit by deponent, was at Ballina Park, in the county of Wexford, and that the Four Courts Marshalsea, Dublin, was his place of abode at the time of obtaining said judgment and swearing said affidavit by deponent, and is now his place of abode, last known to deponent, sworn," &c.

*Brewster, Q.C.* and *Butt, Q.C.* appeared for the appellant.—Master Fitzgibbon was wrong in the conclusion he came to. The requirements of the Act of Parliament were complied with, the residence being suffi-

ciently disclosed on the face of the first affidavit to fix the identity of the person whose estate was to be bound by the registration of the affidavit. By the supplemental affidavit the defendant's residence is positively sworn to—no mistake about it. The later decisions on the Bills of Sales Act, and on the Judgment Mortgage Act, give a freer and more equitable scope to the Act than those of an early date.—*Wolsley v. Worthington* (14 Ir. Ch. 369); *Hewer v. Cox* (30 L. J., N. S., 73, 98.)

*Warren, Q.C.*, and *Henry Fitzgibbon* for the respondents.—There are two affidavits here for the Court to consider. The first affidavit is clearly defective, inasmuch as there is no positive averment of the defendant's residence contained therein. The only thing in that affidavit at all touching residence, was, that the deponent obtained a judgment against the defendant "by the name and description of George Humphreys Brown, formerly of Ballina Park, in the County of Wexford, and now in the city of Dublin, esquire." It is perfectly true that the supplemental affidavit does positively aver the residence of the defendant to be at the Four Courts Marshalsea.—Had the first affidavit been as specific and clear as the second, no question could have been raised; but the first affidavit does not, by way of recital even, disclose the residence to be at the Four Courts Marshalsea, and that being so, the supplemental affidavit cannot aid the first, for there is no power whatever given by the 21 & 22 Vict., c. 105, to make any averment therein that is not recited in the first affidavit: which the supplemental affidavit was to cure. The preamble of that Act recites that under the former Act, 13 & 14 Vict., c. 29, a form of affidavit had been adopted in which among others the last known place of abode, and the title, trade, or profession of the plaintiff, and of the defendant, or the person whose estate is intended to be effected by the registration of such affidavit appears to have been stated, recited, or referred to on the face of such affidavit without being covered with a verification on oath. The first section then empowers the creditor to verify on oath such facts as have been recited in the original affidavit. But there has been no recital here, and therefore no power to introduce an averment of facts not before recited. This case is ruled by *In re Fitzgerald's estate* (11 Ir. Chan. R., 278). In *Fonblanque v. Lee* (7 Ir. C. L. R., 520), it was held that where upon the registration of a bill of sale, the affidavit required by the Bill of Sales Act (17 & 18 Vict., c. 55) omitted the description of the residence and occupation of one of the attesting witnesses to the bill of sale, the bill of sale was, by reason of such omission, rendered void as against an execution creditor.

**THE MASTER OF THE ROLLS.**—This case came before the Court on appeal from an order made by Master Fitzgibbon, whereby the master declared that a judgment obtained by the petitioner on the 18th of December, 1850, against George Humphreys Brown, formerly of Ballina Park, in the county of Wexford, for the sum of £4,400, besides £10 l. 10s. 10d. for costs had not been duly registered as a statutable mortgage, in pursuance of the statute for registering judgments as mortgages against the lands of Graigmore, otherwise Graigmon, in the

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Barony of Gowran and county of Wexford, and that as a judgment was not a charge on said lands. It was contended that this affidavit was defective inasmuch as the residence of the respondent was not stated in the affidavit to be merely at "Ballina Park, in the Co. of Wexford, and now in the City of Dublin, Esq." *McDermott v. McHenry* (7 Ir. Com. Law, 562), was a case decided in the Court of Common Pleas in this country. The affidavit in that case was held to be insufficient on the ground that the residence of Mr. James Sedlitz was not positively sworn to; the effect of that decision was that another Act had to be passed to remedy the evils of former affidavits made since the Act of 1853; the Legislature accordingly passed the Act of 1858 and 32nd Vict., ch. 105, the preamble of which recites, that for the purposes of registration under the said recited Act (13th & 14th Vict., ch. 29), a form of affidavit had been generally adopted which purported to verify on oath the seizure or possession, and the description in manner directed by the said Act, and that several of the affidavits omitted to verify on oath the facts which it was required should be verified by the 13 and 14 Vict., ch. 29, and it was by the 4th section of the supplemental judgment Act, 31 & 32 Vict., ch. 105, provided that in every supplemental affidavit the description and residence, or last known place of abode of defendant, or defendants, as known or existing, should be stated, and such abode of the defendant, or defendants, had been stated in the original affidavit to which such new affidavit shall be supplemental, and to cause an office copy of such supplemental affidavit to be attached to the copy of the original affidavit so previously deposited in reference to the same judgment, decree, order, or rule, which the officer of the registry is hereby authorised and directed to do on being paid the like fees or stamp duty as are payable on the registration of an affidavit under the said recited Act, and such supplemental affidavit when so registered, shall have the like operation and effect as if the facts so verified by same had been verified upon oath in such original affidavit filed in respect of the same judgment." The petitioner has made a supplemental affidavit, and in that affidavit he has expressly stated the residence of the defendant Brown, to be at the Four Courts Marshalsea, in the city of Dublin, and that his own address was at No. 39, Kildare-street, Dublin. We have here plainly stated the residence of both plaintiff and defendant, yet, nevertheless, Master Fitzgerald has decided that this affidavit did not comply with the requirements of the above-mentioned statute. The order Master Fitzgerald has made, it is true, accords with that made in *Fitzgerald's estate* (11 Ir. Ch. 278, 5 Ir. Jur., N. S., 204). There the Court made a decision that the registration was defective on the ground that the last known place of abode of the person whose estate was intended to be effected was vaguely stated. In that case the plaintiff, after stating where the lands that were to be affected by the affidavit lay, the amount of the judgments, &c., proceeded to state the place of abode of the defendant Fitzgerald, "was formerly of the town of Galway, but now of the county of Dublin." I regret to say that

that judgment is binding on this Court, and I must, unwillingly, therefore, affirm the order made by Master Fitzgerald; but, I think it right to say that I do so most unwillingly. I am bound by the judgment of the Court of Appeal in Chancery, and I must say I do not concur with the opinion arrived at by either the Lord Chancellor or the Lord Justice of Appeal, as delivered in that case. According to their judgment the object of the Act would be to give the exact place of abode of the defendant.—I am clearly of opinion that its object was to identify the person against whom the judgment was obtained, and if you identify the person you comply with the spirit of that statute. Here, then, identity is beyond all doubt. Suppose that the affidavit stated that a judgment was had against Lord Clancarty, of the county of Galway, or against the Duke of Leinster, of Carton, or David Latouche, of Dublin, or even against Lord Palmerston, could any person say that those affidavits were defective, when the identity of those against whom judgment was obtained is beyond all doubt. I find, then, that it is utterly impossible to reconcile the decision of the Court of Appeal in Chancery in *Re Fitzgerald's estate* with common sense. In his judgment in that case the Lord Chancellor is reported to have said, "There have been several decisions as to the certainty or vagueness of the place of abode assigned, from which it appears that stating a party to be 'of London,' or 'of Westminster' is insufficient, having regard to the great extent of these respective places, but there can be no doubt that stating him to be 'of Birmingham' or 'of Colton in-le-Moore' is sufficient. I am quite clear that now 'of the County of Dublin' is not a sufficient description of a party's place of abode. It is quite too vague, and as the entire averment shews that the town of Galway was not his last place of abode, it follows that the affidavit was defective in this respect." In the case before me the description of the defendant's last known place of abode was "formerly of Ballina Park, in the Co. of Wexford, and now of the City of Dublin," the affidavit having stated where the lands that were to be effected lay. I have not a doubt on my mind that this affidavit is in the spirit of the Act. *Hewer v. Cox* (30 L. J., N. S., Q.B., 73) is an important case. The Bill of Sales Act, 17 and 18 Vict., c. 36, s. 1, requires the "description of the residence and occupation of the person making or giving, and of the attesting witness to the bill of sale." In that case William Godson and John Hogben executed a bill of sale on the 13th of February, 1859. At the time of filing the affidavit the former resided at No. 2 Holly Cottages, Wellington-place, Stoke-Newington, in the County of Middlesex, and both carried on business in partnership, as printers, in Newstreet, Blackfriars, in the city of London, and not elsewhere, but did not sleep there. In the bill of sale and copy, and also in the affidavits, the said William Godson and John Hogben were described as residing at Newstreet, Blackfriars, in the County of Middlesex. Two objections were raised to this affidavit—first, that the residence of the persons making the bill of sale was not stated at all in the affidavit, as required by the statute, but only the place of business; secondly, that the place of business was incorrectly stated, there actually being no such place as New-

street, Birchfriars, County of Middlesex, as New street, Blackfriars, was in the city of London. The Court of Queen's Bench decided against both these objections. Judge Wightman puts the very pertinent question—"Could any person have been misled by the inaccuracy?" Now, I put the same question. However, I am bound to refuse this motion with costs, acting, I have no hesitation whatever in saying, on a judgment from which I entirely dissent, acting on the judgment of the Lord Chancellor and the Lord Justice of Appeal, much against my own will.

## Court of Exchequer Chamber.

Reported by Valentine J. Coppinger, Esq. Barrister-at-Law.

CORAM LEFROY, C.J., PIGOT, C.B., O'BRIEN, J., HAYES, J., HUGHES, B., DEASY, B., FITZGERALD, J., AND FITZGERALD, B.

COLVILLE v. HALL. — Nov. 1864; Jan. 18, 1865.

### Covenant—Re entry—Condition broken.

The plaintiff being possessed of a term of years in certain premises, demised to the defendant, by lease containing a condition of re-entry in case certain sums of money thereby covenanted to be expended in the erection of buildings in the manner therein provided, were not so expended. Some months subsequent to the execution of the lease, the plaintiff, on being informed that defendant was desirous of subletting certain portions of the said demised premises for building ground, but had a difficulty in making sufficient marketable title on account of the existence of said condition, agreed to provide against that difficulty, and thereupon, by a writing under his hand and seal, and endorsed upon the back of the lease, covenanted with respect to any person who should become tenant for any portion of the demised in manner therein provided, that, in case the estate of the lessee should incur a forfeiture, such forfeiture "shall not in any manner whatever affect the interest or interests, or property of such person, &c., so as in any manner to deprive such person or persons, or any of them, of the full benefit and advantage of their respective buildings and holdings upon the said premises. And it is hereby further covenanted and agreed that, in case of any such penalty or forfeiture, as aforesaid, being incurred, and that any proceedings be taken and rendered effectual on account thereof by said W. C. Colville, his executors, &c., then in such case he, the said W. C. Colville, instead of said James H. Hill, his executors, &c., shall be entitled to recover and receive the rents to be payable by such person or persons so becoming tenant or tenants to said premises in manner aforesaid, and that such person or persons so becoming tenant or tenants to such premises as aforesaid, shall not be rendered or become in any

manner liable to pay any greater sum or sums than the yearly ground rent or rents, to be reserved and made payable respectively to said James H. Hill, his executors, &c., anything to the contrary of these presents or any portion thereof notwithstanding." The lessee having failed to perform the said building covenant, the plaintiff brought an action of ejectment on the title for condition broken. Held—*per Deasy, Hughes, B., Fitzgerald, J.* (affirming *Doe v. Bateman*, 2 B. & Ald. p. 168), that a lessee for years, who had had his whole interest, subject to a right re-entry on breach of condition, might enter for condition broken, notwithstanding that he has no reversion in him.

(*Per Hayes, J.*), that the receipt of rent subsequent to a breach by a receiver appointed by the Court of Chancery at the suit of the plaintiff, did not necessarily amount to a receipt of rent by the plaintiff himself, and did not operate as a waiver of the forfeiture.

(*Per Curiam*) that the objection now raised, that no re-entry by the plaintiff had been proved at the trial, not having been there made, could not be relied on in the Court above.

That the endorsement upon the lease amounted to a release of the condition of re-entry, first (*per Fitzgerald, B., O'Brien, J., and Pigot, C.B.*;—*dissentientibus Deasy, B., Hughes, B., Fitzgerald, J., and Hayes, J.*) on the ground that the condition not being apportionable, and the words being sufficiently large and clearly intended to amount to a release of part, the apparent intention of the parties that the release should be limited in its operation should not be allowed to control a well settled rule of law to the contrary. Secondly (*per Lefroy, C.J.*)—That another construction would lead to multiplicity of suits and circuitry of action.

(*Per Deasy, B., Hughes, B., Fitzgerald, J., and Hayes, J.*; *dissentientibus Fitzgerald, B., O'Brien, J., Pigot, C.B., Lefroy, C.J.*)—That the endorsement amounted merely to a covenant not to sue, on the ground that it simply purported to be such, and that such construction would best carry out the object of the parties.

Quæres—1. Where a termor purports, in the premises of a deed to convey his whole interest, by words which, taken alone, would clearly operate as an assignment, but in the habendum reserves to himself a reversion of twenty-one days, shall the latter words so restrict the operation of the former as to reduce the instrument to a sub lease? 2. Has it become necessary since the passing of the Common Law Procedure Act, 1853, to prove actual re-entry in ejectment on the forfeiture.

THIS was an appeal from a decision of the Court of Common Pleas, bearing date the 7th day of May, 1863, whereby that Court disallowed the cause shown against a conditional order that a verdict entered for defendant should, in pursuance of leave reserved, be changed into a verdict for the plaintiff. The action was brought by W. C. Colville against J. H. Hall, for the recovery of certain premises, situated at the West side of Ballybough lane, in the county of Dublin, and

was tried before Chief Justice Monahan at the Nisi Prius sittings of Hilary Term, 1863. It was an ejectment on the title on the forfeiture for condition broken, and a verdict was, *by consent*, entered for the defendant, leave being reserved that the verdict should be changed into one for the plaintiff, if the Court above should be of opinion that the learned Judge was wrong in his view of the law. The defendant having duly appeared to show cause, the Court, after a full hearing, made the order absolute, Monahan, C.J., having concurred in overruling his former decision. From that order the present appeal was brought. The facts of the case are reported 8th Ir. Jur., N.S., p. 103.

It may, however, be shortly stated that issue being joined upon the plaintiffs title, the following points were urged for the defendant—1st., That the condition of re-entry was void, inasmuch as the instrument in which it was contained, amounted to an assignment and not a sub-lease (the premises of the deed purporting to convey the entire interest of the grantor, and not being controlled by the habendum, by which a reversion in the grantor, of twenty-one days, was purported to be retained), and on that account the clause of condition fell to the ground there being no reversion to support it. 2ndly. That a certain endorsement, under the respective seals of the plaintiff and defendant, affixed to that instrument some months subsequent to its execution, by which plaintiff covenanted that re-entry for condition broken should not in any what whatever, either as to rent or otherwise, affect the interests of such persons as should become sub-tenants under Hall for any portions of the said demised premises on the terms therein provided, amounted to a *waiver of the condition*. 3rdly. That no re-entry to avoid the estate of said Hall, had been proved at the trial, and that since the Common Law Procedure Act, 1853, it was necessary to prove same. 4thly. That the plaintiff, by obtaining a receiver over the said premises, had deprived the defendant of the power of carrying out the engagements, for the breach of which the alleged forfeiture had been incurred. 5thly. That the receipt of rent by receiver, subsequent to the breach, operated as a waiver of the forfeiture by the plaintiff.

*Walter Bourke, Q.C.*—The covenant of November may operate as a release though only purporting to operate as a covenant—Bacon's Abridg. tit. Release, page 634. Conditions, too, are odious in the eye of the law, and our Courts are, therefore, not disposed to lean in favour of them. If we construe the deed of November, 1856, merely as a covenant between Colville and Hall, the subtenants will be without any protection whatever, for, supposing the forfeiture to take place, Hall may then refuse to sue Colville on the covenant, and the tenants, not being parties thereto, cannot take any proceedings against Colville in their own names, nor compel Hall to do so for them, and are thus utterly without remedy. See *Dea v. Newhall* (8 T. R. p. 268), *Willis v. De Costro*, (4 C. B., N. S., p. 216). Another ground upon which it is submitted that the verdict should stand, is, that re-entry upon the lands by the grantor was necessary to avoid the estate, and at the trial no entry was proved.

The entry of the receiver, also, into the possession of the premises, as the agent of the plaintiff, by depriving the defendant of the means of carrying out the terms of the lease, has deprived the plaintiff of his remedy, and has operated as a bar to the forfeiture. It is a well established principle of law that when a man has a certain duty to perform to another, and that other acts in such a manner as to deprive him of the means of accomplishing that duty, he shall not be allowed to take advantage of the default which he has himself caused. Again, the receipt of rent by the receiver, as the agent of Colville, operated as a waiver of the forfeiture. See *Dendy v. Nicoll* (4 C. B., N. S., 384). Besides, the true construction of the deed of May, 1856, is as an assignment and not as an under lease, and the condition of re-entry is, therefore, bad. See *Coke Littleton on Conditions*. That it is, in fact, an assignment, appears from this, that, though a reversion of twenty-one days, is reserved to the grantor by the habendum, yet, as the premises purport to convey his whole interest, they should not be so controlled by the habendum as to reduce the actual subject matter conveyed by the operative part. The appropriate office of the premises is to determine the subject matter granted; and that of the habendum, to mould it into different shapes. When, therefore, a conflict arises between the premises and the habendum as to the subject matter of the grant, the latter must give way to the former.

*M'Mahon* (with him).—A repugnancy in a condition affects the whole estate and cannot affect a part only; *Watkins on Conveyancing*, by Merrifield, p. 142; *Coke's Ins.*, 91 & 297, B. Courts of law are not to favour conditions. As to the manner of the forfeiture, see *Dendy v. Nicoll* (4 C. B., N. S., 380), otherwise a man would recover rents and mesne rates for the same period. Even acceptance of rent under protest, amounts to a waiver, see *Croft v. Lumley* (4 E. & B., 688); *Freeman v. Cooke*, (2 Ex. p. 663); *Cole on Ejectment*; *Bacon on Conditions*, letter Q; *Pollock v. Stacy* (9 Q. B. p. 1033); *Doe v. Bateman* (2 B. & Ald. p. 168); *Coke, Inst.*, vol. 2, section 325, p. 20 H; *Arnsby v. Woodward* (6 B. & C., p. 519), the lease voidable not void and re-entry necessary.

*Darley, Q.C.*—The instrument of May, 1856, is not an assignment, but merely a sub-lease, though even if it were an assignment that would not invalidate the conditions—*Earl of Derby v. Taylor* (1 East. p. 502); *Doe v. Bateman* (2 B. & Ald., p. 168). The effect of a man's being appointed a receiver by the Court of Chancery, is merely to entitle him to receive the rents and profits. That Court will not put a party out of possession unless it be satisfied upon affidavit, that the money due cannot otherwise be paid. Again, it cannot be maintained that the receipt of rent by the receiver, after condition broken, operated as a waiver of the forfeiture, for the receipt of it by him is a very different thing from a receipt by the landlord; *Lessee of Blake-ney v. Higgins* (4 Ir. Jur. p. 17). *Lessee of Hobson v. Donelan* (4 Ir. Jur. p. 19.) And as to rent received after action brought, see *Jones v. Carton*, (15 M. & W., 718); and *Doe v. Pritchard* (5 B. & Ad. 776.) Even if the point as to the non-proof of entry



had been taken at the trial, it would have been of no avail. As to the old law, see *Phillips v. Rollins* (4 C. B., p. 188), *Goodright v. Cator* (2 Douglas, 477). Before the Common Law Procedure Act, lease entry and ouster were admitted by the consent rule. That Act abolished these useless fictions, and all that cumbrous procedure, and enable the parties to raise the question of title at once; see Common Law Procedure Act, 1853, ss. 6, 194, 202 & 203. The defendant's construction of the instrument of November, 1856, as a release, would frustrate the intention of the parties; see *Solly v. Forbes* (2 Brod. & Bing, p. 38); 6 Bacon's Abr. tit. Release, p. 604. *Lacy v. Kinaston* (1 Lord Raymond, 688); *Hutton v. Ayre*, (6 Taunton, p. 289); *Dean v. Newhall* (8 T. R., p. 168); *Talbot's case* (reviewing all the others) (4 C. B., N. S., p. 216.) See also 23 & 24 Vict., c. 154, s. 94, providing that a habere may be executed without affecting the interest of the under-tenants. [*Pigot*, C. B.—The effect of that section is that the tenant's interest would be as much at an end as if the sheriff had turned him out.] See form No. 6, Schedule A of that Act. Again, the sub-tenants would be protected because a Court of Equity would oblige the plaintiff to execute leases to them on the terms of their agreement with the defendant. Where a covenant not to sue has been held to amount to a release, it has been with a view to avoid circuity of action. The reason of that rule does not now apply; *Dean v. Newhall*, (8 T. R., p. 168).

*Pallas* (with *Darley*).—If the defendant's argument be correct, the instrument of November, 1856, would also be a release of the rent reserved by the lease of May of same year, which is absurd. The tenants, even according to our construction, would be protected, and the object of the deed thus effected, for they can proceed in Equity for a lease; see *Man v. Stephens*, (15 Symonds, 377); the argument founded on the alleged incapacity of the tenants to sue in covenant falls, therefore, to the ground; *Piggott v. Stratton* (1 Johnson, 341); *Toft v. Stephenson* (1 De Gex M.N. & Gord. p. 38.). Even at law a release is an instrument of a most flexible character. Even if the document contain actual words of release, yet, if by giving to them their strict meaning, you defeat the intention of the parties, the Court will struggle against that construction—*Willis v. De Castro* (4 C. B., n.s. p. 216); *Henderson v. Stobart* (5 Exch. R., p. 99). As to the result of the document of May, 1856, being an assignment, see *Doe v. Bateman* (2 B. & Ald. p. 168). It is not, however, an assignment, for the effect of the habendum was to limit the estate granted by the premises. If I limit an estate to A, and his heirs, to hold for the life of B, the effect of the latter words is to cut down the estate which the previous words alone would have conveyed; see *Doe v. Steele*, (4 Q. B. p. 663); *Hagarty v. Nally*, (13 Ir. C. L. 532). See also the cases upon the subject collected in 1 Davidson on Conveyancing, p. 89. It is a mistake to suppose that the receiver is the agent of the landlord. The re-entry point is not now open to the other side not having been made at the trial, nor would it in any case help their case. Observe the course of legislation:—first came the Process and Procedure Act; then the Common Law Procedure Act, 1853, ss. 6,

61, 194, 202, 205 & 210. It is not in itself likely that the Legislature, when abolishing useless fictions, would be anxious to restore such an obsolete practice; besides, the confession of lease entry and ouster was necessary formerly for the purpose of raising the question of title in an action for trespass, but that statute expressly provides a manner of raising the substantial question at issue between the parties at once; see *O'Donnell v. Ryan* (7 Ir. Jur. p. 127). This case required an Act of Parliament to correct it.

*W. Bourke*, Q.C. (in reply).—The instrument of May was an assignment; see 1 Shepherd's Touchstone, p. 75, note A. Re-entry must be proved; see Coke Littleton on Conditions, Ferguson's Practice, page 194, vol. I.; *Pluck v. Digges* (2 Huds. & Br. p. 55). There is a distinction in this respect in the respective cases of chattels and freeholds. As regards the non-reservation of this point, the whole case is now before this Court, and if it be of opinion that the materials were insufficient to support the finding, it can even direct a new trial.

On Wednesday, the 18th of January, 1865, the Court delivered judgment.

*DRAY, B.*—In this case it appears that a conflict arose between the premises and habendum, the one purporting to convey the entire interest of the grantor, and the other reserving to the grantor a reversion of twenty-one days, and it was argued at the bar, that under these circumstances the conveyance amounted to an assignment, and that, consequently, the clause of re-entry for condition broken was void, the grantor having retained no reversion in himself to support the condition. According to the view that I take, it is unnecessary for us to enter into the question whether or not the instrument amounted to an assignment, for, even if it did, I am of opinion that the case of *Doe v. Bateman*, is a conclusive authority that the condition of re-entry was good. [Having read the deed of Nov. 1856, he proceeded.] The first observation that occurs to me is that the simple object of that endorsement clearly was to give to such persons as might be disposed to become tenants for any portion of the said demised lands for building ground, a guarantee that, after having increased the value of the premises by erecting buildings at their own expense, they should not be summarily dispossessed, and left without any remedy, through the neglect or misconduct of a party over whom they had no control; and that it plainly, therefore, was not the intention of the parties that this instrument should operate as a release of the condition of re-entry contained in the former deed. It has been suggested in the course of the argument, that the object of protecting the sub-tenant from being disturbed was not, and could not really be effected by the instrument. It was, however, all that Hall required and Colville agreed to give, and if people chose to expend their money upon such security, it was their own affair, and we are not now called upon to consider what remedy the covenant might give to them. I, therefore, concur in the decision of the Court below, that a verdict should be entered for the plaintiff pursuant to the leave reserved.

*FITZGERALD, J.*—During the argument of this case I entertained a very different opinion from that

now put forward by my brother Deasy. On further consideration, however, I have altered that opinion, and I now concur in the judgment just delivered by him, and in the reasoning upon which it is founded.

HUGHES, B.—I also concur in that judgment.

FITZGERALD, B.—It has been argued at the bar that the endorsement of the 12th November, 1856, amounts to a release of the condition of re entry contained in the deed of the 5th May of same year, and that such been the case, the verdict was rightly entered for the defendant. To that argument I am disposed to yield, and am of opinion that the judgment of the Court below should be reversed. The facts to which I refer are substantially thus. The deed of the 5th of May, after reciting that "J. H. Hall had contracted with W. C. Colville for the absolute purchase of the said leasehold premises for the residue of the said term of 500 years, subject to the rents and covenants in said" (recited) "indenture of lease reserved and mentioned for the considerations hereinafter mentioned," and after granting same, &c., thus proceeds: "and the said J. H. Hall, for himself, his heirs, executors, administrators, and assigns, doth hereby covenant and agree with the said W. C. Colville, his executors and administrators, that he, the said J. H. Hall, his heirs, executors, administrators and assigns, shall, and will, at his and their own further costs and charges, lay out and expend, within the space of seven years, to be computed from the 1st day of September, 1855, a sum of at least £2,000 in the erection of building and completely finishing such number of dwelling houses and premises as to the said Joseph H. Hall shall seem most suitable to the locality, &c. Provided always, that if it shall happen that the default shall be made in the observance or performance of the said covenant for building in manner aforesaid, and in making the aforesaid outlay and expenditure as hereinbefore required to be computed from 1st day of September, 1855, then and thenceforth, and at the expiration of the said term of seven years it shall and may be lawful for said W. C. Colville, his executors, administrators, and assigns, into and upon the said hereinbefore mentioned premises, or any part thereof, in the name of the whole to re-enter and the same to have again, repossess and enjoy in his, or their, first or former estate, and as if these presents had never been made, anything in anywise to the contrary notwithstanding." It appears that on the 12th November, 1856, a deed was endorsed on the deed of the 5th May, and made between the same parties, by which, after reciting that "the said J. H. Hall had caused a new brick house to be erected and built on the South-Western angle of the within demised plot of ground; and whereas, the said J. H. Hall is minded and desirous to let the remainder yet not built upon, of said within demised premises for building ground; and it has been agreed upon between said W. C. Colville and said J. H. Hall, that the person or persons respectively who shall become or who have become tenants for any portion of the said demised premises, under said J. H. Hall, his executors, administrators, or assigns, shall not be liable to any greater sum than the yearly rent to be reserved by agreement or lease for their respective holdings, provided such rents be at a fair and full setting value, for time being, of said land, and provided that the dwelling to be erected

by the tenant or tenants of said J. H. Hall, his executors, administrators, and assigns, be of the description required by the within deed," it was witnessed, "That the said W. C. Colville doth hereby, for himself and his heirs, executors, administrators, and assigns, covenant, promise, and agree to and with the said J. H. Hall, his executors, administrators, and assigns, that in case any penalty or forfeiture shall be incurred under and pursuant to and for non-performance of the clauses, covenants, conditions, and agreements within reserved or contained, or any of them, by the said J. H. Hall, his executors, administrators, or assigns, that then, and in such case such penalty or forfeiture shall not in any manner whatever affect the interest or interests, or property of the person or persons, or any of them, their executors, administrators or assigns, who may be tenant or tenants to said within demised premises, or any part thereof, under said J. H. Hall, his executors, administrators, or assigns aforesaid, so as in any manner to deprive such person or persons, or any of them, of the full benefit and advantage of their respective holding and holdings upon the said premises." And it was further "covenanted and agreed that in case of any such penalty or forfeiture as aforesaid being incurred, and that any proceedings be taken and rendered effectual on account thereof, by said W. C. Colville, his executors, administrators, or assigns, then and in such case, he the said W. C. Colville, his executors, administrators, and assigns, instead of said J. H. Hall, his executors, administrators, or assigns, shall be entitled to recover and receive the said rents to be payable by such person or persons so becoming tenant or tenants to said premises in manner aforesaid, and that such person or persons so becoming tenant or tenants to said premises aforesaid, shall not be rendered or become in any manner liable to pay any greater rent or sum than the yearly ground-rent or rents, to be recovered or made payable to the said J. H. Hall, his executors, administrators, or assigns, anything in the within written indenture contained to the contrary notwithstanding." Now it does not appear directly from the case as stated, that there were any such tenancies created, but I think that from the facts before us we might presume that there were. (After some comments on the facts, he thus proceeded:) The Court of Common Pleas was of opinion that the endorsement of the 12th of November, was simply a covenant not to disturb the tenants in the event of Hall's forfeiting his estate, the Court conceiving that this construction would go nearer than any other to effecting the intention of the parties, inasmuch as the landlord would, if he disturbed them, become liable in an action of covenant. I cannot, however, think that the difficulty can be solved by simply giving the sub-tenant a remedy over against the landlord by action on the covenant in case he re-enters. Again, looking upon the instrument as a covenant only, we find that, though there is a class of cases which have held that such a covenant did not fall within the rule, that enables the Court to struggle against a construction that would bring about circuity of action, by holding that a certain class of instruments did not amount to a release. In the cases quoted, the argument that the intention of the

parties could be thus *entirely carried, cut* had great weight with the judges. Now, in the document before us, it is expressly provided that, "in case any penalty or forfeiture shall be incurred," &c., "by the said J. H. Hall, his executors, administrators, or assigns, that then, and in such case such penalty or forfeiture shall not, in any manner whatever, interfere with, or affect the interest or interests, or property of the person or persons, or any of them, or their executors, administrators, or assigns, who may be tenant or tenants to said within demised premises, or any part thereof, &c., so as in any manner to deprive such person or persons, or any of them, of the full benefit and advantage of their respective buildings and holdings upon said premises," which, to put the matter in simple language, amounts to a permission that a certain act shall be attended by its necessary legal consequences. The passage that follows providing that in the event of Hall's estate being put an end to by entry for the forfeiture, the plaintiff, Colville, should step into his shoes, as regards the sub-tenants, is open to the same observation. For these reasons, I am of opinion that the order of the Court of Common Pleas should be set aside.

HAYES, J.—It has been urged that the receipt of the half year's rent that accrued due on the 15th of November, 1862, by the receiver, operated as a waiver of the forfeiture. I am, however, satisfied that this argument is not tenable, and is founded upon a mistaken notion of the relation in which such a receiver stands to the estate, and the consequent effect of payment to him. It is a mistake to conclude that the money which reached the hands of the receiver was necessarily received by him for Colville; on the contrary, it is quite possible that the amount might be entirely exhausted in satisfying prior claimants, and that not one penny of it would eventually reach his pocket. Let us now look to the language of the instruments of 12th November, 1856. [Having read a portion of it, he proceeded.] The plaintiff and the defendant were the only parties to contract, and it has been therefore argued that the effect of the provision was to operate as a release, if at all. I do not yield to this argument. The plain intention of the instrument was to protect the sub-tenant, and I am of opinion that it ought to be construed as amounting to a covenant not to sue only. There is, however, another question that has been broached in the course of the argument—I mean the question whether or not it is necessary to prove re-entry in order to maintain an ejectment of this character. To this a sufficient answer has been given, that as the point was not made and received at the trial, we are not called upon to entertain it now. Had it been then made, it might, perhaps, have been effectual. I am, however, far from being satisfied that proof of actual entry is necessary in such a case; see *Booth v. Olive* (10 C. B., p. 827.) On the whole I am of opinion that the decision below should stand.

O'BRIEN, J.—I am of opinion that the order of the Court below should be reversed. The case of *Willis v. De Castro* (4 C. B., p. 216), appears to me perfectly distinguishable from the present, for, in that case there was an express provision in the deed that it should be lawful for the creditors to execute the

same without prejudice to their other rights. That case, therefore, presents no difficulty. It has, however, been suggested in the course of the argument that it did not appear that there were, in point of fact, any sub-tenants. That difficulty, if difficulty it can be called, has, however, been removed by the very lucid argument of my brother Fitzgerald, who has pointed out, on the facts before us, grounds for believing that there were really tenants upon the lands. It is not easy to see what remedy in equity those persons might have in the event of a forfeiture of Hall's estate; but of whatever kind it might be, it clearly would not place them in as satisfactory a position as before the forfeiture. The principle of the case of *Willis v. De Castro* (4 C. B., N. S., 216), is clearly inapplicable. I am, therefore, of opinion that the judgment below should be reversed.

LEFROY, C. J.—I concur with my learned brothers that the order below should be reversed. The grounds of that view may be reduced to a very narrow compass. The true intent of the parties to this instrument was not only to enter into a covenant to afford a general protection to such tenants as might be induced to lay out their money upon the faith of it, but to protect them against a forfeiture of their interests. I should say that the plaintiff, too, is bound, both at law and in equity, to use all the means in his power to give effect to the contract which he has made with regard to them; and should he then be permitted, in violation of his own contract, to avail himself of his position to break through that contract? Now, it appears to me to be such a contract as a Court of Equity would specifically enforce. It would restrain him from enforcing the forfeiture. The facts would even amount to an equitable defence in a court of law. The principle of preventing multiplicity of suits and circuity of action must, then, be kept in view in putting a construction upon the instrument, for it cannot be denied that an action at the suit of the tenant would lie against the landlord. Therefore, to prevent the mischief that would arise if the parties be driven to have recourse to the complicated machinery of separate suits, I am of opinion that we are bound to construe the instrument as a release of the right of entry, and thereby give to the parties in the first instance what they are entitled to, and carry out the primary object of protecting those who had laid out their money upon the faith of the instrument. For these reasons the judgment below should be reversed.

*The Court being equally divided, the decision below to stand. No costs.*

## Court of Exchequer.

Reported by William Albert Sargent, Esq., Barrister-at-Law.

[BEFORE THE FULL COURT.]

CREDEN v. M'GRATH AND ANOTHER—May 29, 1865.

*Amendment of pleadings on motion to set aside defences.*

*On motion to set aside defences on ground of embar-*

raiment, where in an action for breaking and entering a dwelling-house, and taking away the goods of the plaintiff, and for excessive distress, and where defendants pleaded that they did not break and enter the dwelling-house, but did not plead as to the *asportavit*, and did not aver that the outer door was open at the time of entry, and traversed plaintiff's possession of dwelling-house. Held, that defendants should amend generally, and pay the costs of the motion.

THE summons and plaint in the first count averred that defendants broke and entered a dwelling-house of the plaintiff and broke open the doors of the said dwelling house, and removed, took, and carried away certain fixtures and goods of the plaintiffs therein, and disposed of the same to the defendant's own use. 2nd count, that defendants broke and entered a certain other dwelling house of plaintiff, and removed, took, and carried away certain fixtures and goods of the plaintiff therein, and disposed of them to defendant's own use. 3rd count, conversion of certain goods of the plaintiff. 4th count, similar. 5th count, averment that the plaintiff was in possession of a certain house and premises in Ballyshannon, County Donegal, and was rated and subject to the payment of county cess and income tax, and defendants being collectors of such county cess and income-tax, wrongfully distrained for said county cess and income-tax goods of plaintiff of much greater value than amount of said county cess and income-tax for which plaintiff was rated, and of the charges of the said distress, and of the appraisal and sale thereof, although part of the said goods was then of sufficient value to have satisfied said county cess, income-tax, and charges, and might then have been distrained by defendants for same, and that defendants, thereby made an excessive distress for said arrears contrary to the statute in such case made and provided. 6th count, similar. Damages, £200.

1st plea—To first count, that defendants did not, nor did either of them break and enter the said dwelling house in first count of summons and plaint mentioned as therein alleged. 2nd plea—By leave of the court traverse of plaintiff's possession, of said dwelling-house at time of said alleged trespass. 3rd plea—That before and at the time of the committing of the said alleged trespass in said first count mentioned, there was due in respect of the said dwelling house and premises the sum of £7 Os. 3½d. for county cess. The plea went on to aver the presentment of the county cess by the grand jury, the appointment by the treasurer of the County Donegal of Mr. M'Grath as collector, the appointment of Ward (the other defendant), as deputy-collector, by M'Grath. That £200 was due for income-tax, and that M'Grath and Ward were similarly appointed collectors of it, and that while both were acting under their respective warrants they entered into and upon the said dwelling house and premises, and seized, took, and carried away the goods of the plaintiff in the first count mentioned, and caused same goods to be duly sold pursuant to the statutable enactments in that behalf, for a distress to satisfy the said sums of £7 Os. 3½d. and £2, together with the costs of said distress as by law

authorized. Fourth, fifth, and sixth, pleas were the same pleaded to the second count. 7th plea—Traverse of plaintiff's property in the goods in third count mentioned. 8th plea—To same count similar to third plea. 9th & 10th plea—To fourth count same as seventh and eighth pleas. 11th plea—To fifth count traverse of plaintiff's possession of houses and premises in fifth count mentioned. 12th plea—To fifth count, that £7 Os. 3½d. was due for county cess and £2 for income-tax. That M'Grath and Ward, as collectors, distrained for said sums the goods of the plaintiff in fifth count mentioned, and caused same to be duly sold by public auction to satisfy said sums, together with costs of distress and sale, and that said sale was duly advertised, and said goods were sold, by a properly licenced auctioneer, and produced at such sale the gross sum of £14 8s. 3½d., and that afterwards defendants paid plaintiffs the sum of £4 14s. 5d. balance, after deducting £7 Os. 3½d. £2, and 9s. being costs of said distress, and thereupon defendants deny they made any excessive distress for said arrears in fifth count mentioned. 13th & 14th pleas—To sixth count same as eleventh and twelfth pleas.

*Dove, Q.C.*—Now moved to set aside the first, second, and third pleas, on the grounds of embarrassment, and contended that they only answered the first part of the first count and said nothing as to the *asportavit*. That in the third plea the entry only was therein justified, not the breaking. That there should have been averment that outer door was open at the time of entry. Counsel cited *Pritchard v. Long* (9 M. and W., 666); *Pratt v. Pratt* (2 Exch., 413). The same objection applied to the fourth, fifth, and sixth pleas. 11th plea ought to be set aside, because it does not answer allegation of excessive distress. 12th plea affords no proper issue, merely pleads evidence from which it draws inference of law. The price which goods fetch at auction is no test of excessive distress. Same objection to thirteenth and fourteenth pleas.

*Tottenham, contra*, referred to *Pritchard v. Long* (6 M. and W., 666), which was cited on the other side, and contended that there it was not alleged that the goods were the plaintiff's. In trespass for breaking and entering plaintiff's house and expelling him therefrom, the breaking and entering is the gist of the action, and the expulsion is merely aggravation and need not be specially pleaded to—*Taylor v. Cole* (1 Smith's, L. C., 111). Plaintiff should demur, not mark judgment if pleas are defective though professing to answer the whole count—*Wood v. Farr* (5 Bing. N. C., 247); matters of aggravation need not be traversed—*Stephen and Pinden*, 207. A traverse must not be taken on an immaterial point (*Id.* 205). [*Pigot, C. B.*—If plaintiff allege that defendant broke his doors, that allegation casts on defendant the onus of proving that he did not break the outer doors. If the breaking be negatived, plaintiff cannot prove *asportavit* in same count. The question is, is the *asportavit* material? If it is only in the nature of an aggravation it is not. *Pritchard v. Long* is not a direct authority. *Fitzgerald, B.*—You have alleged several reasons in proof that distress was not excessive: you need only have pleaded that you did not make an excessive distress.] The whole of the first and second

counts fail if the house was not plaintiff's [*Fitzgerald, B.*—If you take my goods out of another's house, have I no remedy?] You have; but here it is pressed that this is plaintiff's house, and he must sustain that allegation. Counsel also referred to the following cases:—*Custus v. Sandford* (4 Ir. C. L. R., 197); *Bushe v. Parker* (1 Bing. N. C., 72); *Chamberlain v. Greenfield* (3 Wils., 292).

Ordered per Curiam, that the defendant amend generally and pay costs of motion.

**M'MULLEN v. THE GUARDIANS OF THE POOR OF THE LURGAN UNION.**—May 29, 1865.

*Application for inspection of documents—Public Nuisance Act, 1848.*

*Upon an application for an order to inspect and take copies of documents relating to the authority by which the guardians of a union opened a sewer which afterwards polluted a watercourse of plaintiff's, and rendered it unfit for use. Held, that the order should not be refused, because there might be some remote possibility of defendant being indicted for the nuisance.*

THE SUMMONS and plaint was for polluting a certain water-course of plaintiff's by defendants having wrongfully opened a sewer from their lands into the said water-course, thereby the said water-course was rendered unfit for use. The defendants, so far as is necessary to be here stated, alleged in their defence (*inter alia*), that they were empowered by a certain order given under the hands and seals of the Poor Law Commissioners, approved of by the then Lord Lieutenant of Ireland, to remedy any defect which might arise in the drainage of the workhouse; that defects did arise, and that in remedying them the grievances complained of were committed.

*Harrison, Q.C.*, for plaintiff, applied to the Court, that in pursuance of notice given, plaintiff might be at liberty to inspect and take copies of all resolutions, minutes, and entries in the books of the defendants, and of all contracts entered into by defendants, and all maps, plans, specifications, reports, and other documents in the custody of the defendants, relating to the cause of action. Counsel relied on the fact that it would be almost impossible for the plaintiff to proceed without such inspection and copies.

*Law, Q.C.*, contra.—If there be any nuisance, the blame rests with the Town Commissioners, not with the Guardians of the Union. On this simple ground the application should be refused, viz., that if the nuisance be proved the guardians will be liable to an indictment for a misdemeanor; they will then have been compelled to furnish evidence against themselves. This result must follow the granting of the application if the nuisance be proved—*Wigram on Discovery*, par. 127. [*Pigot, C.B.*—If the workhouse were built before 1848 the guardians cannot be indicted under the Act for removal of public nuisance. *Fitzgerald, B.*—If defendants' clerk were subpoenaed

to produce documents at the trial, could he refuse to produce them?] I think not. [*Hughes, B.*—Suppose a registrar of marriages has an entry in his books which renders him liable to indictment, as also to an action, can he refuse to give up books for inspection on being required to do so?] These are not analogous cases.

*Pigot, C.B.*—We will not refuse an application to produce documents merely because there may be some remote possibility of an indictment ensuing. If the nuisance is a nuisance to one individual only, it is not a public nuisance. There is no reason shown as to the immediate peril of an indictment. We make an order for the inspection and copy of the the documents required.

## Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

**STUBBER v. ROE.**—Jan. 30, 1864.

*Inspection of Documents—Interrogatories—Common Law Procedure Act, 1856, s. 51.*

*Upon motion made by the plaintiff in an ejectment for non-payment of rent for production of a lease of the lands alleged to be made to the defendant by S. S., and which it was alleged that the defendant had once previously produced before the plaintiff, assenting to the plaintiff's observation that the defendant then held the lands under a lease made to him by S. S., the defendant's affidavit stating that he had no such lease made to him by S. S., and never saw it, and had no recollection of having produced a lease to the plaintiff, but that if he did, it was one which the Court, upon examining it upon the motion, considered the plaintiff had no right to see, the Court made no rule on the motion and refused upon the same motion to give the plaintiff leave to exhibit interrogatories in reference to the alleged interview but without prejudice to a subsequent application.*

*Serjeant Armstrong* (with him *Sidney, Q.C.*), in this case, which was an action of ejectment for non-payment of rent, applied for production of the lease of the lands in question made to the defendant by the Rev. Sewell Stubber being the lease or document which the defendant produced to the plaintiff in the year 1857 at his residence in Colfin. The defence is, that neither the defendant nor any person holds the lands under the plaintiff. The plaintiff's affidavit states that he went on a certain day in the year 1857 with Mrs. Winter, a co-plaintiff, and demanded the rent from the defendant; that he stated the object of going, saying, "You hold under a lease of the late Rev. Sewell Stubber;" that Roe assented; that Roe produced a lease; that the next day a distress was made, and kept for a while, and then rescued by a large mob; that the plaintiff never saw the lease made to Roe. Mrs. Winter's affidavit states that she has read her brother's affidavit, and that it is true. Another bro-

ther has made an affidavit. The plaintiff has made another affidavit, stating that he was brought up by the Rev. Sewell Stubber, and that he believes Roe paid rent to Sewell Stubber up to the time of his death. Roe's affidavit says that he does not, and never did, hold the land under the plaintiff, or under a lease made by Sewell Stubber, or any person in trust for him; that it is untrue that he assented to any such assertion by the plaintiff. But he does not say there is not another lease. This is a special traverse. Our affidavit is clear.

*Battersby, Q.C., and C. Hamilton, contra.*—The defendant has held these lands for 38 years. Sewell Stubber was tenant for life, and was succeeded by Hamilton Stubber, the remainderman. [*Monahan, C. J.*—What is the date of the lease?] A.D. 1824. The defendant's affidavit states that he has no recollection of having produced to C. W. or N. S., or either of them, any lease or document, and if there was any, it must have been one made by Hamilton Stubber, which was the only lease ever made to him, and that with regard to the interview, it is wholly untrue that then or on any occasion, deponent stated directly or indirectly that he held under a lease made by Sewell Stubber, nor did deponent ever see a lease made to him by Sewell Stubber. There is no affidavit of title made by them. We are asked to produce a document we swear we never had.

*Sidney, Q.C., in reply.*—We charge the existence of this lease in our first affidavit, and that is not denied. We say it is what the defendant held under by a particular name. We are not to be prejudiced by an erroneous statement by him. [*Monahan, C.J.*—It is not a document to which you would have any right by law. Can we order a document to be produced which the party swears he has not, and swears that what he has you are not entitled to see?] I ask for leave to exhibit interrogatories touching that one interview, and the document we charge to have been then produced and described as a lease made by Sewell Stubber. [*Keogh, J.*—Three persons swear the defendant produced a lease, and called it so and so. He denies it on oath. They ask to be allowed to exhibit interrogatories on that.]—O. L. P. Act, 1856, s. 56. [*Keogh, J.*—You have not applied under that sect.?] Cannot we bring that section to our aid? [*Monahan, C.J.*—You can serve a notice if you like.] We submit the defendant's affidavit is not satisfactory, and the best test is that we could not on this affidavit indict for perjury. [*Monahan, C.J.*—You may, if the affidavit be unsatisfactory, with leave of the Court, exhibit interrogatories. Assume the defendant has not made a satisfactory affidavit, what order can we make?] I would ask for leave to exhibit interrogatories, or if the Court will not give that, that they will reserve liberty to me to serve a notice of such a motion.

*MONAHAN, C.J.*—The present application is for the production of a particular document, which cannot be carried but on the admission that the defendant has such a document. He states that he has no lease made by Sewell Stubber to himself or anybody, or that he ever saw any. It has been suggested that he may have control over some lease not made directly to himself. There was no application to exhibit interrogatories. It is in terms to get the produc-

tion of a lease made by Sewell Stubber, or of a lease exhibited by himself. He says he has no recollection of producing it, and that if there be any it is a lease we have seen, and which we think the party has no right to see. We say "no rule on the motion," and all costs must follow, without prejudice to any application that may be made.

*No Rule.*

CASSIDY v. KIRCAID.—May 5, 6, 1865.

*Jurisdiction in the Court to enter a verdict in favour of one of the parties upon an issue upon which the jury were by the judge discharged at the trial from finding.—Plea of Privileged Communication.*

*At the trial of an action for slander, to which were pleaded a plea of justification and a plea of privilege, the jury found for the defendant upon the issues joined upon the plea of privilege, but were unable to come to a finding in respect to the plea of justification. The judge discharged the jury from finding upon the latter issue. The plaintiff having obtained a conditional order that judgment might be entered for him notwithstanding the verdict found for the defendant, on the ground that the judge so discharged the jury against the plaintiff's wish, and at the request of the defendant, and that the plea of privileged communication was bad in law, or for a new trial on the ground that the judge so discharged the jury. Held—That the Court had power, with the consent of the defendant, to cause a verdict to be entered for the plaintiff upon the issue, upon which the jury were discharged from finding, and would do so as the plaintiff could not, in any event, have been in a better position at the time of the trial.*

*To an action for slander, which complained that the plaintiff being the servant, and in the employment of C. R., the defendant, spoke and published of him, that he, the plaintiff, was inducing the defendant's servant to rob him by carrying his victuals out of his house, and was hanging about the defendant's house for the purpose of committing a felony, whereby the plaintiff lost his situation of head nursery man, which he then held under the said C. R., the defendant pleaded, that before and at the time, &c., the defendant, had, as a domestic servant, one J. L., who told him, the defendant, that the plaintiff had previously debauched her, and subsequently threatened to do her personal violence, and had incited her to steal from the defendant's house some meat and bread for the plaintiff's use, which the said J. L. did at such solicitation, while the plaintiff was loitering about the defendant's house, in the truth of which statements the defendant believed, and that the said J. L. had urged the defendant to request of the said C. R. to prohibit the plaintiff from further visiting her, and that for the purpose, not only of carrying out the said wishes of the said J. L., but likewise of causing the plaintiff's said master to prevent the plaintiff from further molesting the said J. L., or coming again to the de-*

*defendant's house, or again inducing the said J. L. to steal the defendant's goods and chattels, the defendant, in conversation with the said C. R., spoke and published the words complained of. Upon motion for judgment non obstante veredicto. Held— that this plea disclosed a Privileged Occasion.*

THE first count of the summons and plaint complained that before, and at the time of the speaking and publishing by the defendant of the defamatory words hereinafter mentioned, the plaintiff was the servant, and in the employment of one Charles Ramsay, and whilst in such service and employment, the defendant, well knowing the premises, but contriving and wickedly and maliciously intending to injure the plaintiff, heretofore, to wit, on the 26th day of October, 1864, in a certain discourse which the defendant then had of and concerning the plaintiff as such servant, and whilst in the employment of said Charles Ramsay, in the presence and hearing of divers persons, falsely and maliciously spoke and published of the plaintiff, as such servant, the false, scandalous, malicious, and defamatory words following, that is to say, "you" meaning the plaintiff, "are a robber," meaning thereby that the plaintiff was guilty of a felony, and that, in consequence of the speaking and publishing of said words, the plaintiff lost the situation which he then held under said Charles Ramsay, as head nursery man and was dismissed by the said Charles Ramsay from his situation. The second count omitted the innuendo. The third count complained that the defendant in another defamatory discourse, which he, the said defendant, had in presence and hearing of divers persons, of and concerning the plaintiff concerning his character and credit as such servant, and whilst in the employment of said Charles Ramsay as such servant, spoke and published of and concerning the said plaintiff as such servant, and whilst in the employment of said Charles Ramsay, as aforesaid, the scandalous, malicious, and defamatory words following, that is to say, that the said James Cassidy meaning the plaintiff, was inducing the said defendant's servant to rob him by carrying his victuals out of his house, meaning thereby that the plaintiff was inducing the servant of the defendant to commit a felony, and that the plaintiff was hanging about his, the defendant's, house for the purpose of committing a felony, by means of the committing of the said several grievances by defendant, the plaintiff has been, and is, greatly injured and prejudiced in his name, credit, and reputation, and that by means of the speaking and publishing by the defendant of the said words before mentioned, he, the said plaintiff, was discharged from the employment and lost his situation of head nursery man which he then held under said Charles Ramsay. The fourth count omitted the innuendo.

The defendant pleaded—1st A traverse of the speaking of the words; 2nd, a traverse of the defamatory sense imputed; 3rd, a plea of justification—pleaded to the first and second counts; 4th, a plea of privileged communication pleaded to the first and second counts; 5th, a plea of privileged communication pleaded to the third and fourth counts; 6th, a plea of justification pleaded to the third and fourth counts. The issues were in the terms of the defences. The

plea of privileged communication pleaded to the first and second counts was as follows. And for a further defence to the first and second paragraphs of the plaint, and as a separate defence to each of said paragraphs distributively, the defendant says that before, and at the time of the speaking and publishing of the said supposed slanderous words, as in each of said paragraphs respectively mentioned, he, defendant, had in his service and employment as a menial or domestic servant, to wit one Jane Lloyd, and before the speaking and publishing of said words by him, the defendant, she, the said Jane Lloyd, had told and informed him, the defendant, that he, the plaintiff, had before then debauched and carnally knew her the said Jane Lloyd, under color of a promise of marriage, and that he, the said plaintiff, had subsequently thereto, and before the said speaking and publishing of said words, or any of them, threatened to do personal violence to her the said Jane Lloyd, and that she believed he, the plaintiff, had designed to accomplish and effect the ruin of her the said Jane Lloyd, and to destroy her character, and that she was in dread of and apprehensive that he, the plaintiff, would, if not prevented from so doing, do her, the said Jane Lloyd, personal injury, and that he, the plaintiff, had been in the habit of calling on her, the said Jane Lloyd, both as her former master's and his, the defendant's house; and further, that he, the plaintiff, had, before the said time, when, &c., incited and solicited her, the said Jane Lloyd, to steal from him, the defendant, and from and out of his, the defendant's, dwelling house, wherein he, the defendant, resided, some meat and bread of the defendant's for the plaintiff's use, and that she, the said Jane Lloyd, did, at the solicitation and request of him, the plaintiff, steal said meat and bread of defendant's for plaintiff's use, and that he, the plaintiff, was loitering and lurking about his, the defendant's, house, while she, the said Jane Lloyd, returned into his, the defendant's, house for the purpose, amongst other matters, of stealing said meat and bread and of bringing same afterwards to him, which she did shortly afterwards; and the defendant avers that before and at the time of the speaking and publishing of said words by him the defendant *bona fide* and honestly believed in the truth of each and all the said statements aforesaid, and which she, the said Jane Lloyd, had so before then made to him, the defendant, and that same were respectively true, and the defendant further avers that before the said speaking and publishing of said words, she, the said Jane Lloyd, had urged and requested of defendant, by the ways and means in his power, to hinder the plaintiff from again visiting her, or further keeping her company or corresponding with her, and she then showed and gave to defendant divers letters, some of which were of a threatening and abusive character, which he, the plaintiff, had before then written or caused to be written to her, the said Jane Lloyd, as the said Jane Lloyd then informed him, the defendant, and which information he, the defendant then *bona fide* believed to be true; and defendant also avers that the said Jane Lloyd then told him, the defendant, that he, the plaintiff, was then in the employment of said Mr. Ramsay, as in each of said paragraphs of the plaint mentioned, which information he, the defendant, then



*bona fide* believed to be true, and she, the said Jane Lloyd, then also urged and requested him, the defendant, to see said Mr. Ramsay, and speak to him, and inform him of the plaintiff's conduct and acts as aforesaid, and to request of him, said Mr. Ramsay, to prohibit the plaintiff from further visiting or calling upon her, the said Jane Lloyd, or in any way communicating with her or coming to his, the defendant's, said house, or keeping up any further intimacy with her; and the defendant avers, that at the instigation and request of her, the said Jane Lloyd, and for the purpose and object, not only of carrying out the said request, views, and wishes of her, the said Jane Lloyd, but likewise of informing the plaintiff's said master of the plaintiff's said conduct and acts as aforesaid, and with the view and object of causing plaintiff's said master to hinder and prevent plaintiff from holding further intercourse with said Jane Lloyd, or further molesting her, or coming again to his, defendant's, said house, or again inducing said Jane Lloyd to steal his, the defendant's, goods and chattels, he, the defendant, before the said time when, &c., had certain conversations with the said Ramsay, of and concerning the plaintiff and his said acts in connection with his said conduct as aforesaid, and he, the said Ramsay, referred him, the defendant to the plaintiff himself, and then told and informed him, the defendant, that he, the defendant, would find him, the plaintiff, at one of the establishments or nurseries of him the said Ramsay, situate at Waterloo-road, Dublin. And defendant avers that he, thereupon, went to the said plaintiff at said place, and with the sole object and view of checking and reprimanding plaintiff for having induced defendant's said servant to steal the defendant's said property and also of preventing a further repetition of plaintiff's said conduct in inducing, as he, the defendant, then *bona fide* believed, and still *bona fide* believes to be the fact and truth his, the defendant's said servant, Jane Lloyd, to steal his, the defendant's said property, and likewise with the view and object of carrying out and performing the requests so before then made by said Jane Lloyd, to him, the defendant; he, the defendant, had a conversation with plaintiff touching and concerning his said conduct and acts as aforesaid, and in the course of same, he, the defendant, did speak and publish the said words as in said paragraph respectively mentioned and set forth; and defendant avers, that at the time he so spoke and published same he *bona fide* and honestly believed said statement and charges to be respectively true, and he so spoke and published same solely for the purpose, and with the view and objects as aforesaid, and without malice towards the plaintiff, and which speaking and publishing thereof was a privileged communication, and was made on a privileged occasion, and which is the speaking and publishing in each of said paragraphs respectively complained of. The plea of privileged communication, pleaded to the third and fourth counts, was the following. And for further defence to the third and fourth paragraphs of the plaint respectively, and as a defence to each of same distributively, the defendant says, that in order to avoid unnecessary prolixity of pleading and repetition of averments, he relies on the several statements and averments contained in the immediate preceding de-

fence as being incorporated with and parcel of this defence, save so much thereof as refers to the occasion of the speaking and publishing of said words as relied on by said defence as being privileged; and the defendant says, that after the happening of matters as in said defence respectively mentioned, and after he, the defendant, so became aware thereof respectively, as in said defence also mentioned, he, the defendant, *bona fide* and honestly, and for the sole purposes and objects as in said defence mentioned, and not otherwise, had a conversation with the said Charles Ramsay the master of the plaintiff, touching and concerning the plaintiff's said conduct and acts, as in said defence set forth, and in the course of said conversation, he, the defendant, did speak and publish of the plaintiff said words, as in said third and fourth paragraphs of the plaint respectively stated; and defendant avers that at the time he so spoke and published said words he *bona fide* and honestly believed in the truth of said statement and charges he so made against the said plaintiff as in said paragraphs respectively mentioned, and he so spoke and published same to the said Charles Ramsay solely for the purpose and with the views and objects as aforesaid, and without malice to the plaintiff, and which speaking and publishing hereof the speaking and publishing so respectively complained of, and same was, and is, a privileged conversation, and made on a privileged occasion. At the trial before Monahan, C.J., the plaintiff failed to prove the presence of any third person at the speaking of the words complained of in the first and second paragraphs. The jury found for the defendant upon the issues joined on the pleas of privileged communication, but were unable to come to a finding upon those joined on the pleas of justification. Upon which the Chief Justice discharged them from finding upon such issues. The plaintiff obtained a conditional order that judgment be entered for the plaintiff, and that a writ of inquiry do issue to assess the plaintiff's damages notwithstanding the verdict found for the defendant on the fourth and fifth issues, on the ground that the Chief Justice at the trial discharged the jury from finding on the third and sixth issues against the wish and desire of the plaintiff, and at the instance and request of the defendant, and that the several defences, fourth and fifth, pleaded by the defendant were not, nor was either of them a sufficient answer to the paragraphs in the summons and plaint to which they were respectively pleaded, or that the verdict be set aside and a new trial granted, on the ground that the Chief Justice ought not to have discharged the jury from finding on the third and sixth issues, and ought not to have received the verdict of the jury without a finding on said issues. Against this:

*Sidney, Q.C.* (with him *Dowse, Q.C.*), showed cause.—The order was got upon the authority of *Tinkler v. Rowland* (6 Nev. & Man. 848); which is also reported in (4 A. & E., 868); *Powell v. Sonnett* (3 Bingh. 381); which is there mentioned disparagingly, has been recognized. [*Monahan, C.J.*—In *Powell v. Sonnett*, and those cases, the ground was that it was immaterial.] [*Christian J.*—If the judge was wrong in discharging the jury from finding, at your instance and against the wish of the plaintiff's counsel, can you go down with that issue again?]

[*Keogh, J.*—It is not to be heard that if the Court can put the plaintiff in the same position as if there was a verdict for him, that he has a right to go to a new trial.] A master has a domestic servant, and it is known that a third person is loitering about the house to induce the servant to commit a felony, and that third person is in the employment of another person;—if the plea stopped there, there is abundant privilege. But it does not stop there, but speaks of the defendant's own female servant whom he wanted to protect from personal violence. In *Amann v. Damm* (3 C. B., N. S., 597); also reported in (7 Jar. N. S., 47); Willes, J., said he was prepared to go the length of Chief Justice Tindal's doctrine in *Cothead v. Richards* (2 C. B., 569); that is, that "a man who received a letter, informing him that his neighbour's house would be plundered or burnt on the night following by A & B, and which he himself believed, and had reason to believe, to be true, would be justified in showing that letter to the owner of the house, though it should turn out to be a false accusation of A & B." So here assuming that the defendant heard the plaintiff had committed a theft while out on an errand, and that he went to the plaintiff's master and told him the character of the individual he had employed, that would be a case of privilege. [*Christian, J.*—There is the triple duty or interest, to himself, to his servant, to Ramsay.] *Somerville v. Hawkins* (10 C. B., 583); *Toogood v. Spyring* (1 Cr. M. & R., 181); *Harrison v. Bush* (5 El. & Bl., 344).

*Butt, Q.C.* (with him *Harkan*), contra, refused to consent, to have a verdict entered for the plaintiff on the issue on the plea of justification. [*Monahan, C.J.* We shall enter a verdict for you on the issue on which the jury were discharged from finding a verdict on the ground that that was the most you could have got at the trial. We are satisfied that on a new trial motion we are at liberty to do this.] As to the motion for judgment *non obstante veredicto* the plea of privilege is bad. The defendant made this statement to a person who had not any interest in it, who could not give any redress to the party making the complaint. The case does not come within the rule in *Blagg v. Sturt*, (10 A. & E., N. S., 905). [*Keogh, J.*—There was the double duty here; there was the moral duty to tell the other man, and there was self-interest.] The party to whom the complaint is made should have power to give redress. [*Keogh, J.*—He could dismiss the servant.] The defendant did not go to the tribunal which could have dealt with the charge. [*Keogh, J.*—He might not have been able to prove all these things, but the jury have found that he *bona fide* believed the statement and we must take it so. *Christian, J.*—Ramsay had a corresponding interest to get rid of the servant to protect his own house. *Monahan, C.J.*—Kincaid did not say he went for the purpose of punishing him, but to prevent a recurrence of these matters. *Keogh, J.*—If you be right it comes to this, that the defendant could only have the party prosecuted, and then be open to an action for malicious prosecution.] In *Hamerton v. Greene* (8 Ir. Jur., N. S., 293), *Lefroy, C.J.*, said: "I feel a difficulty in my way which prevents me from saying that the public or any one injured is justified by virtue of its being to this body that he addresses his publica-

tion." [*Keogh, J.*—That case goes to answer the objection made that there was no power to give redress.] The tendency, I admit, in the Courts has, latterly been to enlarge the privilege. I admit that the rule is as in *Harrison v. Bush*, though the expression is not a happy one. The interest must be a practical advantage resulting to the party himself; it will not be sufficient that the party takes an interest in such a person. In *Toogood v. Spyring* Lord Devon's agent was brought into contact with the party, and that gave them a common interest. So in *Amann v. Damm*. In both these cases both were brought into contact so as to have a common interest. If Ramsay had been sending the plaintiff to Kincaid's house upon messages, it would be like those cases. [*Keogh, J.*—It would then be within the letter, is it not within the principle?]. I will separately take the duty and interest—1st, As to duty—if a person has robbed another is there anything establishing that he can go and tell that to his master? A man has no right to go round the whole world and tell every man that he has a robber or a bad character in his employment. [*Keogh, J.*—If there was a moral duty you admit that he would.] Such a moral duty as the law recognises. [*Keogh, J.*—If a legal duty, there could be no question; there would then be justification. *Christian, J.*—It may be too high to call it a moral duty, rather a social duty.] If I hear that a clerk in the Bank of Ireland is a dishonest man, I have no right to tell that to his employers, though it might be a very kind thing to do. [*Keogh, J.*—Suppose a clerk robbed you in the Bank, would you be justified in telling it?] Yes, because it was in the Bank. Suppose I know that a nobleman in England is going to marry a woman I believe to be of bad character. [*Keogh, J.*—Suppose that he was already married to a relative of yours.] [*Christian, J.*—You are pressing upon the weak points of the defendant's views.] 2nd, As to interest. If this was the case; the strong points are on the other two natural, legitimate, and proper way of doing this, the defendant is protected. Will the Court lay down this, that for a thing totally unconnected with his employment and with which the master need not interfere, the party is to bring an indirect pressure to bear by getting the master to say he will dismiss the man unless the thing complained of is put a stop to? [*Monahan, C.J.*—The master would be justified in dismissing the man for annoying another man, and therefore it would be a legitimate influence.] It is not a legitimate method of preventing annoyance to my house to get another man to say he will dismiss the party unless he desists. It is different from the case of a father. [*Keogh, J.*—Has not a master control over the time of his servant? We do not know what time the plaintiff spends in going to the defendant's house and in inducing his servant to commit a felony. Has not the defendant a right to go and say to Ramsay, that the man is spending his time, much or little, which time is Ramsay's property, in inducing his servant to commit a felony?] No more is stated in the plea than that he was in the employment of the master. That might hold in the case of an apprentice or a domestic servant. This man was a gardener. It would come to this, that

2.

**Dr. Miller** on the part of the plaintiff, the public officer of the National Bank, applied for letters of administration of the good of James Elliott, deceased, limited to two policies of insurance on the life of another person, and without the will of the deceased. It appeared from affidavits that the deceased had deposited with the National Bank the two policies referred to, one for £500, and the other for £400, to secure advances, and that at his death he was indebted to the bank in a sum of more than £640 principal, besides interest. The policies had been kept up by the bank, and the life was still in *esse*. The value of the two policies now was less than £400. The deceased had made a will, as it was believed, and the widow and next of kin had been duly cited to lodge the will, and accept or refuse, but none had appeared, and the rule that their non-appearance should be taken as a renunciation had been entered. The widow, it was believed, had the will, and her solicitors had been frequently applied to on the subject, but they always stated that she would in no way interfere, and would not lodge the will; and she had been applied to by letter to Boulogne, where she was, to give the necessary information as to the will, and to lodge it if she had it, but no answer was received. Notice had been given to her solicitors of this motion. The deceased had left no assets save the policies in question. The general rule, no doubt, is not to give a limited grant to persons entitled to a general grant; but in special cases it has been done. In *Patterson v. Hunter* (30 L. J. Pr. 272) a similar grant was made limited to a policy of insurance; and it appears from the *Goods of Fenton* (3 Add., 36, n.) that a limited grant may be made without annexing the will.

KEATINGE, J.—The bank is, in fact, a purchaser of these policies. I will make the order as asked, limited to the two policies of insurance in the affidavit mentioned, and without the will, the grant to be given to the manager of the bank, he giving justifying security.

*Order accordingly.*

IN THE GOODS OF JOHN CREAM, DECEASED.—May 12.

*Attachment—Personal demand of costs.*

*An attachment for non-payment of costs ordered to be paid within six days after service of order will not be granted unless after a personal demand of the costs.*

Dr. Miller moved for a conditional order for an attachment against Anna Maria M'Donnell for nonpayment of certain costs which were ordered to be paid by her to her former proctor, Mr. Beatty, by an order of the 24th April last within six days after service of said order on Mr. Bourke, her new attorney. The latter had entered a rule to change Mr. Beatty, on payment of costs, and the costs had been taxed and certified. The order for payment had been duly served on Mr. Bourke, and a letter had been written to Miss M'Donnell apprizing her of the order, and requesting payment, but no answer had been returned. She lived in a very remote part of the county of Mayo, and personal service or demand on her was very difficult. At law, no doubt, a personal demand on the client was generally necessary, but Sir C. Cresswell made an order for an attachment under similar circumstances as exist here—*Miller v. Miller and Hicks* (31 L. J., Matr. 165).

KEATINGE, J.—I do not think that I can, on the authority of that case, dispense with a personal demand. There may have been one there, though it does not appear in the report. I will follow the rule at law, which requires a personal demand in such cases.

*No rule on the motion, without prejudice to renewing it after a personal demand has been made of the amount due.*

## House of Lords.

[Reported by James Paterson, Esq., of the Middle Temple, Barrister-at-law.]

DICKSON v. THE QUEEN.—Feb. 27.

*Excise—Spirit licences—Grocer—Statute—Implied repeal—Taxable words—Construction.*

The statute 6 Geo. 4, c. 81, imposed a higher duty on licences to retail spirits obtained by spirit grocers in Ireland, and a lower duty on other persons, the spirit grocers being defined as those who do not sell spirits in a greater quantity at one time than two quarts to

be consumed on the premises. A later Act, 6 & 7 Will. 4, c. 38, s. 3, enacted that no spirit grocer should obtain a licence to sell on the premises other than a licence to retail spirits in quantities not less at one time than one pint, and to be consumed elsewhere than on the premises, and no other licence shall be granted to grocers:

*Held* (affirming the Judgment of the Exchequer Chamber), that the latter statute did not impliedly repeal the higher duty applicable to spirit grocers, but that the two statutes were compatible, the one fixing the maximum, and the other the minimum, of the quantity to be sold at one time; and the two descriptions of restrictions did not necessarily imply two different descriptions of persons.

THIS was a suggestion of error in a judgment of the Exchequer Chamber. The plaintiff in error was a suppliant in a petition of right, claiming to recover back a sum of 16s. 6½d., as alleged excess on duty claimed by the Crown, for a license to retail spirits in Ireland.

The Act 6 Geo. 4, c. 81, imposed certain duties on the persons licensed to retail spirits in Ireland, all licences being divided into two classes: one being the spirit grocer's licence, authorising the person licensed to retail spirits in quantities not exceeding two quarts, and to be consumed elsewhere than on the premises; the other being all other licences to retail spirits. The 6 Geo. 4, cap. 81, in its 2nd section, fixes a general rate of duty to be paid throughout the United Kingdom on licences to retail spirits. The duty is regulated by the value of the house in which the retailer resides. The suppliant resided in a house valued at £36 a-year, and the duty properly payable by him, according to the scale applicable to retailers of spirits under the lower licence, was £2 4s. 1d., and no more. The words imposing the duty on retailers of spirits throughout the United Kingdom are as follows: "Every retailer of spirits (except retailers of spirits in Ireland after mentioned)." The words of the exception immediately follow in the same clause, and are as follows: "Every retailer of spirits in Ireland being duly licensed to trade, vend and sell coffee, tea, cocoa nuts, chocolate, or pepper, and not selling spirits in any greater quantity at one time than two quarts; or any spirits to be consumed in the house or premises of such retailer."

The licence mentioned in this exception is explained in the 4th section, which enacts that "All persons duly licensed under this Act to deal in or sell coffee, tea, cocoa-nuts, chocolate, or pepper, shall be deemed grocers, within the meaning of the several laws of excise in force in Ireland at and immediately before the passing of this Act, and shall be entitled to take out the licence hereinbefore mentioned to retail spirits in any quantity not exceeding two quarts at any one time to be consumed elsewhere than in the house or on the premises of such retailer—subject nevertheless to all and every the regulations contained in the said laws, or any of them, in respect of grocers retailing spirits, except so far as any of them are repealed or altered by this Act."

Although this section entitled the Irish grocer to special licence without any other qualification than

though he were a wheel-wright or a journeyman watch-maker, the defendant would have a right to ask his employer to dismiss him. A father has a duty to look after the morals of his children, and a master after those of his apprentice, and, perhaps, of his domestic servant; but the case of a gardener is different. Let this rule be laid down, that the master may be appealed to where there is an obligation on him to dismiss the servant, not a power merely, but an obligation.

*Dowse, Q.C.*, was not called on.

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*CHRISTIAN, J.*—I think it would be well to add that the Court express no opinion on the first ground against which Mr. Butt argued, viz., that there was a moral duty in the defendant to go and tell Mr. Ramsay.

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*MONAHAN, C.J.*, said he had expressed the opinion of the Court to be upon the ground of the interest.

*Rule discharged.*

## Court of Probate.

Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.

IN THE GOODS OF ANNE JULIANA WARD.  
May 25.

*Limited administration.*

*Where administration was required merely to make out title to a term, which was vested in the deceased as mortgagee, and there were no other assets, and on the consent of most of the next of kin, the Court gave a grant limited to the premises comprised in such term, although the party was entitled to a general grant.*

*J. P. Hamilton* for Gifford Car, the lessee of a house and premises demised to him for a term of years, applied for a grant of administration.—He had subsequently mortgaged them to the deceased. The mortgagor had become bankrupt, and the premises were of no value beyond the head-rent. The original lessor had agreed to accept a surrender, with the approval of the Bankrupt Court, from the lessee, provided the legal estate could be got in. All the next of kin of the deceased, except one who was not competent, had renounced, and consented to the application. The deceased had, in her lifetime, agreed to join in the surrender, and a deed to that effect had been approved of by her solicitor. There are no assets of the deceased, and there is no object in taking out administration, but to make title to the lease.

*KEATINGE, J.*—You may take a grant limited to the premises demised by the lease.

*COSTELLO v. ELLIOTT.*—May 11.

*Limited administration—Will.*

*Administration to the goods of the deceased, granted to a creditor, limited to two policies of insurance, and without the will, though a will was in existence, but the widow who had it, when cited, did not lodge it or appear. The next of kin also were cited, but did not appear. There were no other assets.*

*Dr. Miller* on the part of the plaintiff, the public officer of the National Bank, applied for letters of administration of the good of James Elliott, deceased, limited to two policies of insurance on the life of another person, and without the will of the deceased. It appeared from affidavits that the deceased had deposited with the National Bank the two policies referred to, one for £500, and the other for £400, to secure advances, and that at his death he was indebted to the bank in a sum of more than £640 principal, besides interest. The policies had been kept up by the bank, and the life was still in *esse*. The value of the two policies now was less than £400. The deceased had made a will, as it was believed, and the widow and next of kin had been duly cited to lodge the will, and accept or refuse, but none had appeared, and the rule that their non-appearance should be taken as a renunciation had been entered. The widow, it was believed, had the will, and her solicitors had been frequently applied to on the subject, but they always stated that she would in no way interfere, and would not lodge the will; and she had been applied to by letter to Boulogne, where she was, to give the necessary information as to the will, and to lodge it if she had it, but no answer was received. Notice had been given to her solicitors of this motion. The deceased had left no assets save the policies in question. The general rule, no doubt, is not to give a limited grant to persons entitled to a general grant; but in special cases it has been done. In *Patterson v. Hunter* (30 L. J. Pr. 272) a similar grant was made limited to a policy of insurance; and it appears from the *Goods of Fenton* (3 Add., 36, n.) that a limited grant may be made without annexing the will.

**KEATINGE, J.**—The bank is, in fact, a purchaser of these policies. I will make the order as asked, limited to the two policies of insurance in the affidavit mentioned, and without the will, the grant to be given to the manager of the bank, he giving justifying security.

*Order accordingly.*

IN THE GOODS OF JOHN CREEAN, DECEASED.—May 12.

*Attachment—Personal demand of costs.*

*An attachment for non-payment of costs ordered to be paid within six days after service of order will not be granted unless after a personal demand of the costs.*

**Dr. Miller** moved for a conditional order for an attachment against Anna Maria M'Donnell for nonpayment of certain costs which were ordered to be paid by her to her former proctor, Mr. Beatty, by an order of the 24th April last within six days after service of said order on Mr. Bourke, her new attorney. The latter had entered a rule to change Mr. Beatty, on payment of costs, and the costs had been taxed and certified. The order for payment had been duly served on Mr. Bourke, and a letter had been written to Miss M'Donnell apprizing her of the order, and requesting payment, but no answer had been returned. She lived in a very remote part of the county of Mayo, and personal service or demand on her was very difficult. At law, no doubt, a personal demand on the client was generally necessary, but *Sir C. Cresswell* made an order for an attachment under similar circumstances as exist here—*Miller v. Miller and Hicks* (31 L. J., Matr. 165).

**KEATINGE, J.**—I do not think that I can, on the authority of that case, dispense with a personal demand. There may have been one there, though it does not appear in the report. I will follow the rule at law, which requires a personal demand in such cases.

*No rule on the motion, without prejudice to renewing it after a personal demand has been made of the amount due.*

## House of Lords.

[Reported by James Paterson, Esq., of the Middle Temple, Barrister-at-law.]

DICKSON v. THE QUEEN.—Feb. 27.

*Excise—Spirit licences—Grocer—Statute—Implied repeal—Taxable words—Construction.*

*The statute 6 Geo. 4, c. 81, imposed a higher duty on licences to retail spirits obtained by spirit grocers in Ireland, and a lower duty on other persons, the spirit grocers being defined as those who do not sell spirits in a greater quantity at one time than two quarts to*

*be consumed on the premises. A later Act, 6 & 7 Will. 4, c. 38, s. 3, enacted that no spirit grocer should obtain a licence to sell on the premises other than a licence to retail spirits in quantities not less at one time than one pint, and to be consumed elsewhere than on the premises, and no other licences shall be granted to grocers:*

*Held (affirming the Judgment of the Exchequer Chamber), that the latter statute did not impliedly repeal the higher duty applicable to spirit grocers, but that the two statutes were compatible, the one fixing the maximum, and the other the minimum, of the quantity to be sold at one time; and the two descriptions of restrictions did not necessarily imply two different descriptions of persons.*

THIS was a suggestion of error in a judgment of the Exchequer Chamber. The plaintiff in error was a suppliant in a petition of right, claiming to recover back a sum of 16s. 6 $\frac{1}{2}$ d., as alleged excess on duty claimed by the Crown, for a licence to retail spirits in Ireland.

The Act 6 Geo. 4, c. 81, imposed certain duties on the persons licensed to retail spirits in Ireland, all licences being divided into two classes: one being the spirit grocer's licence, authorising the person licensed to retail spirits in quantities not exceeding two quarts, and to be consumed elsewhere than on the premises; the other being all other licences to retail spirits. The 6 Geo. 4, cap. 81, in its 2nd section, fixes a general rate of duty to be paid throughout the United Kingdom on licences to retail spirits. The duty is regulated by the value of the house in which the retailer resides. The suppliant resided in a house valued at £36 a-year, and the duty properly payable by him, according to the scale applicable to retailers of spirits under the lower licence, was £2 4s. 1d., and no more. The words imposing the duty on retailers of spirits throughout the United Kingdom are as follows: "Every retailer of spirits (except retailers of spirits in Ireland after mentioned)." The words of the exception immediately follow in the same clause, and are as follows: "Every retailer of spirits in Ireland being duly licensed to trade, vend and sell coffee, tea, cocoa nuts, chocolate, or pepper, and not selling spirits in any greater quantity at one time than two quarts; or any spirits to be consumed in the house or premises of such retailer."

The licence mentioned in this exception is explained in the 4th section, which enacts that "All persons duly licensed under this Act to deal in or sell coffee, tea, cocoa-nuts, chocolate, or pepper, shall be deemed grocers, within the meaning of the several laws of excise in force in Ireland at and immediately before the passing of this Act, and shall be entitled to take out the licence hereinbefore mentioned to retail spirits in any quantity not exceeding two quarts at any one time to be consumed elsewhere than in the house or on the premises of such retailer—subject nevertheless to all and every the regulations contained in the said laws, or any of them, in respect of grocers retailing spirits, except so far as any of them are repealed or altered by this Act."

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*Rule discharged.*

## Court of Probate.

Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.

IN THE GOODS OF ANNE JULIANA WARD.

May 25.

*Limited administration.*

*Where administration was required merely to make out title to a term, which was vested in the deceased as mortgagee, and there were no other assets, and on the consent of most of the next of kin, the Court gave a grant limited to the premises comprised in such term, although the party was entitled to a general grant.*

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**KEATINGE, J.**—The bank is, in fact, a purchaser of these policies. I will make the order as asked, limited to the the two policies of insurance in the affidavit mentioned, and without the will, the grant to be given to the manager of the bank, he giving justifying security.

*Order accordingly.*

**IN THE GOODS OF JOHN CREAN, DECEASED.**—May 12.

*Attachment—Personal demand of costs.*

*An attachment for non-payment of costs ordered to be paid within six days after service of order will not be granted unless after a personal demand of the costs.*

**Dr. Miller** moved for a conditional order for an attachment against Anna Maria M'Donnell for nonpayment of certain costs which were ordered to be paid by her to her former proctor, Mr. Beatty, by an order of the 24th April last within six days after service of said order on Mr. Bourke, her new attorney. The latter had entered a rule to change Mr. Beatty, on payment of costs, and the costs had been taxed and certified. The order for payment had been duly served on Mr. Bourke, and a letter had been written to Miss M'Donnell apprizing her of the order, and requesting payment, but no answer had been returned. She lived in a very remote part of the county of Mayo, and personal service or demand on her was very difficult. At law, no doubt, a personal demand on the client was generally necessary, but **Sir C. Cresswell** made an order for an attachment under similar circumstances as exist here—*Miller v. Miller and Hicks* (31 L. J., Matr. 165).

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*No rule on the motion, without prejudice to renewing it after a personal demand has been made of the amount due.*

## House of Lords.

[Reported by James Paterson, Esq., of the Middle Temple, Barrister-at-law.]

**DICKSON v. THE QUEEN.**—Feb. 27.

*Excise—Spirit licence—Grocer—Statute—Implied repeal—Taxable words—Construction.*

*The statute 6 Geo. 4, c. 81, imposed a higher duty on licences to retail spirits obtained by spirit grocers in Ireland, and a lower duty on other persons, the spirit grocers being defined as those who do not sell spirits in a greater quantity at one time than two quarts to*

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*Held (affirming the Judgment of the Exchequer Chamber), that the latter statute did not impliedly repeal the higher duty applicable to spirit grocers, but that the two statutes were compatible, the one fixing the maximum, and the other the minimum, of the quantity to be sold at one time; and the two descriptions of restrictions did not necessarily imply two different descriptions of persons.*

THIS was a suggestion of error in a judgment of the Exchequer Chamber. The plaintiff in error was a suppliant in a petition of right, claiming to recover back a sum of 16s. 6½d., as alleged excess on duty claimed by the Crown, for a license to retail spirits in Ireland.

The Act 6 Geo. 4, c. 81, imposed certain duties on the persons licensed to retail spirits in Ireland, all licences being divided into two classes: one being the spirit grocer's licence, authorising the person licensed to retail spirits in quantities not exceeding two quarts, and to be consumed elsewhere than on the premises; the other being all other licences to retail spirits. The 6 Geo. 4, cap. 81, in its 2nd section, fixes a general rate of duty to be paid throughout the United Kingdom on licences to retail spirits. The duty is regulated by the value of the house in which the retailer resides. The suppliant resided in a house valued at £36 a-year, and the duty properly payable by him, according to the scale applicable to retailers of spirits under the lower licence, was £2 4s. 1d., and no more. The words imposing the duty on retailers of spirits throughout the United Kingdom are as follows: "Every retailer of spirits (except retailers of spirits in Ireland after mentioned)." The words of the exception immediately follow in the same clause, and are as follows: "Every retailer of spirits in Ireland being duly licensed to trade, vend and sell coffee, tea, cocoa nuts, chocolate, or pepper, and not selling spirits in any greater quantity at one time than two quarts; or any spirits to be consumed in the house or premises of such retailer."

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The Act 6 Geo. 4, c. 81, imposed certain duties on the persons licensed to retail spirits in Ireland, all licences being divided into two classes: one being the spirit grocer's licence, authorising the person licensed to retail spirits in quantities not exceeding two quarts, and to be consumed elsewhere than on the premises; the other being all other licences to retail spirits. The 6 Geo. 4, cap. 81, in its 2nd section, fixes a general rate of duty to be paid throughout the United Kingdom on licences to retail spirits. The duty is regulated by the value of the house in which the retailer resides. The suppliant resided in a house valued at £36 a-year, and the duty properly payable by him, according to the scale applicable to retailers of spirits under the lower licence, was £2 4s. 1d., and no more. The words imposing the duty on retailers of spirits throughout the United Kingdom are as follows: "Every retailer of spirits (except retailers of spirits in Ireland after mentioned)." The words of the exception immediately follow in the same clause, and are as follows: "Every retailer of spirits in Ireland being duly licensed to trade, vend and sell coffee, tea, cocoa nuts, chocolate, or pepper, and not selling spirits in any greater quantity at one time than two quarts; or any spirits to be consumed in the house or premises of such retailer."

The licence mentioned in this exception is explained in the 4th section, which enacts that "All persons duly licensed under this Act to deal in or sell coffee, tea, cocoa-nuts, chocolate, or pepper, shall be deemed grocers, within the meaning of the several laws of excise in force in Ireland at and immediately before the passing of this Act, and shall be entitled to take out the licence hereinbefore mentioned to retail spirits in any quantity not exceeding two quarts at any one time to be consumed elsewhere than in the house or on the premises of such retailer—subject nevertheless to all and every the regulations contained in the said laws, or any of them, in respect of grocers retailing spirits, except so far as any of them are repealed or altered by this Act."

Although this section entitled the Irish grocer to special licence without any other qualification than

though he were a wheel-wright or a journeyman watch-maker, the defendant would have a right to ask his employer to dismiss him. A father has a duty to look after the morals of his children, and a master after those of his apprentice, and, perhaps, of his domestic servant; but the case of a gardener is different. Let this rule be laid down, that the master may be appealed to where there is an obligation on him to dismiss the servant, not a power merely, but an obligation.

*Dowse, Q.C.*, was not called on.

*MONAHAN, C.J.*—It is unnecessary to go through the cases. We are all of opinion that it cannot be argued, but that Kincaid here had an interest and a duty to protect his servant, and an interest in protecting his own property. Then was he justified in going to the master to apprise him with the object of bringing his influence to bear in order to prevent a repetition? Mr. Butt admitted that if there was a duty shown, not a legal duty, but a moral or social duty, this plea would be good. This is not general or special demurrer, but a motion after verdict, and the Court are bound to presume that the judge explained the law, and saw there was that relation subsisting. I do not entertain any doubt but that there was a moral and social duty to prevent the recurrence of such misconduct. Possibly we cannot get a case in all its parts like the present. I think this plea is one to be favoured, when honestly and *bona fide* pleaded. The Court are right in encouraging the performance of social as distinguished from legal duties. This rule must be discharged. The plaintiff has succeeded to the extent of having the verdict entered for him on the other plea.

*CHRISTIAN, J.*—I think it would be well to add that the Court express no opinion on the first ground against which Mr. Butt argued, viz., that there was a moral duty in the defendant to go and tell Mr. Ramsay.

*KEOGH, J.*, said he would have been prepared to decide the motion on that ground alone.

*O'HAGAN, J.*, said that he thought so too, and was not convinced by Mr. Butt's argument.

*MONAHAN, C.J.*, said he had expressed the opinion of the Court to be upon the ground of the interest.

*Rule discharged.*

## Court of Probate.

Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.

IN THE GOODS OF ANNE JULIANA WARD.

May 25.

*Limited administration.*

*Where administration was required merely to make out title to a term, which was vested in the deceased as mortgagee, and there were no other assets, and on the consent of most of the next of kin, the Court gave a grant limited to the premises comprised in such term, although the party was entitled to a general grant.*

*J. P. Hamilton* for Gifford Car, the lessee of a house and premises demised to him for a term of years, applied for a grant of administration.—He had subsequently mortgaged them to the deceased. The mortgagor had become bankrupt, and the premises were of no value beyond the head-rent. The original lessor had agreed to accept a surrender, with the approval of the Bankrupt Court, from the lessee, provided the legal estate could be got in. All the next of kin of the deceased, except one who was not competent, had renounced, and consented to the application. The deceased had, in her lifetime, agreed to join in the surrender, and a deed to that effect had been approved of by her solicitor. There are no assets of the deceased, and there is no object in taking out administration, but to make title to the lease.

*KEATINGE, J.*—You may take a grant limited to the premises demised by the lease.

*COSTELLO v. ELLIOTT.*—May 11.

*Limited administration—Will.*

*Administration to the goods of the deceased, granted to a creditor, limited to two policies of insurance, and without the will, though a will was in existence, but the widow who had it, when cited, did not lodge it or appear. The next of kin also were cited, but did not appear. There were no other assets.*

*Dr. Miller* on the part of the plaintiff, the public officer of the National Bank, applied for letters of administration of the good of James Elliott, deceased, limited to two policies of insurance on the life of another person, and without the will of the deceased. It appeared from affidavits that the deceased had deposited with the National Bank the two policies referred to, one for £500, and the other for £400, to secure advances, and that at his death he was indebted to the bank in a sum of more than £640 principal, besides interest. The policies had been kept up by the bank, and the life was still in *esse*. The value of the two policies now was less than £400. The deceased had made a will, as it was believed, and the widow and next of kin had been duly cited to lodge the will, and accept or refuse, but none had appeared, and the rule that their non-appearance should be taken as a renunciation had been entered. The widow, it was believed, had the will, and her solicitors had been frequently applied to on the subject, but they always stated that she would in no way interfere, and would not lodge the will; and she had been applied to by letter to Boulogne, where she was, to give the necessary information as to the will, and to lodge it if she had it, but no answer was received. Notice had been given to her solicitors of this motion. The deceased had left no assets save the policies in question. The general rule, no doubt, is not to give a limited grant to persons entitled to a general grant; but in special cases it has been done. In *Patterson v. Hunter* (30 L. J. Pr. 272) a similar grant was made limited to a policy of insurance; and it appears from the *Goods of Fenton* (8 Add., 36, n.) that a limited grant may be made without annexing the will.

KEATINGE, J.—The bank is, in fact, a purchaser of these policies. I will make the order as asked, limited to the the two policies of insurance in the affidavit mentioned, and without the will, the grant to be given to the manager of the bank, he giving justifying security.

*Order accordingly.*

IN THE GOODS OF JOHN CREAM, DECEASED.—May 12.

*Attachment—Personal demand of costs.*

*An attachment for non-payment of costs ordered to be paid within six days after service of order will not be granted unless after a personal demand of the costs.*

Dr. Miller moved for a conditional order for an attachment against Anna Maria M'Donnell for nonpayment of certain costs which were ordered to be paid by her to her former proctor, Mr. Beatty, by an order of the 24th April last within six days after service of said order on Mr. Bourke, her new attorney. The latter had entered a rule to change Mr. Beatty, on payment of costs, and the costs had been taxed and certified. The order for payment had been duly served on Mr. Bourke, and a letter had been written to Miss M'Donnell apprizing her of the order, and requesting payment, but no answer had been returned. She lived in a very remote part of the county of Mayo, and personal service or demand on her was very difficult. At law, no doubt, a personal demand on the client was generally necessary, but Sir C. Cresswell made an order for an attachment under similar circumstances as exist here—*Miller v. Miller and Hicks* (31 L. J., Matr. 165).

KEATINGE, J.—I do not think that I can, on the authority of that case, dispense with a personal demand. There may have been one there, though it does not appear in the report. I will follow the rule at law, which requires a personal demand in such cases.

*No rule on the motion, without prejudice to renewing it after a personal demand has been made of the amount due.*

## House of Lords.

[Reported by James Paterson, Esq., of the Middle Temple, Barrister-at-law.]

DICKSON v. THE QUEEN.—Feb. 27.

*Excise—Spirit licence—Grocer—Statute—Implied repeal—Taxable words—Construction.*

*The statute 6 Geo. 4, c. 81, imposed a higher duty on licences to retail spirits obtained by spirit grocers in Ireland, and a lower duty on other persons, the spirit grocers being defined as those who do not sell spirits in a greater quantity at one time than two quarts to*

*be consumed on the premises. A later Act, 6 & 7 Will. 4, c. 38, s. 3, enacted that no spirit grocer should obtain a licence to sell on the premises other than a licence to retail spirits in quantities not less at one time than one pint, and to be consumed elsewhere than on the premises, and no other licence shall be granted to grocers:*

*Held (affirming the Judgment of the Exchequer Chamber), that the latter statute did not impliedly repeal the higher duty applicable to spirit grocers, but that the two statutes were compatible, the one fixing the maximum, and the other the minimum, of the quantity to be sold at one time; and the two descriptions of restrictions did not necessarily imply two different descriptions of persons.*

THIS was a suggestion of error in a judgment of the Exchequer Chamber. The plaintiff in error was a suppliant in a petition of right, claiming to recover back a sum of 16s. 6½d., as alleged excess on duty claimed by the Crown, for a license to retail spirits in Ireland.

The Act 6 Geo. 4, c. 81, imposed certain duties on the persons licensed to retail spirits in Ireland, all licences being divided into two classes: one being the spirit grocer's licence, authorising the person licensed to retail spirits in quantities not exceeding two quarts, and to be consumed elsewhere than on the premises; the other being all other licences to retail spirits. The 6 Geo. 4, cap. 81, in its 2nd section, fixes a general rate of duty to be paid throughout the United Kingdom on licences to retail spirits. The duty is regulated by the value of the house in which the retailer resides. The suppliant resided in a house valued at £36 a-year, and the duty properly payable by him, according to the scale applicable to retailers of spirits under the lower licence, was £2 4s. 1d., and no more. The words imposing the duty on retailers of spirits throughout the United Kingdom are as follows: "Every retailer of spirits (except retailers of spirits in Ireland after mentioned)." The words of the exception immediately follow in the same clause, and are as follows: "Every retailer of spirits in Ireland being duly licensed to trade, vend and sell coffee, tea, cocoa nuts, chocolate, or pepper, and not selling spirits in any greater quantity at one time than two quarts; or any spirits to be consumed in the house or premises of such retailer."

The licence mentioned in this exception is explained in the 4th section, which enacts that "All persons duly licensed under this Act to deal in or sell coffee, tea, cocoa-nuts, chocolate, or pepper, shall be deemed grocers, within the meaning of the several laws of excise in force in Ireland at and immediately before the passing of this Act, and shall be entitled to take out the licence hereinbefore mentioned to retail spirits in any quantity not exceeding two quarts at any one time to be consumed elsewhere than in the house or on the premises of such retailer—subject nevertheless to all and every the regulations contained in the said laws, or any of them, in respect of grocers retailing spirits, except so far as any of them are repealed or altered by this Act."

Although this section entitled the Irish grocer to special licence without any other qualification than

that which he derived from his being licensed to sell groceries, there was nothing in the Act to prohibit him obtaining the ordinary publican's licence, by going before the magistrates and obtaining the licence to sell beer, in accordance with the 13th and 14th sections of the Act. In this case he was included in the general class of retailers of spirits, receiving an unrestricted licence upon paying the lower rate of duty.

So long as these licences were issued to grocers in the terms of this Act, no question arose as to the duty payable. If the grocer held a beer licence and applied for a publican's licence, he paid on that licence the lower duty. If he applied for the special licence mentioned in the 4th section, he was charged with the higher rate of duty, and this matter continued up to the year 1836. In that year the statute 6 & 7 Will. 4, c. 38, made a change in respect of the retail licence obtainable by grocers.

The 3rd section of this Act was as follows: "And be it further enacted that from and after the passing of this Act, no person in Ireland who shall be duly licensed under any Act or Acts for granting excise licences to deal in or sell coffee, tea, cocoa-nuts, chocolate, or pepper, nor any person deemed a grocer within the meaning of the laws of excise in force in Ireland at or immediately before the passing of this Act, shall be entitled to take out any licence to retail spirits in the house or on the premises of such retailer or in any house or on any premises within one quarter of a mile of the house or premises of such retailer, other than a licence to retail spirits in not less than one pint at one time, and to be consumed elsewhere than in the house or premises of such retailer. And it expressly enacted that 'any licence to retail spirits in any other manner granted after the passing of this Act to any such grocer or person so licensed as aforesaid should be null and void to all intents and purposes whatever.'"

On the passing of the latter Act (6 & 7 Will. 4, c. 38), doubts arose whether that Act impliedly repealed the higher duty imposed on spirit grocers by the previous Act, 6 Geo. 4, c. 81. In 1841 the suppliant brought an action to try the question, and the Irish Exchequer Chamber decided, by a majority of six to four, in his favour: *Dickson v. Pope* (7 Ir. L. Rep., 74). In 1845 the latter Act was repealed by the 8 & 9 Vict. c. 64, whereupon the Irish spirit grocers demanded back the excess of duty which they had paid while the Act of 6 & 7 Will. 4, c. 38, was in force. The excise authorities having refused to refund the sums, the present petition of right was filed. The Court of Queen's Bench, without hearing argument, followed the judgment of the Irish Exchequer Chamber, and gave judgment for the suppliant. The English Exchequer Chamber, in error, unanimously reversed the judgment of the Queen's Bench, whereupon the present suggestion of error was made.

*I. Butt*, Q.C., for the plaintiff in error, contended that the Exchequer Chamber was wrong, and the Irish Exchequer Chamber right in construing the Act; that the Act of 6 & 7 Will. 4, c. 38, having taken away the higher duty on the licence imposed by 6 Geo. 4, c. 81, that duty could not be transferred

by implication to a new and different licence created by the latter Act; that at all events, inasmuch as there was a doubt, a tax was not to be imposed by implication.

The *Attorney-General* (Palmer), the *Solicitor-General* (Collier), and *C. Hutton*, for the respondent, contended that there was nothing inconsistent between the two statutes. The first merely imposed a maximum on the saleable quantity, while the latter statute imposed a minimum restriction.

THE LORD CHANCELLOR—My Lords, the question which has been argued before your lordships, at considerable, but by no means unnecessary, length, is one of great nicety, and requiring much care and discrimination in language. The point for your lordships to decide in reality is, whether the licence granted to the suppliant was properly chargeable with a duty of £3 0s. 7½d. or with a duty of £2 4s. 10d., and this depends upon the question whether the suppliant was a retailer of spirits within the description contained in the schedule appended to the 2nd section of the 6 Geo. 4, c. 81, or whether he was within the exception contained in that clause, viz., within the words "except retailers of spirits in Ireland after mentioned." If the suppliant comes within the description of retailers of spirits in Ireland after mentioned, then he is properly chargeable with the larger duty; but if he no longer answers that description, then he is caught (if I may use the phrase) only by the general enactment which is applicable to all retailers of spirits. The words of the exception—that is, the description of those retailers of spirits who are after mentioned—speak of the retailers of spirits in Ireland who have obtained grocers' licences, and are not selling spirits in any greater quantity at one time than two quarts, or any spirits to be consumed in the house or on the premises of such retailers. The argument on behalf of the appellant is, that that is a special and definite description of the then grocer who was licensed to retail spirits, and that that specific form of licence has been subsequently altered. So that, if you hold the duty here imposed to attach to the licensed individual who has received the specific form of licence here described, then, if it turns out that that specific form of licence has been altered, the contention is, that as the licence is different, the person bearing it becomes different; for if it be imposed upon the person who has received licence A, the argument is, that it is not applicable to the person who has received licence B. Now, undoubtedly, we must not lose sight of that great rule in the construction of fiscal laws, that they are not to be extended by any laboured construction, but that you must adhere to the strict rule of interpretation; and if a person who is subject to a duty in a particular character, or by virtue of a particular description, no longer fills that character or answers that description, the duty no longer attaches upon him and cannot be levied. The argument which has been most ingeniously and elaborately conducted on behalf of the defendant has been this: first of all it has been said by the appellant, that the licence which is here intended to be referred to—I mean by the words I have already read, describing the excepted retailers—is the licence which is described in the 4th section of the same statute. That was a licence to

be granted to grocers giving them power to retail spirits in any quantity not exceeding two quarts at any one time to be consumed elsewhere than in the house or on the premises of the retailer. The licence, according to this rule, if it be granted, would be a licence with the maximum of the quantity to be sold, but without the mention of any minimum. It appears from a variety of statutes to have been the earnest desire of the Legislature, in a way which the Legislature sometimes adopts under the notion that an Act of Parliament can render people moral or temperate, it seems to have been the earnest desire of the Legislature to impose every possible difficulty upon the grocers retailing spirits in small quantities. This particular object seems not to have been quite effected by the statute I am now adverting to, for it failed to fix anything like a minimum quantity. It imposed a maximum, but it left the grocer restrained from selling more than two quarts at liberty to retail spirits in small quantities. This point appears to have attracted the attention of the Legislature, and in a subsequent statute, the 6th and 7th of Will. 4, and by the 3rd section of that statute, it is enacted in substance, that after the passing of the Act no grocer (I am substituting the word grocer for the larger description which is there given) shall be entitled to take out any licence to retail spirits in the house or on the premises of such retailer, or in any house or any premises within one quarter of a mile of the house or premises of such retailer other than a licence to retail spirits in quantities not less than one pint, and to be consumed elsewhere than in the house or on the premises of the retailer. The former licence restrained the grocer from selling more than two quarts, but there was the same restriction with regard to the house and premises where spirits sold were to be consumed, viz., the quantity was not to be consumed in the house or on the premises of the retailer. In this subsequent section the Legislature says: "You shall not sell less than one pint, and you shall not sell even a pint to be consumed in the house or on the premises of the retailer." It expressly enacts that the pint sold is to be consumed elsewhere. Now the argument on the part of Mr. Butt has been, that this addition made to the licence makes it a different licence, and that the grocer who is subjected to the restriction contained in this addition becomes in reality, *quoad* the selling of spirits, a different person from the person described in the 6 Geo. 4, and that he no longer answers the description which alone is taxed, viz., of the grocer the retailer of spirits not selling spirits in any greater quantity at one time than two quarts. It is difficult so to express the matter as to convey to your lordships' minds with anything like precision this nice and subtle distinction. It all turns upon this inquiry: Is the limitation of the maximum of the quantity to be sold repealed expressly or by implication by the enactment which I have read out of the 3rd section of the 6 and 7 Will. 4? Because, if the whole limitation as to the maximum be thereby repealed, then, my lords, I think you will admit that the individual licensed under the 3rd section of the 6 and 7 Will. 4, has different powers and authorities by his licence than those which are contained in the former licence, and if he becomes by

virtue of this subsequent statute a grocer at liberty to sell any quantity of spirits, then he would no longer answer the description of a grocer not selling, that is, not being at liberty to sell, any greater quantity than two quarts. But, my lords, I have laboured in vain to find any reason for holding that these two enactments are not perfectly compatible the one with the other. I have also laboured in vain to find any reason for holding that when you have added to the licence it can no longer be regarded as answering the description of a grocer not selling, that is, not being licensed to sell, any greater quantity than two quarts. It all turns upon this, whether the two sections may not be most consistently and correctly reconciled by taking the one as fixing the maximum, and taking the other as superadding the minimum. If the superaddition of minimum materially affected the description contained in the taxing clause, and rendered it no longer applicable to the person, then the taxing clause could not be acted upon; but if the superaddition of the minimum leaves the licensee still retaining the characteristics which enable him to answer and exactly to satisfy the description contained in the taxing clause, then no rule of construction would require your Lordships to hold that the two sections are in any way inconsistent. You could not hold that the former section was in any manner affected or repealed by the latter. That is the conclusion at which I have, with some difficulty, been able to arrive, and to which I invite the assent of your Lordships. In this view the thing becomes reasonably clear and consistent. The Legislature had imposed a maximum, but it had not imposed a minimum. It apprehended that much danger might arise from the retailing spirits by grocers in small quantities, and therefore it added a minimum to take away or to obviate that danger. But when it added the minimum it did not say that the licence should be altered; it did not enlarge the capacity of the licensee with regard to quantity, and I think that the licensee still remains at liberty to sell no greater quantity at one time than two quarts, although he was subjected to the further restriction, that of being disabled to retail spirits in glasses, and was obliged to sell a quantity not less than one pint, and that to be taken away from the premises for consumption. It was contended by Mr. Butt that the construction of the statute would be affected greatly by a consideration of the fact of the practice. He has told your Lordships that a practice followed upon the statute of the 6 Geo. 4 of a grocer sinking his character of a grocer, and assuming the guise and character of a publican, getting a licence to sell beer *eo nomine*, and then presenting himself before the justices for a general license to sell spirits. He desired your Lordship to construe those specific words of the description, "not selling spirits in any greater quantity," &c., as having been used by the Legislature, with a prophetic anticipation of the practice that might ensue upon the passing of the Act, and as descriptive of the grocers in their two capacities, viz., grocers that obtained grocers' licences to sell spirits, and grocers that got publicans' licenses to sell spirits. I do not think that your Lordships



would be at all warranted in giving to the words used in the Act of Parliament, and which are plainly applicable to the existing state of things, the meaning contended for by the learned counsel, that they were used with reference to possible future state of things. Neither do I think, if the whole of the facts alleged by Mr. Butt were conceded, just for the purpose of the argument, that it would affect the real question upon which the decision of this appeal depends, and which I take to be simply this: whether the description contained in the schedule to the 2nd section of the Act 6 Geo. 4, is or is not rendered no longer applicable by the fact of the maximum quantity therein indicated being the limit, the *ne plus ultra*, and the licence being repealed and altered by the 3rd sect. of the subsequent Act, 6 & 7 Will. 4. I find nothing to warrant the conclusion that there was such a repeal. I find in the nature of things that the two enactments are perfectly consistent, the one having given a maximum without a minimum, and the other having given a minimum without disturbing the maximum. If the antecedent description is as I have said, and it refers only to the minimum, and the maximum remains undisturbed and unaffected, the description is applicable, although the minimum is superadded to the maximum. Upon these grounds, although it is impossible to render the matter quite as clear as one would desire to make it, I humbly move your Lordships that the judgment of the Court below be affirmed, and that the appeal be dismissed.

LORD CRANWORTH.—My Lords, I entirely concur with my noble and learned friend the Lord Chancellor that the judgment in this case must be for the defendant in error. Before the passing of the Act of Geo. 4 there certainly was a licence that limited in its terms the grocer to selling spirits in any quantity within certain limits. The licence was a general licence that the grocer might obtain them, although by former Acts he could not have done so. Then the Legislature enacted that, in spite of his having such a licence, it should not be lawful for him to sell at one time more than two quarts. And so stood the law when the 6 Geo. 4 was passed. The former duties were then repealed, and amongst other duties that were imposed upon every retailer of spirits in Ireland being duly licensed to trade in, vend and sell, coffee, tea, cocoa-nuts, chocolate, or pepper, and not selling spirits in any greater quantity at one time than two quarts. That was the mode (certainly I think it was rather an inartificial and clumsy mode) of referring to the restriction which the law imposed upon the licensed grocer who obtained a licence to sell spirits. There was no such thing then as a licence to sell in any quantity at one time exceeding two quarts. There was a licence to sell, but the law said, "Although you have got that licence in your character of grocer, you shall not sell more than two quarts." It was contended by Mr. Butt, that however that might have stood before the passing of the Act, by the 4th section it became necessary that the licence should be a licence to sell in quantities not exceeding two quarts. That 4th section is very inartificially framed, and in a very blundering manner, because it assumes something to have been said before that had not been said at all. I take the object

of the clause to have been this, to remove the doubts that I collect existed before as to who came within the description of grocers in Ireland. It enacts that from and after a certain day all persons who shall be duly licensed under this Act to deal in or sell coffee, tea, cocoa-nuts, chocolate, or pepper, shall be deemed grocers within the meaning of the several laws of the excise in force in Ireland at and immediately before the passing of this Act. And then it goes on in the passage upon which Mr. Butt seems to rely: "and shall be entitled to take out the licence hereinbefore mentioned to retail spirits in any quantity not exceeding two quarts at any one time." There has been no such licence hereinbefore mentioned in any part of the description of retailers of spirits in Ireland, as authorising persons to sell spirits not in any greater quantity at one time than two quarts. There was no licence that authorised that, and there was no intention to give any different character to the licence. That being the state of the law, the publican's Act was passed, and that had reference, not to duties, but to the prevention of intemperance and drunkenness, and in that Act there were a great many provisions, the tendency of which no doubt was to make the inhabitants of that part of the United Kingdom less intemperate; and among other provisions there is this: "That from and after the passing of this Act no person in Ireland who shall be duly licensed under any Act or Acts for granting excise licences to deal in or sell coffee, tea, cocoa-nuts, chocolate, or pepper, nor any person deemed a grocer within the meaning of the laws of the excise in force in Ireland at or immediately before the passing of this Act, shall be entitled to take out any licence to retail spirits in the house or on the premises of such retailer or in any house or on any premises within one-quarter of a mile of the house or premises of such retailer other than a licence to retail spirits in quantities not less at one time than one pint." What is there to show in the slightest degree that other restrictions which existed before were meant to be affected? I see nothing of the sort, and although I agree with what fell from the Lord Chancellor, that we must not strain Acts of Parliament so as to let it be supposed that a duty has been imposed upon the subject which the Legislature has clearly said shall not be imposed, I think one is not bound, because that is a very well-known principle, to shut one's eyes to the obvious meaning of the enactment. The former Act fixed a maximum, and said you shall not, although you have a licence to sell spirits, sell more under that licence than two quarts at any one time. Now it has been said, with a view to promoting temperance in the country, you shall be placed under this restriction, that you shall never sell less than a pint; that is to say, you shall never sell small quantities to persons who might come into your shop to tittle; you must sell a quantity that will be larger than could be so consumed. That, in my opinion, is the obvious intention of the enactment, and I see no reason to suppose that there was any intention to alter the former enactment, viz., they were not to sell more at any one time than two quarts. And if so, they remained where they were before, and were liable to the higher rate of duty.

LORD WENSLEYDALE.—My Lords, I entirely concur

in the observations which have been made by the two noble and learned lords who have preceded me, and I have nothing to add to them. I have felt perfectly satisfied with the reasons which were given by Erle, C. J., in the judgment delivered in the Exchequer Chamber. It has appeared to me that the ultimate result was perfectly clear, and that the judgment of the Court below ought to be affirmed.

*Judgment affirmed.*

## Rolls Court.

*Ex relations.*

COX v. LEIGH.—Jan. 28, 1865.

*It is a breach of trust, for a trustee of a term in a settlement to secure portions, to assign the term for the principal sum, unless at the same time he receives all arrears of interest then due.*

J. T. Ball, Q.C., stated the case for the petitioners, which was, that by settlement dated the 3rd day of July, 1834, made on the marriage of G. P. Piggot, William Pemberton Piggot, his father, conveyed lands upon certain trusts, to G. H. Haughton, (who predeceased his co-trustee,) and Francis Leigh, the respondent, for a term of 300 years, for the purposes therein mentioned, namely, to raise £5,500 for the younger children of William P. Piggot, with interest thereon at £5 per cent., from three months after the death of William P. Piggot, which sum was to be divided amongst the said younger children as the said William P. Piggot should appoint. In the events which happened, the petitioner, Charlotte Cox, otherwise Piggot, became entitled to £600, part of said principal sum of £5,500. William P. Piggot died in 1854, thereupon several of those entitled to portions of the said charge pressed for payment, and by indenture dated the 3rd day of March, 1859, the surviving trustee, the respondent in this case, Francis Leigh, and several of those entitled to the portions of the said charge, in consideration of the principal sum then paid to the said Francis Leigh, but without any of the arrears of interest, assigned the said charge and the term of 300 years for securing the same to one Joseph Jeffares. Mrs Cox, the petitioner, did not execute that deed; Francis Leigh paid into Court under the Trustee Relief Act, several portions thereof; and, amongst others, the portion of the petitioner. There was then due on the last mentioned portion a considerable arrear of interest which Francis Leigh did not pay into court, and this was the breach of trust with which he was charged by the petitioner. The shares in the sum paid into court having been ascertained by the report of Master Brooke, dated the 28th of May, 1861, and Charlotte Cox's share having been paid out of court to her, this petition was brought for the purpose of rendering Francis Leigh, the trustee, personally responsible for the amount of the interest due on the day of payment into court. Neither the present

owner of the estate nor the assignee of the term and charge were made respondents.

W. R. Smith appeared for the respondent. The respondent raised several defences by his answer, but the only one insisted on at the hearing was—that he was a mere trustee of the term and never having acted save in the receipt of the money and payment thereof into court, could not be held liable as an ordinary trustee for breach of trust, and that the petitioner's remedy was against the lands and not against him personally. The hardship of the case against Francis Leigh was pressed strongly.

T. Pakenham Law replied for the petitioner.—In reply to the Master of the Rolls he stated that he could find no case where a mere trustee of a term had been made personally responsible, as in the reported cases the landowner was always a party, and the relief sought was against him. He urged that the respondent had taken away the petitioner's remedy by his act of assigning away the term when all the interest due, as well as the principal secured by the term, had not been raised, and that the trustee was only discharged by the Trustee Relief Act from the monies actually paid into court. That if there was any equity against the landowner and assignee of the charge, the Court should never compel the petitioner to work out so obscure an equity, but would give her the direct remedy against the trustee who had been guilty of a breach of trust.

*Cur adv. vult.*

Feb. 22.—THE MASTER OF THE ROLLS declared that the assignment by Francis Leigh of the term without having raised the interest due was a breach of trust, and that accordingly he should pay the interest to the petitioner and her costs of the suit.

## Court of Queen's Bench.

[Reported by William Woollock, Esq., Barrister-at-Law.]

O'BRIEN AND OTHERS v. MURRAY AND OTHERS.

November 22; Dec. 13, 1864.

*Ejectment—Mercantile Law Amendment Act, s. 19 & 20 Vic. c. 97—Actual seizure—Chattels real.*

*Quære, does the word "goods" in sec. 1 of 19 & 20 Vic. c. 97, (the Mercantile Law Amendment Act.) include chattels real, so as to protect an assignment thereof made bona fide, for value, and without notice against a writ of fieri facias lodged with the sheriff, previously to and executed after the assignment?*

THIS was an action of ejectment, brought by the plaintiffs John O'Brien, John Rogers, and Thomas Rogers, for the recovery of the house and premises No. 1, Lower Summer-hill, in the parish of St. Thomas, and city of Dublin. The case was tried at the sittings after Trinity Term, 1864, before Mr. Justice O'Brien and a common jury. The defendant,

Patrick Murray, alone took defence and appeared at the trial. The plaintiffs, John O'Brien, John Rogers, and Thomas Rogers, claimed, as assignees of the Sheriff of the city of Dublin, by the indenture herein-after mentioned. At the trial the plaintiffs proved an indenture of lease, dated the 23rd May, 1834, and made between Mary Turpin of the first part, Maria Canavan of the second part, and the defendant Murray of the third part, whereby the said Turpin and Canavan demised to the defendant the premises in question for the term of twenty-one years, at the yearly rent of £52. He also produced and put in evidence an attested copy of a judgment recovered on the 17th day of July, 1863, by one John Forbes, against the defendant in the Court of Exchequer in Ireland, and an attested copy of a writ of *fiari facias* issued on the foot of said judgment, and directed to the sheriff of the city of Dublin, forth of said court on the 3rd day of August, 1863, marked for the recovery of the sum of £34 18s. 2d., for debt and costs, besides the expenses of the levy thereunder, and of the sheriff's return thereon; and he further proved by Mr. Terence O'Reilly, the sub-sheriff of said city of Dublin, the delivery of said writ to him on the 3rd day of August, 1863, and that he delivered a warrant to seize under said writ to the sheriff's auctioneer, Mr. Thomas Dillon. He also proved by said Dillon, a seizure and a sale under said writ to the plaintiff for the sum of £30. The plaintiff further produced, and put in evidence, an indenture of assignment bearing date the 4th September, 1863, made between William Dargan, High Sheriff of the city of Dublin, of the one part, and the plaintiff of the other part, whereby, after reciting said writ of *fiari facias*, and the seizure thereunder, and the sale of said premises to the plaintiff on the 12th day of August, 1863, for the sum of £30 by public auction, said sheriff, in consideration of said sum of £30, assigned said premises to the plaintiff, to hold to him, his executors, administrators, and assigns, for the residue of said term of twenty-one years, subject to all rents and covenants in said original lease contained. With this evidence the plaintiff closed his case. The defendant produced and put in evidence an indenture of assignment, bearing date the 6th day of August, 1863, made between himself of the first part, Joseph Watkins and Joseph Farran Darley of the second part, and Joseph Franklin of the third part, whereby, in consideration of the sum of £262 9s. 8d. thereby recited to be then due and owing to the said parties thereto of the second and third parts by the defendant, he the said defendant assigned to said parties thereto of the second part the said premises, the subject of this action, to hold to them, their executors, administrators, or assigns, for the residue of the term of 21 years upon the trusts therein mentioned. The defendant also produced from the office for the registry of deeds in Ireland, an affidavit made to register as a statutable mortgage, a certain judgment recovered by one John Grennan against the defendant on 13th day of May, 1863, for the sum of £10 18s. for debt or damages. This affidavit stated that the defendant was possessed of the house and premises, No. 1, Summer-hill, in the county of the city of Dublin, in the respective parishes of Saint Thomas and Saint George, or one of them, and

was registered in said office on the 23rd day of May, 1863. He also produced an affidavit made to register as a statutable mortgage, another judgment recovered by the said John Forbes against the defendant on the 18th day of July, 1863, for the sum of £47 8s. 3d. besides £7 4s. 11d. for costs. This affidavit stated that the defendant was possessed of the house and premises, No. 1, Summer-hill, in the county of the city of Dublin, in the respective parishes of Saint Thomas and Saint George, or one of them, and was registered in the said office on the 18th day of July, 1863. The defendant's counsel then asked the learned judge upon this evidence to direct a verdict for the defendant. Counsel for the plaintiff objected that the assignment to Messrs. Watkins and Darley, though prior in point of date to that from the sheriff to the plaintiff, yet appeared upon the evidence of the sub-sheriff and his auctioneer, to have been made and executed after lodgment with the sheriff of the writ of *fiari facias* under which the sale had been had, and was, therefore, inoperative as against said assignment, the premises being bound from the day of the lodgment with the sheriff of the writ of execution. He also objected to the statutable mortgage in John Grennan's case, that it was a defective registry under the statute, the parish in which the premises were alleged to be situate being defectively stated, and that the statement of the sum recovered as being debt or damages also vitiated the registry. He further objected to the statutable mortgage in John Forbes case, that it was a defective registry under the statute, the parish in which the premises were alleged to be situate being defectively stated. He, therefore, asked his lordship to tell the jury, that if they believed the plaintiff's evidence, they should find a verdict for him. The learned judge, however, without leaving any question to the jury, directed a verdict for the defendant, reserving liberty to the plaintiff to apply to have said verdict turned into a verdict for the plaintiffs if the Court above should be of opinion that the assignment from the sheriff ought to prevail against the assignment to the Messrs. Watkins, and if said Court should think the judgment mortgage defectively registered or inoperative against the plaintiff. Accordingly, on the 5th November, 1864, the plaintiff obtained a conditional order, that the verdict had for the defendant Patrick Murray, should be turned into a verdict for the plaintiff, pursuant to the leave reserved, or that a new trial should be had. Against this conditional order, came was now shown on behalf of the defendant Murray. The only question really argued was whether the Mercantile Law Amendment Act, st. 19 & 20 Vict., c. 97, applied in the case.

*Morris*, Q. C. and *Bevagh*, Q. C., were for the plaintiffs.

*Purcell*, Q. C. and *O'Loughlin* for the defendant.

The defendant's argument was, that notwithstanding the prior lodgment of the writ with the sheriff, the assignment of the 6th August was protected by sec. 1 of the Mercantile Law Amendment Act, st. 19 & 20 Vict. c. 97, and that the word "goods" in that section included chattels real. For the plaintiff it was contended that the Act did not apply to the case of chattels real, and that the use of the expression "ac-

real seizure," in the section, showed that the word "goods" could not extend to chattels real, which were not capable of an actual seizure.

Dec. 13.—O'BRIEN, J.—This case was tried before me. Mr. Purcell, for the defendant, called on me to non-suit the plaintiff as there was no evidence of a seizure of the house for which the ejectment was brought. Now, the sheriff was produced, but he did nothing but hand in the writ, but his auctioneer, a man of the name of Dillon, was produced, and he stated, in point of fact, that he never went to the premises at all for the purposes of this writ, that he went to them in June for the purpose of another writ, but that under this writ he never went to the house to seize it, and that he never did seize it in fact. Upon that Mr. Purcell said there was no evidence of seizure. I was of opinion that as the case then stood, the plaintiff having produced the sheriff's deed to him, and having brought the action subsequently to the execution of that deed, there was no necessity of giving any proof of seizure. It was quite sufficient that the deed should have been executed. The case went on. Mr. Purcell then said that the legal estate did not pass by this deed of the sheriff, and he referred to several provisions of the Judgment Mortgage Act; but in the argument before us now that question was given up. However, the defendant then produced a deed of the 6th August, 1863, three days after the writ was lodged with the sheriff, and six days before the actual sale took place, and he said that at the time this deed was executed the property remained in the execution debtor. In that he was certainly borne out by the two authorities *Doe v. Jones* (9 M. and W., 372), and *Playfair v. Masgrove* (14 M. and W. 239). However, the question then raised for our consideration is, whether, inasmuch as the plaintiff's deed was actually executed by the sheriff, when executed it had not relation back to the time of the seizure so as to overreach any intermediate deed. The defendant insisted that at the date of this second deed the legal estate was not in the debtor, and that, therefore, nothing passed by the deed from the sheriff to the plaintiff. At the close of the case Mr. Beytagh produced Mr. Bradley, the solicitor who prepared the defendant's deed and who was the witness to it. There was no suggestion that the deed was not a perfectly *bona fide* deed, given in consideration of existing debts; no question arises as to that, but on the cross-examination of Mr. Bradley, it was sought to shew that he had notice of the execution. He was asked the question, however, and denied it. Well, that is not unimportant, as it would have been part of the duty of Mr. Bradley in taking an assignment of a chattel interest to have gone to the sheriff's office to inquire was there an execution. He said he had no notice. Well, on that state of things I directed a verdict for the defendant if they believed Mr. Bradley's evidence, reserving liberty to the plaintiff to move for a verdict if the Court should be of opinion that he was on the evidence entitled to it, defendant to be at liberty to rely on the deed of the 6th August, 1863. I took that down at the trial, and read it to the parties. There was really no discussion at the trial as to this deed being impeachable. Well, now, however, we have to consider the provisions of the Act of 1856, the Mercantile Law Amend-

ment Act. The first section of that Act provides: "no writ of *feri facias* or other writ of execution, and no writ of attachment against the goods of a debtor shall prejudice the title to such goods acquired by any person *bona fide*, and for a valuable consideration before the actual seizure or attachment thereof by virtue of such writ: provided such person had not at the time when he acquired such title, notice that such writ or any other writ by virtue of which the goods of such owner might be seized or attached, had been delivered to and remained unexecuted in the hands of the sheriff, under sheriff, or coroner." Now, supposing even that the deed had relation back to the seizure, still, here the defendant says he had not any notice at the time of the execution. As I have said, Mr. Bradley was examined and denied notice, and I deal with this case as if there was no proof of any notice. The various facts were stated which the plaintiff had established, and which he was entitled to rely upon. The evidence, so far as it went, negatived notice. Assuming that there was no notice what is the plaintiff's answer to this section? It is first said that the words in the statute are, "goods" of a debtor, and cannot be considered to include chattels real. What was the object of this Act of Parliament? It must be construed with reference to the Statute of Frauds, and in it the words used are "goods," and it has been settled that in that statute the words "goods" included chattels real. Looking at the definition of the word "goods," you will find that the word included, not merely chattels personal, but chattels real. That being so, this case comes within the Act, and I believe the only doubt is, whether there should not be a new trial. The verdict, in this case, does not preclude the plaintiff re-trying his own action, and it was not suggested by the plaintiff that by examining Mr. Watkins himself he could prove any notice. But where the plaintiff takes his case, and rests it on the state of facts which I have mentioned, and the question is, whether on that he is entitled to have a verdict, I do not think we are bound to give him a new trial. Of course, no matter what the value of the premises was, and what sum the plaintiff gave for them, he is entitled to have his legal right asserted; but I think it is not to be lost sight of that the premises were bought at the price they were bought at. That, of course, ought not to interfere with legal rights, but we should exercise a discretion, and, therefore, I believe, the rule is that the verdict below should stand.

HAYES, J.—I concur with my brother O'Brien. This was an action of ejectment for a term of years which was sold by the sheriff. The defendant was a lessee under a lease of 1834. (His lordship then stated the facts of the case.) In my opinion the plaintiff is not entitled to have a verdict entered for him. The object of st. 19 & 20 Vict., is to protect the dealings which a person may have, if those dealings are *bona fide*, and without notice of any writ being lodged with the sheriff. The Statute of Frauds had enacted that the property in goods should be bound from the time of the lodgment of the writ, so that any goods disposed of by the party after such lodgment might be followed by the sheriff and seized, and sold by him even though they might have been

sold by the owner for the purpose of paying the very debt for which the writ had been issued. That was the evil which was intended to be remedied by the Mercantile Law Amendment Act, which is in *pari materia* with the Statute of Frauds. It has been said that the Act speaks of an actual seizure, and so does not refer to a term of years. To that I answer, that the case being within the mischief intended to be remedied by the statute, ought, if possible, to be held to be within its words. But I see no difficulty in giving to the words "actual seizure" a construction which would make them apply to a term of years. It is not necessary that there should be manual delivery to constitute an actual seizure. In *Cole v. Davies* (1 Lord Raym., 724), it was held that a seizure of part was a seizure of all. In recent times, in *Balls v. Thick* (9 Jur., 304), Lord Denman says, that any act done by a person having authority which distinctly intimates to the party that he intends to execute the writ, is sufficient to constitute a seizure. According to these authorities it appears to me, that if the sheriff, having received a writ had, between then and the 6th August, gone to the premises, and announced that he would have sold under the writ, he would have done enough to constitute an actual seizure under the Mercantile Law Amendment Act. For these reasons I am of opinion that the party should retain his verdict.

LEFROY, C. J.—I concur with my brothers.

FITZGERALD, J.—I concur with the rest of the Court in thinking that the plaintiff is not entitled to have a verdict entered for him, and that is the way he has brought the matter before the Court. I think he fails on the point reserved, but it seems to me that the real controversy has not been decided, and that the case should go to a new trial. As to the case below, the plaintiff, who has a *prima facie* case, is entitled to succeed. I take the law to be, as to chattels real, that unless the case is protected by the Mercantile Law Amendment Act, the moment the writ is delivered to the sheriff it binds the chattels real, and when the writ is executed it overrides the intermediate dealings, unless they are protected by the Mercantile Law Amendment Act. I do not mean to go into that at present. What the Statute of Frauds deals with is, that the writ shall not bind the property in goods; but in dealing with this Act to amend the law as to trade and commerce, it is open to us to consider whether it has to do with any goods but such as are liable to actual seizure, which chattels real are not. I assume that the defendant is entitled to the benefit of the Act if he can bring his case within it. The Act was never submitted to the judge at the trial, and when the case came on to be discussed here, the senior counsel for the defendant shewed cause, and the argument proceeded, till at the last moment the Mercantile Law Amendment Act was referred to. So neither one party nor the other rested on the Act. What it provides is this. It has an exception resting on the previous law. The effect of the old law was, as I have said, and the Act says, that for the purpose of amending the law respecting trade and commerce, a writ of *fiari facias* shall not prejudice the title to goods acquired *bona fide* and for value before service. The party must shew that he

is a purchaser for value, *bona fide*, and that he had no notice. It lies on the defendant to ascertain by a jury that he had no notice of the writ of execution in question, or of any other writ. If the case had proceeded properly, it was a question to be submitted to the jury, on which the jury could have drawn their own conclusions. It cannot be said that there was any evidence because Mr. Bradley was examined, because Mr. Bradley did not do his duty. His duty was to go to the sheriff's office and search if there was a writ. For anything that appears, the deed might have been got by reason of the Messrs. Watkins and Darley knowing of the writ. That is the only point I have any doubt upon, and I think there ought to be a new trial.

LEFROY, C. J.—All that we decide in this case is, that there should not be a new trial.

*Cause shewn, allowed with costs.*

ECHLIN v. BRADY—January 12, 1865.

*Action for criminal conversation—Particulars.*

*Motion for particulars of occasions of criminal conversation refused.*

THIS was a motion on behalf of defendant that plaintiff should be directed to give particulars of the occasions on which the criminal conversation, for which the action was brought took place, and that all proceedings in the action should be stayed until the particulars should have been furnished. The action was one for criminal conversation with the wife of the plaintiff. The present motion was grounded on an affidavit of the defendant, stating his entire ignorance of the matter for which he was sued, and denying that he ever had had the criminal conversation alleged.

Byrne, in support of the motion.—This action is one in which the parties cannot be examined, and that is a circumstance which makes it the more necessary for the defendant to know exactly of what he is accused. The count here is in the form given by the schedule to the Common Law Procedure Act, a similar application was granted in the case of an action of slander in *Early v. Smith* (12 Ir. C. L. Rep., App. xxxix). The later practice has been in favour of using the power of the Court to order particulars to be given, in order that the defendant may know what case he has to meet. [O'Brien, J.—There is a distinction in the case of slander, because there the defendant might say either that he did not use the words complained of, or that the occasion on which they were used was privileged, and, therefore, for that purpose he may want to know what the occasion was; but no such defence arises in actions for criminal conversation.] I submit that the cases are exactly analogous.

HAYES, J.—There is a difference between this case and that of slander. In that case the gist of the action was the publication of the slander. Here it was a secret matter. It is like the case of a person suing an agent for a balance which the agent has

received. I remember Joy, C.B., said he would not allow that the defendant should call for the bill of particulars, knowing the matter very much better than the plaintiff, and, I think, in the same way that covers the present case. Here there is a denial that the thing took place at all. It may not be proved that it took place at all, as the only persons who could tell it are the guilty parties who cannot be examined.

O'BRIEN, J.—I have called attention to the difference which exists between *Early v. Smith* and the present case. From the nature of the action it is impossible to expect that the plaintiff should be able to fix the time. The fact may be presumed, and the jury may be satisfied from various circumstances, such as letters, &c., that criminal intercourse did take place, without their being satisfied as to the time when it took place. Let us see what hardship there is on the defendant here. If he be able to prove that at a particular time, of which evidence was given, he was not at the place at all, and that the evidence is false, the action fails, and if necessary also, the Court could give a new trial on the ground of surprise.

LEFROY, C. J.—The Court have come to the opinion, I am happy to say, unanimously, that there should be no rule upon this motion. My own notion is, that every decision should be founded upon principle and authority. There was neither principle nor authority cited in the present case. The principle applicable to such an application is that wise precaution which is given in the case cited, that the party applying to oblige his adversary to make an exposure of his case, must make that application founded upon an oath that he does not believe, and cannot form an opinion as to the matter with which he is charged, that the charge is so vague that he does not know what he is charged with. Well, then, there is a good authority, a good principle for making a rule in such a case; but is it possible to imagine that in this case he has so qualified himself? Under those circumstances we have unanimously come to the determination to refuse the motion.

## Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

### HARRIS v. DICKIE.

*Demurrer—Plea in abatement—Pendency of suit in England for the same cause of action.*

*To an action of debt upon a judgment the defendant pleaded that the plaintiff had issued a writ in England against the defendant then and now residing in England, for the same cause of action, and that the said action was pending, Held a bad plea upon general demurrer.*

This was a demurrer to a plea in abatement. The action was one of debt upon a judgment. The summons and plaint stated that on the 7th December, 1855, a writ was sued out in this court, in which the

now plaintiff was plaintiff, and the now defendant was defendant; and it was considered by the said court that the plaintiff should recover £103, and £12 for costs; and the plaintiff had not obtained any execution, and that all things happened, and times elapsed, &c. The defence was—that before this the plaintiff issued a writ in England against the defendant, then and now residing in England, for the same cause of action, and that the said action was pending. The plea did not allege that the plaintiff had declared in England.

*Palles* (with him *Hemphill*, Q.C.) in support of the demurrer.—My first proposition is—that an action in a foreign country is never pleadable in abatement. My second proposition is—that the Court cannot, by referring to the writ of summons, ascertain that the cause of action is the same cause of action. As to the first proposition, I refer to *Foster v. Vassall* (3 Atk. 589); *Bayley v. Edwards* (3 Swan. 703); *Hall v. Odber* (11 East. 124). The cases are all considered in *Smith v. Nicolls* (5 Bing. N. C. 208). England is a foreign country.—*Harris v. Saunders* (4 B. & C. 411); *Cox v. Mitchell* (7 C. B., N. S., 55); *Sperry's case* (5 Rep. 61 b); *Mitchell v. King* 2 Barnar. 143). There is no case on record in which an action in a foreign court was ever pleaded as a plea in abatement.

*Green*, contra. [*Monahan*, C.J.—Suppose issue were taken upon this plea, how could it be tried—by the Court or by the jury?] By the Court. That is evidence in England which is evidence in Ireland. An attested copy of a judgment in the Court of Exchequer in England would be evidence in this Court.—*Collins v. Lord Mathew* (5 East. 472). My proposition is—that the one court can take notice of the proceedings in another court in England, so as to bring the case within the rule that a person cannot be twice proceeded against for the same thing. There is no doubt that if this was a plea that there was an action pending in another court here, it would be good. That being conceded, I contend that the court will take notice that the court in England is a court of superior jurisdiction.

*Hemphill*, Q.C., in reply.—It is admitted that there is no precedent. The burden of supporting a proposition so novel is on the other side. There is at present pending in the Court of Exchequer in Ireland *Lewis v. Bartlett* (13 Ir. C. L. Rep. App. xxxix.), one of the heaviest cases ever tried in this country; and it was never thought of to plead there that an action was also brought in England for the same cause. An action pending in an inferior court cannot be pleaded. The pendency of a suit in a foreign court is no answer; nor is it that a judgment has been recovered in a foreign court.—*Smith v. Nicolls* (5 Bing. N. C. 221); *Bank of Australasia v. Harding* (9 C.B. 661). An Irish judgment does not rank as a debt of record in the administration of assets in England; nor does a writ in Ireland run in England, nor vice versa.

MONAHAN, C.J.—This is the very first time that such a plea was ever pleaded.

*Demurrer allowed.*

STUBBER v. HANRAHAN.—April 18, 20, 1865.

*Attorney's licence*—56 Geo. III. c. 56; 5 & 6 Vic. c. 82; 16 & 17 Vic. c. 63.

*An attorney who resided in Parsonstown, and ordinarily carried on business there, though he transacted business in Dublin through his son, who resided in his own house in Dublin, and who was not an attorney, was held not to be liable to pay a city licence under 5 & 6 Vic. c. 82, s. 16.*

*Douse, Q.C.*, in a number of cases of which the above was one, applied to the Court, stating that the plaintiff, Nicholas Stubber, had objected to the taxation of the costs of his attorney, Thomas F. Cooke, on the ground of want of qualification. The taxing officer declined to go into the question, and adjourned the taxation. Nicholas Stubber had been plaintiff in six actions, and defendant in a seventh. The son of Thomas F. Cooke, who has an office in Talbot-street, Dublin, and who is not an attorney, was the party acting all through; his name is William E. Cooke; the father is a Parsonstown attorney. It does not appear that W. E. Cooke is an attorney, or acts for any other attorney. The notice of this motion is addressed to the father. The father and the son have made affidavits, and Stubber has made an affidavit in reply. The Court will hold that the son is substantially the father, and not a town agent acting for a country attorney. 56 Geo. III. c. 56, ss. 65, 66, 67, 68, is the old Stamp Act, and stands for a portion of this motion unrepealed. Our relief is claimed under the 68th section. The present Act is the 5 & 6 Vic. c. 82.—*Keegan v. Mowlds* (8 Ir. Jur. N. S. 416). The only distinction is—that there he was the defendant. It is admitted that this man has only paid the £6 licence. He says he was not bound to pay the £12 licence. But on the facts here I contend that he does reside in the city of Dublin for this purpose, because the son practically does business in his father's name. Or if the Court will not think this, then the father is allowing a person to carry on his business who is not qualified; and this would equally with the question of residence prevent him from recovering his costs. If an attorney who is substantially resident in the country as practising quarter sessions attorney, conducts his business through a clerk in an office in Dublin, he is practising in Dublin. The whole question of the relations of country attorneys and town agents who are not themselves attorneys will be an unpleasant one when it is opened. In *Keegan v. Mowlds*, no doubt, the facts were stronger than here. [*Monahan, C.J.*—I do not see why the taxing officer should not first decide to what costs Cooke is entitled.] I find a case where the master disallowed items on this principle, but did not disallow the entire bill.

*Palles Q.C.*, (with him *Byrne*) contra.—Nicholas Stubber in reply to the affidavits of Cooke sen., and Cooke jun., states that he has seen various persons in the office in Dublin who, Cooke stated, were clients; and that he often said he had to leave him to attend them. This application is made in ten cases, in some of which rules to change have been entered, and therefore as to some of them, this Court has no jurisdiction

to enter on this question, which would properly arise on a plea to an action brought to recover the costs in them. These rules were entered by the plaintiffs themselves. They are in this dilemma: they should either apply to set aside the rules, or appeal from the taxation. By the Act of George III. and the two Acts of Vic. the certificate remains in force till Jan. 6th in the following year, and is to be stamped as of the usual residence which by 5 & 6 Vic. c. 82 has received the meaning of being where the attorney shall ordinarily carry on his business. A man is intended to have only one residence. Where then does or did Cooke at the commencement of the year 1864 ordinarily carry on his business? [*Monahan, C.J.*—Is that clear, that if a certificate for the country be taken out, and the party comes to town and resides there in the same year, that the certificate taken out will do?] I think so. [*Monahan, C.J.*—The only question is—if he ordinarily carries on his business in the city of Dublin within the meaning of this Act.] He ordinarily carries it on in Parsonstown.

*Douse, Q.C.*, in reply.—[*Christian, J.*—Does not a solicitor ordinarily carry on business where he has an office and sees clients; and is not any business which grows out of that rather extraordinary business?]

MONAHAN, C.J.—The case is quite clear. No principle is better established than this—that an Act of Parliament imposing a tax must be construed most strictly. Here one class of attorney is to pay a higher tax than another. The language must therefore be what will leave no doubt whatever. The Legislature does not make it necessary to pay the higher tax for the transaction of business in the superior courts. It does not make that the criterion. But if the attorney ordinarily resides in the country he pays the smaller tax. 5 & 6 Vic. c. 82, s. 16, provides to “prevent evasion of such higher duties if any person shall ordinarily carry on his business within the city of Dublin, &c., or shall for the space of forty days or more in any one year reside within the limits aforesaid, every such person shall be deemed to be resident, &c. and shall be liable to the higher duties.” Therefore residence is out of the question. The only question is—if he ordinarily carries on his business within the city of Dublin. He does not, because he ordinarily carries it on elsewhere, with the exception of that business which he carries on through his son, who resides in his own house.

*Motion refused.*

STUBBER v. ——— April 20, 1865.

#### *Inspection of documents.*

*The plaintiff in an ejectment in which an appeal was pending to the Court of Exchequer Chamber applied to the Court of Common Pleas to obtain a certified copy of a deed which was not given in evidence at the trial, but which was alleged to relate to the subject-matter of the ejectment, and to be in the custody of a person who held it as a trustee for both the plaintiff and defendant. The Court refused the motion. The Court of Chancery alone*



*has jurisdiction to grant inspection by way of anticipation.*

In this case, which was an ejectment tried before Christian, J., and in which an appeal was pending to the Court of Error,

Dowse, Q.C., for the plaintiff, applied to obtain a certified copy of a deed of 1752, being the marriage settlement executed on the marriage of the father and mother of the plaintiff's grandfather. [Christian, J.—On the trial the only deed given in evidence was one of 1809, on the separation of Ohetwoode Hamilton and his wife, and two memorials of other deeds.] We want the copy for the appeal now pending. [Monahan, C.J.—How can that be? Must not the appeal be decided on the grounds before us when we made the order? As I understand, the documents used at the trial are all we have power to order the production of. You may bring a new action and apply for documents not produced on the former trial.] Under the common law jurisdiction of the Court I think we are entitled. [Monahan, C.J.—That might have been before the trial in this Court.] We are contending for a new trial. [Christian, J.—We must take it as a fact that no such deed was given in evidence at all, and therefore if you got the copy you could not make any use of it.] But under the common law jurisdiction of the Court we are entitled to a copy of a deed which Hallows holds as a trustee for both parties. [Monahan, C.J.—No matter who holds it, has the Court jurisdiction?] It has. [Monahan, C.J.—Except for the purpose of a pending suit?] The deed has to do with the lands, and we cannot tell what effect it may have till we see it. It may contradict some of the evidence which was given in the case. We are perhaps not entitled to it as a matter of discovery, but if this be a deed, the common property of both parties, the Court will not require us beforehand to show what use we will make of it. Could not we move now for a new trial on the ground of surprise? [Monahan, C.J.—Scarcely now.] I admit we can only use it for a new trial motion.

Battersby, Q.C., contra, was not called on.

MONAHAN, C.J.—We have no jurisdiction to grant this except for the purpose of a cause pending in the Court. The Court of Chancery alone has jurisdiction to grant inspection by way of anticipation. It is the proper court to make the application to.

CHRISTIAN, J.—The deed as now opened by Mr. Dowse would contradict the case made by the plaintiff at the trial.

*Motion refused.*

LONGMANS v. WALLACE.—June 4.

*Memorandum of satisfaction—Common Law Procedure Act, 1853, sec. 144—Irish Bankrupt and Insolvent Act, 1857—Arrangement clauses.*

The defendant petitioned the Bankrupt Court under the arrangement clauses of the Bankrupt Act, 1857, and protection was given on the 15th April, 1858. The plaintiff's attorney was cautioned against proceeding against the defendant for the

amount of his claim; but he did proceed, and the defendant gave a consent for judgment, which on the 21st May, 1858, the plaintiff registered as a mortgage against the lands of the defendant which had been previously mortgaged to the Ulster Bank, and were afterwards sold. Promissory notes for the amount of the composition agreed on were tendered to the plaintiff. The defendant obtained his certificate on the 11th October, 1859. The Court declined to grant a motion made on behalf of the Ulster Bank that a memorandum of satisfaction might be entered upon the judgment with a view to making title to the lands against which the plaintiff had registered it.

Porter, on behalf of the Ulster Banking Company, applied that a memorandum of satisfaction might be entered upon a judgment obtained by the plaintiff against the defendant for the sum of £25 8s. 6d. and £11 13s. 4d. costs. The affidavit of the solicitor stated that the plaintiff obtained a judgment for £25 8s. 5d. against the defendant; that the defendant filed a petition in the Bankrupt Court under the arrangement clauses of the Bankruptcy Act; that an order was made on the 15th April, 1858, appointing a meeting on the 24th May for proof of debts; that protection was given on the 15th April; that a certificate was given, that a composition was accepted to give bills for a portion of the debt, and that promissory notes were tendered to the plaintiff and the amount of them subsequently lodged in the Bank. The plaintiff's attorney was cautioned against proceeding, and he did proceed pending the bankruptcy proceedings, and a consent for judgment was given. The composition was made with all the creditors but the Ulster Banking company. This judgment was registered as a mortgage against lands which, with all the rest, came into the Bankrupt Court. These lands were previously mortgaged to the Ulster Banking Company. They have been since sold by private sale, at full value, and I apply to have satisfaction entered to enable title to be made—20 & 21 Vic., c. 60, sections 352, 145. There is no dispute but that this was a debt at the time of filing the petition. The certificate, when given, operates as a declaration that everything was done which was necessary.

Falkner, contra.—This motion is made under section 144 of the Common Law Procedure Act, 1853. It is decided that the Court will only do it in a clear case. The judgment was registered as a mortgage on the 21st May 1858 (which is the date of the affidavit to register); 11th October, 1859, was the date of the certificate—20 & 21 Vic., c. 60, ss. 343, 346, 347. *Fluester v. McClellan* (8 C. B., N. S., 357); *Southern v. Sidney* (3 Jur., N. S. 1239); *Naylor v. Mortimore* (9 W. R., 784); *Alleard v. Wesson* (7 Excheq., 753).

Porter in reply.—I admit that the Court must see the case to be clear. There is no doubt in this case unless there be a doubt of the power of the Legislature to enact. The protection under s. 343 is protection of the petitioner's person and property from process. The certificate of conformity by the 145th section is made an absolute discharge of all debts, and

this certificate has the same operation. [*Monahan, C.J.*—Would it be a discharge of a mortgage?] Not if it existed previously. But by section 331 this judgment mortgage has no priority over the simple contract debts. We could not have prevented the plaintiff from obtaining that judgment, and not to waste the estate, we gave a consent. He had been warned. The effect of registering the affidavit as a mortgage is a different thing. It is admitted by the plea in *Allcard v. Wesson*, that the plaintiff had no notice, but here the plaintiff had notice. [*Christian, J.*—What do you say to the word “thenceforth” in s. 352?] It means that no previous proceeding shall have any binding force till ratified by the certificate, but when given, the certificate is an absolute discharge referring back. [*Monahan, C.J.*—What is there on the fair construction of “thenceforth” to push back that?] Section 352 says the certificate shall operate to all intents and purposes as fully as if the same were a certificate of conformity. The mortgage was not duly registered, because it was done pending the proceedings. [*Ball, J.*—Have you any authority on the construction of this certificate?] No; only the general principle of the Act of Parliament. [*Ball, J.* It is susceptible of this construction that the debt is discharged *quoad* the person.] Section 352 enacts that the effect is to be the same as that of a certificate in bankruptcy.

*MONAHAN, C.J.*—We do not think that under these sections we can deprive this person of his mortgage.

*CHRISTIAN, J.*—My opinion goes upon this: that on the section of the C. L. P. Act this is not so clear as Mr Porter would represent. The question when the time to argue it shall come is not free from doubt.

*BALL, J.* concurred on both the grounds stated by the Chief Justice and Christian, J.

*Motion refused.*

MIDLAND GREAT WESTERN RAILWAY COMPANY v.

NUGENT.—Nov. 18, 1864.

*Setting aside defences—Duplicity—Common Law Procedure Act, 1853, s. 70.*

*To a summons and plaint which stated that the defendant had covenanted with the plaintiffs for good title to convey certain premises, and that it should be lawful for the plaintiffs, &c., to enter upon and enjoy the said lands, and that the plaintiffs were willing to enter, but that one J. B., under a demise heretofore made to him by the defendant entered, and before the execution of the indenture of conveyance to the plaintiffs, and since, continued in possession, and excluded, and still excludes, the plaintiffs, the defendant pleaded that he did not commit the breaches of covenant complained of, or any of them. This plea was set aside as embarrassing.*

*Carleton, Q.C.,* (with him *Latouche*) moved to set aside the pleas in this case as being double, and involving several defences. The action was brought upon an indenture in which the defendant did covenant, that notwithstanding anything made, executed, &c.,

he had good right to convey certain premises, and that it should be lawful for the plaintiffs, their successors and assigns, to enter upon the lands, and enjoy the lands in fee-simple without interruption of the defendant, or anybody claiming under him. The plaint states that the plaintiffs were willing to enter, and have asked permission to enter upon the said lands; but one John Bryan, under a demise heretofore made to him by the defendant, entered, and before the execution of said indenture, and since then, has continued in possession, and still excludes the plaintiffs. The defence is, that the defendant did not commit the breaches of covenant complained of, or any of them. The same is pleaded to another count. This amounts to *non infregit*. Several defences are open to the defendant on this pleading, and it is double.

*Byrne* in support of the plea.—This is a good plea.

—*Coulson v. Attwood* (26 L. J., N. S., Ex., 244).

The English rule is not different from the Irish one. By the Common Law Procedure Act, 1853, s. 70, the defence, by way of denial, must traverse some one or more than one material matter of fact. This is a cumulative averment. In *Winton v. Moore* (8 Ir. C. L. R., 234), the Chief Baron speaks of a cumulative averment. Baron Greene, I admit, dissented. [*Latouche* said that that case was overruled by *Brennan v. Williams* (9 Ir. C. L. R., App. xxxvi.)] The Court are not bound by that decision. There was no appeal upon the motion. There is no single breach here complained of except this cumulative averment. [*Monahan, C.J.*—The meaning is that before the indenture was executed, you conveyed to Bryan, and that Bryan keeps them out. There are two allegations, either of which you might traverse. If you could plead the general issue, they would have to prove two things. What do you mean to prove at the trial?] That Bryan did not keep the plaintiffs out, and therefore an issue could easily be framed. This plea would have been good under the old system. There is a dove-tailed averment in the summons and plaint. [*Monahan, C.J.*—It is necessary to sustain the plaint to say two things, not merely that Bryan kept the plaintiffs out, but also that his title is through you. You might plead that he did not derive from you, but that would be admitting that he did keep them out. Then you might also plead that though he did derive under you, he did not keep them out. Thus on a bill of exchange you could not traverse the acceptance and the notice of dishonour. The only question is, if this be compound, whether you can plead *non infregit conventionem*.] Would not an issue set this clear? [*Monahan, C.J.*—Not if you be wrong: we may adopt either of the views in the Court of Exchequer. [*Christian, J.*—Is there any case which lays it down that mere duplicity is a ground for setting aside a plea unless it be embarrassing?] No; but there is an authority the other way.—*Wendland Railway Co. v. Blake* (6 H. & N. 410). [*Carleton* then cited *Austin v. Tufts* (8 Ir. C. L. R., 30. *Christian, J.*—The Chief Justice there says the plea is double and embarrassing: how is a plea embarrassing merely because it is double? The words in the section, “The defence shall traverse one or more than one material matter of fact,” would lead to this, that a defence was not necessarily bad because it tra-

versed more than one material matter of fact. [*Monahan, C. J.*—We have been in the habit of setting aside such pleas. What is the meaning of "traversing one or more?" It may be that that is where two elementary facts go to make up one fact.] The Common Law Procedure Act intended that the parties should have a right to traverse as they had traversed before, and that the defendant might traverse more than one material matter of fact.

*La Touche* in reply.—The plea traversing the breach of the covenant in *Bullen and Leake* is, "that the said G. H. did not enter into the said house, or evict the plaintiff therefrom as alleged." The plea traversing the title is "that at the time the said G. H. had no lawful claim or title," &c. In *Brennan v. Williams*, Fitzgerald, B., says, "If the defendant intends to put in issue two distinct averments, he should do it by separate pleas. [*Ball, J.*—Is it embarrassing to compel the party to prove two things?] *Monahan, C. J.*—Supposing the defendant's real case to be, that Bryan did not disturb you, but that he does not mean to controvert the fact of the title, it may be very inaccurate to say that that is embarrassing, but yet such a construction ought to be adopted as would not put the party to unnecessary expense, and upon that ground I must have used the language I did in *Austin v. Tufts*. It is embarrassing, not for pleading, but because the plaintiff does not know what the defendant is going to put him to prove.]

*MONAHAN, C. J.*—We must follow what we have been in the habit of doing, and set aside these pleas on the ground that they traverse two distinct matters of fact.

*CHRISTIAN, J.*—I should have some difficulty in coming to the conclusion that because the pleading is double, it is embarrassing, considering that special demurrers are abolished, and considering what is said in *Welland Railway Co. v. Blake*. But I think the question is no longer open, whether being double is not being embarrassing. *Austin v. Tufts* is in point.

*MONAHAN, C. J.*—Let the defendant, in the ordinary way, apply on an affidavit, if he wants to plead two things, and let him have additional time to plead, and let the plaintiff have the costs of this motion.

*Motion granted.*

**STUBBER v. ROE—May 9.**

*Venue—Ejectment.*

*The plaintiff, in an action of ejectment for non-payment of rent, having prima facie satisfied the Court that there was reasonable apprehension that he would not get a fair trial in the county in which the lands were, the Court, upon the motion of the plaintiff, changed the venue.*

*Buchanan* (with him *Serjeant Armstrong*) for the plaintiff, moved to change the venue, from the Queen's Co. to Dublin. The action was an ejectment for non-payment of rent. We say there is a strong hostility towards us in the Queen's County. The affidavits on the other side do not state a witness by

name whom they mean to examine. On of the defendants, a medical man, says it would be inconvenient to him to leave his patients. Virtually the question is the title.

*Battersby, Q. C., and C. Hamilton, contra.*—[*Monahan, C. J.*—It is not alleged by the defendants that the plaintiff is a pauper. The sole question is, has the plaintiff *prima facie* satisfied us there is reasonable apprehension he will not get a fair trial.] It is the defendant's *prima facie* right to have the venue where it is. These affidavits impute partiality to the magistrates of the county. The plaintiff seeks to have the venue changed on three grounds—1. Violence on the occasions of making distress, some of them as long as 14 years ago, and some 7. As far as it is possible to contradict these statements, the persons implicated have come forward and denied them. The plaintiff does not state he was present, but states from hearsay and belief. We have affidavits of those who were present. His second ground is, that 53 jurors out of 153 on the panel are either tenants, or connections or relations of tenants. That is contradicted. The gentleman who is agent of these estates, *Hamilton*, says, "It is not true that there are 53 jurors who are tenants, or connections, or relations, for deponent hath carefully compared the panel with the rent-roll, and states there are but 4 who are tenants of the said estate, and but 3 who, to the best of deponent's belief, are connected with them." The medical man saith there are not more than 7 or 8 who are tenants or relations, or connections of said tenants, and that he believes the statement to be grossly inaccurate. The third ground made is that a prejudice exists against plaintiff, and in favour of the defendants.—*Jackson v. Lodge* (1 Ir. Law Rep. 161). [*Ball, J.*—Was this before the Common Law Procedure Act?] It was. The defendant's affidavit denied that he had tampered with the jurors, and the existence of the prejudice. The Court refused the motion with costs. [*Ball, J.*—No case was made.] It was stated that there was a strong prejudice. The plaintiff here does not say he was ever injured himself.

*Serjeant Armstrong* in reply.—The discretion of the Court is absolute and very wide.—C.L.P. Act, 1853, s. 196. This differs from the ordinary venue motion. This is a case in which the plaintiff has no selection. We swear that, in 1863, men who went there to make a distress were turned out of the house, and were detained, and threatened to be thrown over the bridge, and there is no denial that they were detained. As to the 53 out of 153 tenants, *Hamilton* says, that he knows the tenantry better than we do, and knows there is nothing of the kind, which is strong to show that he has influence in the country.

*Motion granted.*

## Court of Exchequer.

Reported by William Albert Sargent, Esq., Barrister-at-Law.

[BEFORE THE FULL COURT.]

CONDON V. GREAT SOUTHERN AND WESTERN RAILWAY COMPANY.—May 29 & 30, 1865.

*Conditional order—New trial—Death caused by railway company—8 & 9 Vict., c. 93.*

*In an action against a railway for damages for the death of a child aged 14—Held, that the jury are to consider whether there was a reasonable probability of future pecuniary benefit to the parents, or else has there been past pecuniary benefit; these being the only grounds for damages. The service to be rendered, under Lord Campbell's Act must be substantial, not as in case of seduction.*

THIS was an action brought by the plaintiff to recover damages for the death of her son, Michael Condon, who it was admitted was killed by the negligence of the defendants in driving one of their engines. The case was tried before Mr. Serjeant Armstrong at the last Limerick Assizes, and the jury found a verdict for plaintiff with £10 damages and costs. A conditional order was obtained for a new trial. There were four counts in the summons and plaint to which the defendants pleaded several defences, but it is not necessary to refer to the pleadings; more particularly, for the only question in the case (all others being abandoned by consent) arose on the 7th issue, which was "whether the plaintiff, or any or either of the persons for whom or on whose behalf she has brought this action did sustain any pecuniary loss whatsoever by reason of the matter in the said writ complained of." Plaintiff's first witness, plaintiff herself, Ellen Condon, proved she was mother of Michael Condon, who was killed; that Michael was 14 years old. He was able to do the business in his father's absence; to go four miles and bring a load of hay, and fodder the cows, and take in the calves to the butcher's, and bring the cows back and forward, and count them and look after them all when his father was away, and he would go with the donkey cart for coals. That he would assist her in carrying on the business. He would be now nearly as useful as his father. On cross-examination she admitted Michael got no wages from her husband's employer (her husband was killed at the same time with Michael, and she got £400 damages for his death some time ago). He used to help his father, and was sent to school; never sent Michael to earn anything. Plaintiff's second witness, Robert Heuston proved that plaintiff's husband had been his herd. Michael was a very small boy. I think he might drive a donkey, or pick stones off a field; he might be worth sixpence a day. Cross-examined—He was very little and delicate; I would not take him to be more than 10 years of age. He never earned anything from me.

Coffey, Q.C., for defendants, submitted there was no evidence to go to the jury to sustain the 7th issue for plaintiff, and asked the learned serjeant to direct a verdict for the defendants on that issue.

Butt, Q.C., for plaintiffs, insisting there was evi-

dence, the learned Serjeant declined to direct thereon for defendants.

Serjeant Armstrong, in charging the jury, told them that in his opinion it was not necessary, in order to maintain the action, that the deceased boy should have been in receipt of wages which he handed over to his father or mother; that they might consider whether in the changed condition of the mother, occasioned by the father's death it was reasonably to be expected that if the boy had lived he would have been of some appreciable and substantial benefit to his mother by sharing her labour and thereby enabling her to earn the more for herself and her other children (as to which they might consider his past conduct, and the services he had rendered) or by actually earning something which he would have allowed her to have the benefit of. That there was no evidence he was undutiful or indocile, but rather the contrary. That they might consider whether, if he were able to earn money, he would have helped his mother by those earnings; but in this view, if they chose to adopt it, they should allow and deduct for his reasonable support, and consider only the simple profit (if any) possibly derivable from his earnings. That they should consider the boy's age, the chances of his life dropping, the probability that if he had lived he would, ere long, have been doing for himself, and not for his mother or the children. That he would have been under no legal obligation to have contributed to their support, even though able to do so. That they should not consider the mother's feelings with a view to damages; but on the whole, be moderate, if they should think it a case for damages at all. There was no objection taken to the learned serjeant's charge.

Exham, Q.C., for plaintiff, showed cause against the conditional order which had been obtained on the grounds that the verdict was against evidence, and the weight of evidence, and for misdirection of the learned serjeant. The sole issue is whether there was any pecuniary loss sustained by the plaintiff in the death of her child aged 14. It is a fallacy that a child must have been proved to have been in receipt of some pecuniary salary to support such an action as this, and the loss of a reasonable probability in future of pecuniary gain to the family of the deceased, is the gist of the action. It is not necessary that child *eo instanti* of his death, should be of pecuniary advantage to his family—*Pim v. the Great Northern Railway Company* (4 Best & Smith, 396); *Franklin v. South Eastern Railway Company* (3 H. & N., 211); *Duckworth v. Johnson* (4 H. & N., 653); *Dalton v. South Eastern Railway Company* (4 C. B., N. S., 296).

Coffey, Q.C., contra, in support of order.—There is no case where it was held that such an action would lie, where there was not something actually earned by, or given to, the deceased before his death. [*Pigot*, C. B.—A servant should be procured to supply the place of the child who was killed.] *Avery v. Bowden* (6 El. & Bl. 974); *Mahon v. Ellis* (6 H. L. Cases, 993). The other side admitted that if deceased had been an infant in arms the damage would have been inappreciable, but where is the line to be drawn between that case and the present, or when

are you to say that you can estimate the loss?—*Franklin v. South Eastern Railway Company* (3 H. & N., 653).

*Jellatt, Q.C.*, on the same side.—This is, in a great measure, a case of first impression, and regard must be had to the construction of the statute 8 & 9 Vict., c. 93—*vid. Duckworth v. Johnson* (4 H. & N. 653). The service to be proved here is different from that which is necessary to maintain an action for seduction. In the latter case the action depends upon a fiction of law, and the slightest imaginable service, even pouring out tea, has been held sufficient to satisfy the law, but here there must be a real substantial loss incurred. There is no survivorship where two have been killed together; between those two, therefore, father and son, it cannot be maintained here that the jury were at liberty to estimate the damages by taking into consideration the benefit which the boy might possibly have rendered in supplying, in some degree, his father's place. [*Pigot, C.B.*—This would go to answer an action for the death of the father, and after that an action for the death of the child. Suppose 10 of a family are killed simultaneously, how can an action be brought and damages estimated if we take your view?] It was presenting to the jury a state of facts that did not arise.

The Court did not call for a reply, but intimated that they would deliver judgment next day (May 30th). On the following day, accordingly, the unanimous decision of the Court was delivered by the Lord Chief Baron.

*PAJOR, C.B.*—There is no difficulty as to the rule of law to be applied in this case, the only question is as to its application. It has been established by many decisions, that the damages are to be estimated by the pecuniary loss sustained. The jury are to consider whether there was a reasonable probability of future pecuniary benefit to the mother, the plaintiff in this case, if the deceased had not been killed. The latest cases on the subject are *Pim v. Great Eastern Railway Company* (4 Best & Smith, 396), and the same case at the original hearing (2 Best & Smith, 759). We have to determine whether there was any evidence of wages previously received or earned by the deceased, and we think there was evidence enough to leave it to the jury to say whether deceased had rendered services, and if so, what, to his mother; and there was evidence that he was so disposed, and that he would, probably, in future, be of advantage to her. The plaintiff's employer estimated the value of the boy's services at a sum, small indeed, but yet something—6d. a-day, that is 3s. a week. The jury then were to consider the motives which actuate people in an humble walk of life, and determine whether there was a reasonable probability that deceased would have fulfilled the ordinary duties of a child to its parent, which, though of imperfect obligation, are yet duties and to be expected. There was a suggestion in the course of the argument that the jury may have had their minds directed to the estimating the services done and to be done by the child, as in substitution of benefit formerly derived from the father, and if at the trial this objection had been raised, perhaps the defect would now have to be remedied as the damages given for the child's death might then have

been in the nature of a double remedy, but this objection was not taken. The judge only told the jury that they might consider, whether in the changed condition of the mother, occasioned by the father's death, it was reasonably to be expected, that if the boy had lived, he would have been of some substantial benefit to his mother. That they might take into consideration his past conduct, and from that conjecture as to the future. See *Dalton v. South Eastern Railway Company* (4 C. B., N. S., 296). The jury were then told to weigh against these considerations the fact that the son might leave his family and provide for himself when he grew up to man's estate. Thus, the judge fairly put the case to the jury, and, as I said before, even if his direction was faulty, when it was not objected to at the trial, it cannot be objected to now. If the jury had been misled, we might have sent the case to another jury, but even if the small damages that were given had been larger, it would have been no reason for us now to disturb the verdict. It was suggested to us that we were not to hold that any small service would be sufficient to sustain the action, as in the case of seduction, we wish to be understood as giving no sanction to that argument. The necessity for proving some slight service to support the technical grounds on which the action of seduction is brought, is different from the pecuniary loss necessary to be sustained under Lord Campbell's Act. A mere scintilla of evidence is not enough, there must be a reasonable probability of future, or else past, services rendered by the deceased. The sole objection is, that the judge left the question of damages to the jury, and we cannot hold that he ought to have directed for the defendants. It follows, then, that the rule must be discharged.

*FITZGERALD, B.*—I agree with my Lord Chief Baron, and the rest of the Court, but I have more doubt in deciding whether the judge should have determined with regard to the survivorship of the son or not. It was urged upon us that this case would be very important as a precedent, but we have only decided that there was evidence, in this particular case, to go to the jury, and nothing more.

*Coffey, Q.C.*, then applied for leave to appeal, if, on consideration, he should deem it advisable. There was a principle involved in the case far beyond the small damages given. [*Hughes, B.*—The appeal would not determine the principle any more than this judgment has done.]

*The Court refused the application.*

## Court of Bankruptcy & Insolvency.

[Reported by John Levy, Esq., Barrister-at-Law.]

[BEFORE BERWICK, J.]

RE THE BANBRIDGE EXTENSION RAILWAY.

*Railways—Bankruptcy of joint-stock company—Trading and commercial purposes.*

*A railway is a joint-stock company established*

*for trading and commercial purposes. Where a railway has been partly made, by execution of earth works, although rails have not been laid, and no traffic or trading has taken place, or could take place; it is not necessary to prove trading on the part of the company, and the company may be declared bankrupt as one established for trading and commercial purposes.*

THIS case came before the Court on a motion to shew cause against an order of adjudication declaring the Banbridge Extension Railway Company bankrupt.

J. T. Ball, Q.C. Kernan, Q.C. and Falkner, were for the petitioning creditor in support of the adjudication.

J. E. Walsh, Q.C., Harrison, Q.C., and Sidney, Q.C. were for the railway company, and contended that under the circumstances of the case, and inasmuch as the railway never was opened for traffic, that, in fact, as nothing was done but the construction of some of the earth works, and there having been no traffic, or no trading of any kind, the company could not be declared bankrupt.

The facts appear in the judgment of the Court.

BENWICK, J.—This case comes before me on a motion to shew cause against the adjudication by which this company was declared bankrupt on the 30th day of March last, and in order that the real question between the parties should be clearly put in issue, it has been agreed that I should take down and add to my order the following admissions as part of the cause shown, namely—"That the railway in question was partly made and in process of formation, in pursuance of the 24th & 25th Vict., c. 89, that the company was incorporated under that Act, and that as a matter of fact, the railway had not yet been completed, or any part opened or used for carriage of passengers or goods, but that lands were purchased, shares issued to shareholders, and that the petitioning creditor's debt was for work done in course of formation of the line." And on this state of facts I am called on to say that no case has been made against this company to bring it within the operation of the Irish Bankruptcy and Insolvency Act. The first point relied on is, that no evidence has been given of an actual trading, which, it is alleged, is a condition precedent in all cases before an adjudication can be made, and to sustain this position, much stress has been laid on an observation of mine in the Bagnalstown and Wexford Railway case, in which I expressed an opinion that proof of trading was necessary to sustain an adjudication against a joint-stock company under this Act of Parliament, and, certainly, if I were justified in that conclusion, it would follow as a matter of course, that the adjudication in this case could not be sustained, inasmuch as the undertaking has not reached that stage at which it was possible to commence an actual trading, such as was contemplated in the act of incorporation; but I am satisfied, on consideration, that the view I took of the 151st section of the Bankruptcy and Insolvency Act, and which, under the circumstances of that case, was not necessary for my decision, nor, indeed, was it the subject of much argument, was too narrow, and that the true meaning of that section is that if a company which comes within

the description of a joint-stock company in the interpretation clause of the Act commit an act of bankruptcy it should be dealt with in the Court of Bankruptcy as all other bankrupts are. But then arises the question which has been so ably argued by Mr. Harrison. Is the present company shown to be such a joint-stock company? and it is contended that to bring any such company within the operation of the Bankrupt Laws, it must be shown to be engaged in trade or commerce, and that the mere proof that a company is a railway company, and incorporated as such by Act of Parliament, is not *per se* sufficient, inasmuch as no railway company can be said to be engaged in trade and commerce till it has held itself out to the public as undertaking the carriage of passengers or goods, and several cases have been cited from the decisions in which, and the opinions of the learned judges in their judgments therein, it appears to be held that there is no obligation imposed by law upon a railway *ex vi termini* to become carriers, but that before they become answerable as such, and liable to any obligations in that character, it is necessary that they should hold themselves out to the public as engaging to act in that capacity. Now, I am quite willing to concede that to bring a joint-stock company within the interpretation clause of the Bankruptcy Act, it must be one for commercial or trading purposes, and if it were necessary for me to decide in the present case whether this company had begun to trade in such a manner as to make themselves liable to all the obligations of common carriers, I should require to look at the authorities and examine the present code of railway law with a little more attention than appears to me, in this case, necessary. I should, however, just remark, on this point, that when I find an obligation imposed by law on all railways to be carriers of her Majesty's troops, and when I read the provisions of "the Railway and Canal Traffic Act, 1854," which appear plainly to impose upon every railway the duty of conducting the carrying trade in connection with their line, I should have great difficulty in arriving at the conclusion that a railway was not necessarily a company established for commercial purposes, and bound by the terms of its incorporation to act as such. But, I am not called upon to decide this question at all, and I decline to enter into any such speculation. The question before me, and the only one I have to decide, is not whether this company had, as a matter of fact, become a trading or commercial company by having actually engaged in trade or commerce, but simply whether it was a company "associated for commercial or trading purposes," the intention with which the Act of Incorporation was obtained, and not the extent to which that intention was carried into effect, being the sole question for decision. By the interpretation clause of the Act, joint-stock companies shall include "every company and body of persons associated for any banking or other commercial or trading purposes in Ireland, and incorporated by statute or charter." In this, and every other similar case, I must, therefore, look to the Act of Incorporation to arrive at the proper conclusion, and when I consider the Act by which this company was established, I can have no doubt whatever of the intention of its promoters, the object

with which it was obtained, or the purposes it was intended to fulfil. I find it recited in the Act of Incorporation that it was to be a railway in connection with others already made, that it was considered of great public advantage to enable it to enter into traffic agreements with other companies, and to enter into agreements for working the traffic on the proposed line with the engines and carriages of another, the Ulster Railway Company. By the 35th section, the tolls for the use of the railway are defined for the different specified articles conveyed upon the railway. By the 36th section, the tolls for passengers and animals to be conveyed in carriages upon the railway are specified. By the 37th section, the tolls for the use of engines, &c., by the subsequent sections, the tolls for the carriage of goods and passengers are regulated; and by the 61st section it is enacted, that the deposit shall not be repaid unless the company shall, within a given time, open the railway for the public conveyance of passengers, or prove that one half of the capital has been raised by shares and expended. And when I find Lord Cottenham, in *Ex parte Barber* (1 Macn. and Gordon, p. 180), in which the exact same question arose on the analogous English statute, laying down as undoubted law, "that the making a railway for the carriage of persons or goods is a commercial purpose," and when the Act of Incorporation clearly shows that it is a railway intended for those purposes, I cannot feel any doubt that the present adjudication must stand, and that I must disallow the cause shown against it, and, of course, with costs.

[BEFORE LYNCH, J.]

RE ASKEN MORRISON.

*Passing of accommodation bills—Reckless trading.*

Where a mercantile house in extensive trade keeps books accurately, and is, therefore, aware every year of its real condition, which shews a rapidly increasing state of insolvency, and accumulating debts, such accurate accounts strengthen the charge of reckless trading. It is highly criminal, in a mercantile point of view to go on trading and drawing accommodation bills when a trader knows that he is in a state of insolvency, and that his difficulties are increasing every year, and it increases the enormity of the offence where a trader thus circumstanced, permits a member of another firm to accept bills in their names, without the knowledge or consent of his partners, such bills being for the accommodation of the insolvent trader, even though some trivial accommodation was given to the solvent firm.

Although books be accurately kept, and that there is no charge against a bankrupt for not having fairly accounted and vouched his schedule, yet where his conduct has been so reckless as a trader, and where he had carried on a system of manufacturing ac-

commodation bills, the Court will adjourn the examination sine die.

THE bankrupt in this case was an extensive trader in William-street, Dublin. On his failure he attempted to come in under the arrangement clauses, but the case was turned into bankruptcy, and after several adjournments it came on for final examination.

Kernan, Q.C., opposed the passing of the examination on the part of the Royal and Union Banks.

Hallowes, for the London and County Bank.

Levy, for a country shop-keeper on whom the bankrupt had drawn two bills for the same debt.

Seeds, for creditors under a trust deed where the bankrupt was trustee.

Heron, Q.C., was for the bankrupt.

The facts are fully stated in the judgment of the Court.

LYNCH, J.—This case has been argued very fully before me, and for two days (specially appointed) the investigations into it have been carried on. It has now arrived at its final stage awaiting my judgment as to the passing of the final examination. Several matters have been adduced before me as showing that the bankrupt is not entitled to have his final examination now passed. I think I may properly reduce these objections to three heads—first, reckless trading; secondly, the passing of accommodation bills to an enormous amount, and improper practices; thirdly, the procuring of Mr. Salter, one member of the firm of Switzer, Ferguson, and Co., to put the name of the firm to accommodation bills without their privity. In dealing with these three objections I deal with the whole case, for some minor and subsidiary matters that have been brought before me are, or most of them are, mere individual cases illustrating the consequences to others of trading pursued by the bankrupt. Now, as to reckless trading, I must say that I never had a case to which the charge of reckless trading was so peculiarly appropriate. All that has been advanced to show that he fairly accounted in this court, goes most strongly to condemn him on this charge. He kept books regularly, he had the means of knowing the extent of his annual losses, and he did know his position as insolvent, and yet, in spite of this knowledge, he continued extending his trade, extending his credit, and still drawing in new victims to his system of trading. What legitimate hope of re-establishing himself in solvency could Mr. Morrison have had in the last years of his trading? Can there be a justification for a man who, year after year, pursues a sinking and hopeless trade—a trade with rapidly increasing liabilities, and as rapidly sinking means to discharge them, a trade which showed in 1856 a deficit of £8,375, and showed in 1864, a deficit of £20,934. Mr. Morrison knew all this—it was before his eyes, and still he went on with the pretence of solvency, dragging in every friend and every dependent trader whom he could practice on, to back up his hopeless trading. While we naturally feel sympathy for a gentleman in the present position of Mr. Morrison, we are not justified in for-



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1863 to £19,957; and in 1864 to £25,284; and to all appearance, but for the sudden check caused by the failure of another house, they would have gone on with the same rapid growth, and for no purpose except to keep a totally insolvent concern in a high mercantile position in trade. Here, I say, we have this system in excess. Here we have a purpose formed to manufacture this seeming mercantile paper to any extent necessary to keep up Mr. Morrison in his falsely-retained mercantile position. The humbler trader here who, by misrepresentation of his circumstances, obtains some small advances, is often dealt with severely by me; for I hold it my highest duty, as far as lies in my power, to enforce honesty and candour in trade representations. The man who, by a deliberate misstatement—by a false pretence—obtains a small sum from another, is often liable in our law to criminal punishment. And yet here, not in a small way, but on a gigantic scale, all these frauds were perpetrated, and by plain, false pretences the banks were led to incur the enormous extent of losses inflicted on them by Mr. Morrison. I can see, and I have heard, no palliation in these acts. There was no room to hope for redemption out of his difficulties. The increasing deficit spoke too plainly for hope to have room or place, and yet the system was persevered in for no other purpose, as far as I can see, than to enable Mr. Morrison to indulge himself still in the pride of standing in this city as one of its leading merchants. Such a case as this cannot be lightly dealt with by me. The very life of trade is threatened when men of high name and repute are found to betake themselves to such courses; and although it is painful, indeed, to me to deal in such harsh language with this case, yet I feel that I would be shrinking from my duty if I said less. The third objection comes more naturally as an objection by one firm of creditors in this case, but it is an objection necessarily mixed up with the other matters brought before me in this case, and greatly illustrative of the reckless extent of Mr. Morrison's bill manufacturing habits. The firm of Switzer, Ferguson, and Co. complain here through the assignees (and in any point of view they have certainly abundant cause of complaint) that they now stand involved in an enormous liability by these manufactured bills on which their names were placed by Mr. Salter without their sanction, knowledge, or authority, and they charge that Mr. Morrison entered into this dealing with Mr. Salter knowing that Salter had not the authority of the firm. It is an undisputed fact that Mr. Salter acted in this matter without the privity or sanction of his co-partners, and that he, misled by the miserable deception of getting for himself some smaller help in the same unmercantile way, yielded to the betrayal of his co-partners by affixing their names to these bills. Now it is only justice to Mr. Salter to say that I do not believe he ever contemplated the possibility of the result that Mr. Morrison must have known. He did an immoral act in using their names without their authority, but it was kept concealed from him the real act he was doing. It is charged here that Mr. Morrison carried on this dealing with Mr. Salter, knowing that Salter acted without the privity or knowledge of his co-partners. This is a heavy charge, involving an amount

of guilt in Mr. Morrison so large that it ought not merely be dealt with in this court, where our punishments are only negations of rights to be acquired, and not positive punishment. I do, I confess, feel considerable pain in canvassing this part of the case. There is upon it conflicting testimony, and it is painful in the extreme to have to weigh testimony and canvass probabilities on such a charge made against a gentleman of such long standing in trade, and holding for so long a time so high a mercantile position. Now it is quite clear that Salter kept studiously concealed from his co-partners his act in putting their names upon these bills. The manufacture of these bills was continued regularly for two or three years. Their amount was often over £10,000, and yet, for all this time no notice, no whisper of their existence ever reached the firm. Mr. Morrison swears that he was unaware that the firm were ignorant of these transactions. Mr. Grubb, the principal agent in carrying them out, swears also as to his ignorance, and Mr. Salter tells us that he never apprised Mr. Morrison or Mr. Grubb that he acted without authority from his firm. So far I have positive testimony on this charge on behalf of Mr. Morrison. On the other side Mr. Blood deposes to matters which, if believed by me, amount to a confession by Mr. Morrison and Mr. Grubb that they knew Salter acted without authority. In answer to questions 473 and 476, he says Mr. Grubb told him in presence of Mr. Morrison, in answer to the question, "Were you aware that Switzer, Ferguson, and Company were cognisant of Mr. Salter accepting bills in their name?" "No," said Mr. Grubb, "they knew nothing of it, and, more than that, Mr. Salter told me not to tell you anything about it, and when you used to come into the office he would put the pen on one side and tell me distinctly not to tell you." I now refer to Mr. Grubb's evidence in answer to questions 797, 798, 799, and 805, 806, and 808, as hardly satisfactory on such a point, and I refer to his answer to question 802, put by me. The question was—"I ask you did you ever see Salter putting aside bills on seeing Blood coming in—did you see him do that?" His answer was—"Well, my lord, I did." Indisputably these bills, for the two or three years of their manufacture, were executed principally by Mr. Salter in Mr. Morrison's office, and when sent to the establishment of the firm were sent enclosed in envelopes addressed to Mr. Salter. During all the time that this immense amount of bills existed, a regular ledger account for goods went on with the firm, and in that account, regularly furnished, no reference to these bills was ever made; so that this dealing with Salter respecting these bills was always kept separate and distinct—only disclosed to Salter—and by no act of Morrison's house was this dealing with Salter ever disclosed to the firm. It appears the monthly accounts were furnished by Morrison's house to Switzer, Ferguson, and Co., and Mr. Grubb referred to one of them to show that accommodation to Ferguson, Switzer, and Co. passed into their transactions. It, unfortunately for Mr. Grubb, appears to me that this reference disclosed a most startling piece of evidence. The account was a goods account, amounting to £119, furnished openly to the firm. At the same time Salter got an accommodation for £200, and a

bill for £319 in the name of the firm was given by Salter. What docket sent to the firm now exists to show this transaction? A docket solely conversant with the real account for £119—and, containing this startling entry, as a credit, "By bill £119." There never was such a bill, and it is certainly marvellous, if all was straight and fair, and open in these dealings that a document so peculiarly illustrative of a dealing with one member of the firm so as to keep it concealed from the other members of the firm, should exist. It is, I confess, a startling thing to me, that it was possible, to keep for three years afloat such enormous dealings with the name of this firm, now admittedly totally unknown to them. I should have supposed that great management must have been used to keep the knowledge of such large transactions from their ears, and very great care, indeed, used to keep from their notice by matters sent to them some intimation of the matter. For three years Mr. Morrison often met Mr. Switzer in friendship and in kindness, they conversed as friends on small topics, and it so happened that he never once mentioned to Mr. Switzer the fact of this enormous extent of accommodation in which he was involved. How did it happen that in this long course of such extensive dealing the necessity never arose to communicate as to it with any one but Mr. Salter? Again, if the dealing was fair, and open, and honest, why was it carried on in privacy? Why was it concealed from Blood, a friend of the firm? Why was the manufacture of these bills carried on in Morrison's office, or through means of private notes sent to Salter? To frame any theory to account for all these matters short of criminal complicity in Salter's act must establish a case of so keen a sense of the impropriety of his conduct in Mr. Morrison's mind as makes it a matter of little importance, as far as my judgment is concerned, in which way it is taken. Having thus at length canvassed these objections, it remains for me now to pronounce my judgment. Mr. Morrison stood in a high and respectable position as a merchant in this city, and it is to me a matter of extreme regret that I have felt bound by duty to censure so severely his conduct. But while I feel pain on his account, I must also remember the wide-spread destruction his conduct has brought on humbler persons in trade. I think his trade for the last few years was hopeless, and aimless, and therefore reckless and profligate. I see no possible object in its extension and pursuit than the gratification of an immoral pride to uphold a mercantile position for an insolvent house, reckless of the ruin he brought upon his neighbours. I see this carried out by a system of manufacturing accommodation bills which only served as pretences for raising money fraudulently to their amount, without any other limit or stint than that which was necessary to keep up the fraudulent show of solvency. If this course of conduct were permitted in trade the whole system of credit devised for extending the trade-capital of the country would be brought into jeopardy, and the worst and most immoral species of gambling would be sanctioned. I think this case is one so strong, so flagrant in its exemplification of the practices whereby the very life of commerce is affected that, however, painful the act is, I feel that I am bound in duty to ad-

journ this final examination *sine die*. It has been argued here that I am not authorised to give this judgment, and the decision in *re Burke* (14 Ir. Ch. 107) has been cited. I have already decided that I do not consider that case as ruling any such point, and gave at length my reasons for so deciding; but this point can be raised by appeal, and I most sincerely hope that an appeal may be brought, and that my judgment may be altered if the Appellant Court think that I have in it dealt too harshly with Mr. Morrison.

## Assize Court.

Reported by Oliver J. Burke, Esq., Barrister-at-Law

CONNAUGHT CIRCUIT, SUMMER ASSIZES, 1864.

COUNTY ROSCOMMON (RECORD COURT).

[BEFORE DEASY, B.]

WILSON, APPELLANT; CROFTON AND OTHERS, RESPONDENTS.

*Landlord and Tenant Consolidation Act, 23 & 24 Vict., c. 154, s. 3.—Notice to quit signed by mortgagor only.*

*Where a notice to quit was signed by C. the mortgagor of certain lands, which were held by W. the appellant, as tenant from year to year, and where the deed of mortgage, dated 20th May, 1857, contained provisions "that if the mortgagor should pay the interest regularly within two months after the days appointed for payment, the mortgagee should not proceed to call in the money, and also that until default of payment of principal or interest, it should be lawful for the mortgagor to hold and receive the rents." C. accordingly (no default in payment of principal or interest having occurred) did continue to hold and receive said rents, and while so holding and receiving same, he signed said notice to quit, which was then served upon W. Held (reversing the decree of the Chairman) that under the third section of the 23 & 24 Vict., c. 154, the relationship of landlord and tenant existed between the mortgagee and W. the appellant, and that therefore the notice to quit was defective in not being authorized by the said mortgagee.*

THIS case came before the Court on appeal from the decision of Francis W. Brady, Esq., Q.C., the Chairman of the County of Roscommon. The facts of the case are fully stated in the judgment of the learned Baron.

Walter Bourke, Q.C., and Monahan, appeared as counsel for the petitioners.

Michael Morris, Q.C., and Roper were for the respondents.

Nov. 2.—DEASY, B.—This was an appeal from the Chairman of Roscommon, heard before me at the last assizes. The action was an ejectment on the title founded on a notice to quit. The plaintiff proved a yearly tenancy and service of a notice to quit. The defendant then gave in evidence three original memorials signed

by plaintiff of three mortgages, including the lands in question, two dated 20th May, 1857, and the third dated 31st August, 1857, and contended as the notice to quit was signed by the mortgagor only, it was insufficient to determine the tenancy from year to year, which was in existence prior to the date of the mortgage. The case stood over partly to enable the plaintiff's counsel to look into the mortgage deeds, and partly to enable counsel on both sides to look into the authorities, and to give me fuller assistance. This has been done. I have received from the counsel in the case all possible information, and after giving the matter full consideration, I have come to the conclusion that I ought to reverse the decision, and enter a dismiss on the merits. It appears that the two first mortgages contain provisions that if the mortgagor should pay the interest regularly within two months after the days appointed for payment, the mortgagees should not proceed to call in the money in one case before the 1st of January, 1864, and in the other before the 1st of May, 1863, and also provisions that until default of payment of principal or interest, it should be lawful for the mortgagor to hold and receive the rents. It was contended by Mr. Morris that these provisions amounted to a re-demise to the mortgagor, and gave him the legal estate until the 1st of May, 1863, which was after the service of the notice to quit. I do not think that is the effect of those provisions. I think certainty of duration, which is equivalent to a demise, is wanting; for at any time after the first gale day, the term might cease by default in payment. For this I think the case of *Doe v. Goldwin* (2 Q. B. 143) relied on by Mr. Monahan, is a strong authority. I think the true construction of these provisions is, that they are agreements by the mortgagees not to enforce their legal rights until one of the events stipulated for shall have occurred, but that they do not deprive the mortgagees of any portion of the legal estate which is expressly conveyed, without qualification, in the earlier parts of the deeds. But even if a legal term were created by them, it would pass, by the deed of 1857, to the mortgagees, and the period for redemption fixed by that deed of 11th July, 1862, had passed before notice to quit had been served. According to the law as it stood before the passing of the late landlord and tenant Act, the notice would clearly be defective as not being authorised by or binding on the mortgagees, and I do not think the effect of the third section of that Act relied on by Mr. Morris has altered the law in that respect. I consider the tenancy here, as one subsisting at the dates of the first mortgage, for I do not consider the increase of rent in 1859 from £95 to £100, had the effect of creating a new tenancy between Lord Crofton and defendant. That, I think, would be contrary to the intentions of both parties, and was plainly not considered by either to have that effect. That being so, the effect of the mortgage was to convey the reversion to the mortgagee, subject to the yearly tenancy of defendant, and to make the latter, in point of law, a yearly tenant to the premises. The mortgagee might, after requiring the defendant by notice, to pay his rent, proceed to enforce his legal rights as landlord against him. The receipt of rent by the mortgagor was only during the mortgagee's

pleasure, controlled by the covenants in the mortgagee's deeds, which, for the reasons stated above, I think, did not take away his legal right in a court of law. The relations of landlord and tenant subsisted, I think, from the date of the mortgage to the date of any new taking, or new mortgage, since the mortgage between the plaintiff and defendant, I do not think the mortgagee can determine that relation by a notice to quit, authorised by the mortgagee to whom he conveyed the reversion expectant on defendant's yearly tenancy. For these reasons, which I have thought it due to counsel, as well as to the parties, to put in writing, I have come to the conclusion that the decree of the chairman should be reversed, and a dismiss on the merits entered. It is not a case of a formal defect in plaintiff's title; in my opinion the foundation of his title to recover in this ejectment, namely the notice to quit, fails, and he must serve a fresh notice.

## Court of Appeal in Chancery.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

### NOTE.

DOLPHIN v. ATWARD—reported supra. p. 165.

The marginal note to this case should be as follows:—"Although a decree be made by the Court of Appeal in Chancery, the application to enrol same must be made to the Court of Chancery, when the appeal is from Chancery." It is otherwise when the appeal is not from the Court of Chancery—vid. *Sadler v. McDowell* (10 Ir. Ch. 461).

BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.

FAIRCLOTH v. BOLTON.—Nov. 10, 1864.

*Decree to account—Bill of revivor—Supplemental bill.*

*The Court of Equity Exchequer, in 1786, made a decree to account, in a suit in which the first tenant in tail who represented the inheritance was before the Court. Afterwards the said tenant in tail died without issue, and the next tenant in tail was made a party by a bill of revivor (and not by a supplemental or original bill). In 1793 there was a report of a sum due, and a decree for a sale. In a suit to raise the charge by a sale of the lands, it was held (affirming the decision of the Master of the Rolls), that the decree to account gave a good title to the charge on the lands, although in the subsequent proceedings the suit was erroneously continued by a bill of revivor only.*

This case came before the Court on appeal taken by the appellants (the respondents below), to a decretal order, made by the Right Hon. the Master of the



Rolls, whereby his Honor decided that an order made by Master Brooke (the master to whom the petition was referred under the 15th section of the Court of Chancery, Ireland, Regulation Act), dismissing the petition, was erroneous. The facts of the case are as follows:—On the 18th September, 1793, a decree was made by the Court of Equity Exchequer in Ireland, in a certain cause wherein Samuel Spaight and Diana, his wife, were plaintiffs, and Anne Faircloth, Henry Faircloth, and others were the defendants. By the said decree it was decreed that the defendants should pay to the said plaintiffs two several sums of £488 19s. 10d. late Irish currency, with interest from 7th of July 1792, together £747 9s. 6d. like currency, for the plaintiff's costs, or in default thereof, certain lands in the decree mentioned should be sold by the Chief Remembrancer for the purpose of paying the amount of said decree. The above named £488 19s. 10d., was the sum to which the said Diana Spaight was entitled on her marriage, and was charged upon said lands, of which said Anne Faircloth was tenant for life, who, for the purpose of preventing the said lands being sold, paid to said Samuel Spaight the amount of said decree and costs, and thereupon said Anne took an assignment of said charge for the purpose of keeping same alive as against the inheritance. And by her will, made immediately before her death in 1841, she bequeathed, as in her will is mentioned, the said charge, and she appointed Diana Bolton, since deceased, her executrix, and the petitioner is her executrix, and consequently personal representative of said Anne Faircloth.—Master Brooke dismissed the petition, his order stating, that "it being admitted that Diana Spaight, in the petition mentioned, survived her husband Samuel Spaight, and it appearing that the decree therein also mentioned, having been a *chase in action* belonging to the said Diana, was not reduced into possession in the life time of her husband Samuel Spaight, declare that the petitioner has not any title to the sum of £1,196 3s. 11d. by the said decree secured as in petition mentioned, and it is hereby ordered that the petition do stand dismissed with costs." The reasons assigned for this order of Master Brooke being correct were, first, that the amount of the said decree of 1793 was adjudged to be paid to the *two* plaintiffs, and that as the amount thereof was not paid, as Henry Faircloth, the respondent below, alleged, to *one* of the plaintiffs, Samuel Spaight, during his life and not reduced into possession, it survived to Diana, and, therefore, that the present plaintiff, who is the representative of Anne Faircloth, to whom Samuel Spaight had assigned said charge, had no right to sue, inasmuch as the payment should have been made to Diana, and the assignment of the charge should have been by her. The Master of the Rolls, however, from the evidence, was of opinion that there was reduction into possession by payment made to Samuel Spaight, and that consequently Henry Bolton was entitled to the charge so kept alive; and upon this one ground his Honor reversed the Master's decretal order.

On the hearing before the Master of the Rolls, however, another argument was advanced by Faircloth, which was not mentioned before the Mas-

ter, and that was that the foundation of the present suit was bad, and that the decree of 1793 had a glaring error on its face, and that it could not in any way bind the present owner of the inheritance against whom the said charge was kept alive. The error alleged was, that previous to the making of the said decree of 1793 a decree to account of 1st February, 1786, was had in the said suit of *Spaight and wife v. Faircloth*, in which suit the original bill was first filed in 1779, that said decree to account declared that the charge to which the plaintiffs in said suit were entitled was well charged on the lands, and thereupon it was referred to the Chief Remembrancer to inquire and report what sums were due, and the Chief Remembrancer reported the exact sum due on the charge; exceptions were then taken to the report, and during all those successive steps the inheritance was properly represented, the tenant in tail being before the Court.—However before the said exceptions were argued the tenant in tail died, upon which death the suit was continued against John Faircloth, the next tenant in tail in remainder, by bill of revivor, in stead of by a supplemental bill, or by an original bill, in the nature of a supplemental bill. On the 21st of June, 1792, said John Faircloth died without having suffered a recovery. The next error on the face of the decree was, that on the death of the said tenant in tail John, his brother Henry should have been made defendant as remainder-man in tail and not as heir-at-law. The enrolment, after setting out the said exceptions, states that "whereas the said John Faircloth afterwards died, whereby the cause, and the proceedings thereon, abated as to him; whereupon the plaintiffs, on or about the 8th of January, 1793, filed their bill of revivor, stating the several proceedings aforesaid, and the death of the said John Faircloth, whereby the cause and the proceedings thereon abated as to him, and praying that the cause and the proceedings thereon might be revived against the defendant Henry Faircloth, the next brother and heir-at-law of the said John Faircloth, and be in the same plight and condition against him as the same were in at the time of the death of the said John; and praying a subpoena to revive accordingly." The decree is then set out, whereby the exceptions were overruled and the report confirmed; and after the Registrar adding the interest that accrued since the date of the report, it was decreed that the defendants Anna Faircloth, the said tenant for life, and Henry Faircloth, the then tenant in tail, or such of them as ought to do so, should, in six calendar months, pay to the plaintiffs the sum of £448 19s. 10d., with interest from the 7th July, 1792, until paid, together with £749 9s. 6d. costs; or in default thereof, that the Chief Remembrancer should set up for sale the lands therein mentioned, and that, out of the money arising from the sale, the plaintiffs should be paid the sum due to them; and the usual consequential directions were given, and the decree concludes thus:—"But forasmuch as defendant, Henry Faircloth, is a minor, it is hereby ordered, adjudged, and decreed that the performance of this decree on his part be respited until six months after he attains his age of twenty-one years, and that then he do perform the decree on his part, or show

cause, if he can, to the contrary." It appeared that Henry Faircloth, the defendant in the Exchequer suit, died, without issue, on the 15th of November, 1799; and that the appellant, Henry Faircloth, is a descendant of a younger brother.

The *Solicitor General* (Lawson), with *Brewster*, Q.C., and *M. Blood Smith* appeared for the appellants. The decree is manifestly erroneous on the face of it. It is unheard of that the tenant in tail should have been brought before the Court on bill of revivor. It is laid down in *Mitford on Pleading*, page 72, that if the interest of a defendant defending in his own right wholly determines, and the property becomes vested in another person, not claiming under him, as in the case of a remainder man in a settlement becoming entitled upon the death of a prior tenant under the same settlement, the suit cannot be continued by bill of revivor, for though the remainder-man have the same property which the prior tenant enjoyed, yet the remainder-man and the prior tenant have not in some cases the same rights. So, "in general, by an original bill in the nature of a supplemental bill, the benefit of the former proceedings may be obtained." *Gifford v. Hort* (1 Sch. & Lef. 386), and *Rowland v. McDonnell* (13 Irish Eq. 365). If, then, this decree be erroneous on the face of it, the Court will not lend its aid to carry it out. *O'Connell v. M'Namara* (3 Dr. & War. 411). The marginal note there says that a party seeking to have the benefit of a former decree, must be prepared to show that such decree is right, for the Court will not carry out the decree if it appear to be erroneous. The same principle is followed in *Stamer v. Nisbitt* (3 Jones & Lat. 447). The inheritance, then, was imperfectly represented, and therefore, no title could be had through the decree. *Pasley v. Lord Clanmorris* (3 Ir. Eq. 442); *M'Namara v. Blake* (11 L. R. 445) affirmed on appeal 12 I. E. 362.

*Warren*, Q.C., *Serjeant Sullivan*, and *Philip Keogh* were in support of the order of the Master of the Rolls. We admit that there is an irregularity in the proceedings by bill of revivor; but, now, coming at this hour of day, after three-quarters of a century, a recovery shall be presumed to have been suffered by John, the first tenant in tail, the probate of a will is frequently presumed. So the loss of a recovery deed. After twenty years a recovery shall be presumed as against the purchaser, and the Court is now asked to preserve a recovery. But where the decree to account was made, the first tenant in tail was before the Court. A supplemental bill would have been quite sufficient, and it is unnecessary where a tenant in tail who was a party to a suit died to file an original bill in the nature of a supplemental bill. *Lloyd v. Johns* (9 Ves. 87). In *White on Supplement and Revivor*, p. 167, Mr. White, after commenting on the case of *Lloyd v. Johns*, states:—"On the whole, it is submitted that the inference to be drawn from *Lloyd v. Johns* is that, whether the tenant in tail who dies without issue be a plaintiff or a defendant, the suit may be continued by or against the second tenant in tail by supplemental bill; and that the examination of witnesses, whether *de bene esse* or in chief, and all other proceedings by or against the first party, will be good in favour of, or

against, the second party. The principle is similar to that which prevails in the case of new assignees of bankrupts." The Master of the Rolls did not decide the question whether a final decree, in a suit which should have been continued by supplemental bill instead of by bill of revivor, is, on that ground, null and void. It appeared to his Honor to be unnecessary to decide that question, in this case, whether the final decree in the Exchequer suit was binding on Henry Faircloth the defendant in that suit, he not having shown cause against the decree, and the present respondent not having taken any proceedings to set it aside. But he held that the decree of 1786 was binding on the respondent, the inheritance having been then properly represented; and the report appeared to him to be at least *prima facie* evidence against the respondent, subject, possibly, to his showing that the exceptions should have been allowed, the exceptions not having been argued until after the death of the tenant in tail.

THE LORD CHANCELLOR.—I think that the inheritance was properly represented at the time that the Court of Exchequer made the decree to account. That being so, I think the other questions that have been argued are immaterial. The Master of the Rolls did not feel that he was called on to decide whether the final decree was null and void, on the ground that that decree was made in a suit which was in truth erroneously continued by a bill of revivor, instead of by supplemental bill; but he decided it on the ground that the decree to account was sufficient to charge the lands. I see no earthly course for the Master of the Rolls the have followed other than what he has done.

THE LORD JUSTICE OF APPEAL.—I am perfectly satisfied that the Master of the Rolls took the correct view of the case.

## Court of Chancery.

Reported by Oliver J. Burke, Esq., Barrister-at-Law;

THE BELFAST HARBOUR COMMISSIONERS v. LOWTHER AND THE MARINE INVESTMENT COMPANY.

*Merchant Shipping Amendment Act* (25 & 26 Vict., c. 63, s. 68)—*Interpleader*—*No rule on a motion.*

On the 19th July, 1864, *L.*, who was the consignee of a ship which was expected to arrive at *B.* became the equitable assignee of the freight of said ship, and he also had acquired an equitable charge on the ship's cargo. Afterwards on 4th Aug. 1864, the *M. I. Co.* became mortgagees of the ship for a sum of £6,500. On the 13th of September following, the ship arrived at *B.*, and the cargo was stored in *L.*'s name with the *B. Harbour Commissioners*. On the 15th Oct. the *M. I. Co.* caused a notice to be served on the harbour commissioners of their claim to the freight, and the harbour commissioners accordingly refused to give up the property to *L.*, thereupon *L.* brought an action in trover and detinue for the cargo against

said commissioners, who then applied on motion under the Interpleader Act to the Court of Common Pleas, in which Court the action was pending, to stop said action. On the hearing of that motion, it was insisted by the M. I. Company that under the 68th section of the Merchant Shipping Amendment Act, notice being given to the Harbour Commissioners, who were wharfingers, and on whose wharf the goods were stowed, it was their duty to retain the property until the lien which the M. I. Company had upon them was discharged, and that it was no case for interpleader. The Court of Common Pleas made no rule on this motion. Held, that the Court of Chancery was not precluded from entertaining the case by the decision of "no rule" arrived at by the Court of Common Pleas.

Held, also, that this was not a case within the 68th section of the Merchant Shipping Amendment Act, which had reference merely to acts between the owner of the ship and the owner of the goods, and not to the rival claims of the mortgagees and mortgagor of the ship.

THIS was a cause petition presented by the Belfast Harbour Commissioners against the respondents, Samuel Lowther and the Marine Investment Company, praying that said Samuel Lowther, and the Marine Investment Company may set forth their respective claims in respect of certain timber and deals, and that they may be decreed to interplead and settle, and adjust their several demands between themselves, and that it may be ascertained in such manner as the Court might think fit, to which of them the said timber and deals ought to be delivered, or how otherwise the same should be disposed of, petitioners undertaking to deal with and dispose of same as the Court shall direct. And that the said Samuel Lowther and his agents, may be restrained by the order and injunction of this Court from prosecuting a certain action at law, commenced by him against the petitioners in the Court of Common Pleas, and that the Marine Investment Company and their respective agents, may, in like manner, be respectively restrained from instituting or prosecuting any other action at law or in equity against petitioners touching said timber and deals. It appeared that on the 13th of September, 1864, the ship Edward Cardwell, from Miramichi, arrived at Albert-quay, Belfast, with a cargo of timber, which was consigned to Lowther, and which came into the petitioners' possession as wharfingers. While it was in their possession, the Marine Investment Company (Limited) made a claim against the timber for a large sum, and served a notice on the petitioners, cautioning them against giving up the custody of the timber. Mr. Lowther who had a prior equitable claim, as assignee of the freight and of the cargo, brought an action in the Court of Common Pleas of trover and detinue against the petitioners to recover the value of the timber, stated to be worth about £4,500, and the petitioner having obtained a conditional order under the Interpleader Act, the Marine Investment Company appeared to show cause against the making absolute of that order. The principal question in the argument in the Court of Common Pleas arose upon the construction of the 25th and 26th Vict., cap. 63, sec. 68, the Merchant

Shipping Amendment Act, 1862, by which in substance it was provided that when goods are landed from any ship, and placed in the custody of any wharfinger, if the ship-owner give notice to such wharfinger that the goods are to remain subject to a lien for freight or other charges to an amount mentioned in such notice, the goods so landed shall continue so liable in the wharfinger's hands, and he shall retain them until the amount is discharged, and if he failed to do so, he should make good to the ship-owner any loss occasioned to him. The plaintiff's argument was that the notice which had been served by the Marine Investment Company was not in compliance with the statute, and was served too late. The Marine Investment Company insisted that the defendants would be answerable to them if they gave up the timber without paying the freight. The case was argued before Monahan, C. J., and Christian, J.; the former was of opinion that the rule for an interpleader order should be made absolute, but Christian, J., thought it was not a case for an interpleader order, and, consequently, no rule was made on the motion. The present petition was then filed by the petitioners, who were the defendants in the action, and the parties who sought for the interpleader order, to restrain those proceedings at law, and have the rights of the parties adjudicated upon in equity. The facts of the case are fully stated, and the arguments reviewed, by the Lord Chancellor in his judgment.

Brewster, Q.C., Chatterton, Q.C., and William Andrews, appeared for the petitioners.

The Solicitor-General (Sullivan), Harrison, Q.C., and Falkiner, for Mr. Lowther.

Macdonogh, Q.C., Jellett, Q.C., and Porter, for the Marine Investment Company.

THE LORD CHANCELLOR—This case, which was argued last term, involves a great number of facts, and, certainly involves a vast variety of questions. I have very carefully examined the case, and certainly, as regards the facts, it is only by a statement of them in detail, and in the order in which they occur, that we can attain to a proper understanding of the entire of the case. This is a case of conflict between Mr. Lowther and a company in England called "The Marine Investment Company." Mr. Lowther stands in various capacities which I will allude to bye-and-bye. The Marine Investment Company claim as mortgagees of a ship called the Edward Cardwell. That ship was built originally by the Hon. Peter Mitchell, in Miramichi, in America. In February, 1864, Mitchell was in Belfast; there there were certain persons then trading as Lemon and Company, and they supplied him with cordage and sails for this intended vessel, this being an exchange in the way of barter in one sense, and he agreed to ship to Lemon and Company, on board this Edward Cardwell, a certain quantity of timber. On Feb. 19, 1864, the following charter party was accordingly entered into between the parties, and this charter party forms the basis of the rights claimed in the present case.

"Charter party between Peter Mitchell and James Lemon & Son, Belfast. 19th February, 1864.

It is this day mutually agreed between Peter Mitchell of Miramichi, owner of the good ship or ves-



sel called (new ship now building) of the burden of about 1,250 tons or thereabouts, whereof is master, and now at Miramichi (in course of building) to be launched in May next, and James Lemon and Son, of Belfast, merchants and charterers. That the said ship being light, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed sail and proceed to a loading place in Miramichi, New Brunswick, or so near thereto as she may safely get, and there load from Peter Mitchell, as per contract, about two thirds of the ship cargo, with deck load included, consisting of spruce or pine deals with ends for stowage only. Balance of cargo to be shipped by Mr. Mitchell on his own account, and not exceeding what she can reasonably stow and carry over and above her cabin tackle, apparel, provisions, and furniture, and being so loaded shall forthwith proceed to Belfast direct. Date of shipment not to exceed the first of August next, or so near thereto as she may safely get, and deliver same agreeably to bills of lading, and so end the voyage (acts of God, restraint of princes and rulers, the dangers of the seas and navigation, adverse winds, fire, pirates, and enemies during the said voyage, being always excepted,) and the charterers do hereby promise and agree to load the vessel with the said cargo at the port of loading, and receive the same at the port of delivery as herein stated, also to pay freight as follows:—

"Timber, per load of 50 feet Caliper measure—to be on Mr. Mitchell's own account.

"Deal, per St. Petersburg standard of 1,980 superficial feet—£4—Eighty shillings per standard.

"Deal ends, per ditto—£2 13s. 4d.—Fifty-three shillings and fourpence.

"Staves, per standard mile.

"Lathwood, per fathom of 4 feet.

"Payment whereof to become due and to be made as follows—one-third cash, and remainder by good and approved bills at 4 months' date, or in cash less 2 per cent. at option of merchant on right delivery. All despatch days are to be allowed the charterers if the ship be not sooner despatched for loading at Miramichi and discharging at Belfast, not exceeding fifteen days for discharging, and ten days on demurrage, at £15 per day, to be paid for each and every day the vessel is detained over and above the said lying days. It is also agreed that for the security and payment of freight, dead freight, and demurrage, the said owner or master shall have an absolute lien and charge on the said cargo, and for the true performance hereof the said Peter Mitchell, Esq., binds himself and his heirs and assigns, the vessel, her freight, and appurtenances, and the said James Lemon and Son in like manner bind themselves, their heirs and assigns, and the cargo to be laden on board the said vessel, each unto the others, in the penal sum of £1,400.

"2½ per cent. commission is due in the amount of freight and prime on the shipment of this charter party to Samuel Lowther, ship and insurance broker, 112 Corporation street, Belfast, by whom or by whose agents the ship is to be reported at the Custom House on her return to her port of discharge in the United

Kingdom, paying the usual commission for doing inward or outward ships' business.

"Signed by Peter Mitchell, in presence of S. P. Mitchell. Lowther.

"Signed Jas. Lemon & Son, in the presence of S. Jas. Lemon & Son. Lowther.

That is the contract under which the timber was put on board that ship and the special agreement according to which payment was to be made, namely, one-third in cash and the remainder in good approved bills on delivery to the merchants, Messrs. Lemon and Company Belfast. On the 29th of June in that year, the bill of lading of the cargo then on board, that was Mitchell's portion of the cargo to be delivered, was made out, and on the 16th of July the bill of lading of Lemon's portion of the cargo was sent and afterwards endorsed by Mitchell to Lemon and Company. In that same month of July it appears that a Mr. Harris, who was one of the firms of Wright and Company, of Liverpool, and General Agents to said Mitchell at that place, came to Belfast, and had applied to Mr. Lowther to advance him a certain sum of £1,000, which was to be secured on the freight and on Mitchell's portion of the cargo. Now Lowther swears, that it was agreed between him and Mitchell at the time Mitchell was in Belfast, that he, Lowther, should advance money to Wright and Company, of Liverpool, on account of freight, and apply the proceeds of the freight to pay himself when the vessel should arrive, and that he was also to advance money to Wright and Company on his, Mitchell's, portion of the cargo, so that the contract, made with Mr. Mitchell while in Belfast, fully warranted the dealing with Wright and Company. On the 19th of July, Lowther advanced two sums of £1,000 each, one sum being secured on the freight of Lemon's portion of the cargo, and the other on Mitchell's portion of the cargo, and Harris, on that occasion showed Lowther a certificate of sale of the ship which he had then from New Brunswick from Mitchell; it was agreed, and letters were written to him, Lowther, by Wright and Company with the bill of lading, that he might sell Mitchell's portion of the cargo to pay himself the £1,000, and Lowther gave his acceptance on account of the sum so advanced, and returned them when they became due, so that he actually parted with so much money. So far for the title of Mr. Lowther as it then stood; he had acquired in that way an equitable assignment of the bulk of the freight for the sum of £1,000; he had acquired an equitable charge on Mitchell's portion of the cargo, for the amount of £1,000, and that is the title which Mr. Lowther, upon his own account, claims this cargo.

Now the title of the Marine Investment Company begins in the month of August; Lowther had made the advance on the 19th of July, and the Marine Investment Company had nothing to do with the ship until long after that; their connexion with it begins in the month of August, when they were applied to to advance £700 as a mortgage on the ship, Wright and Company had then got the certificate, or bill of

sale which they showed to Mr. Lowther on the 19th of July, but nothing was done upon it in any way as against the interests of Mr. Mitchell or Mr. Lowther until the beginning of August, when the Marine Investment Company was applied to to advance £700 on the ship as I have stated. The communications between Harris and the Marine Investment Company began in the early part of August, and it was ultimately agreed that they should advance £5,000 on the ship, and, thereupon, on the 2nd of August a letter was written to that effect, a bill of sale was executed by Harris, and certain documents were deposited and handed over on the 4th of August; these are the documents, amongst others, on which the Marine Investment Company found their claim. Nothing was said then, or afterwards, or at all, about the freight of the ship; the transactions related to the ship and the ship alone; the Marine Investment Company had not then, nor never had any contracts relating to the freight, and therefore their claim to the freight, whatever it be, is a claim to it as incident to the ship, but as an incident to the ship, there is no doubt in the world but that rights will accrue to them in reference to the freight from that transaction. They (that is the Marine Investment Company) advanced again £1,500 more, and, therefore, they stand as purchasers or mortgagees for valuable consideration of this ship for the sum of £6,500, the bill of sale made to them, or handed over to them, though executed by Wright and Company was in blank as to the vendees, that is the persons to whom the ship was to be delivered, but on the 6th of October that was completed, by having filled in the names of the trustees, who are mentioned now in the case; and the reason they say is, that as the ship could not be registered sooner, it was not necessary to fill up the blank till that time. So far the title of the Marine Investment Company, but previous to that, previous to the ship's arrival, one other transaction occurred, namely, on the 23rd of August, Lemon and Company arranged with Mr. Lowther to take charge of their part of the cargo, and sell it upon commission on their account, and they drew on him for £1,000 on account of the cargo, and handed over the bill of lading endorsed to him, so that as matters then stood Mr. Lowther had a £1,000 charged on the freight, a £1,000 charged on Mitchell's portion of the cargo and a £1,000 charged on Lemon's portion of the cargo, so that he was at that time agent as regarded the ship and freight for Mitchell who was then, at least, the mortgagor of the ship, and who had been the owner; so matters stood when the ship arrived in Belfast, which was on the 13th of September in that year, and thereupon Lowther took possession of the ship as agents of Mitchell, and telegraphed her arrival to Wright and Company as had been agreed; he proceeded then to discharge Lemon's portion of the cargo, and it was all discharged before the 1st of October, and all stored in Lemon's name on the wharf of the Harbour Commissioners; it was ready for delivery, and part of it was actually delivered on orders given by Lowther in favour of persons to whom he sold portions of it. On the 6th of October Lowther apprized Lemon and Company as to his having advanced money on the freight to Mr. Mitchell and having accepted a bill for

a £1,000, and that he was authorised by Mitchell to collect the freight. On the 12th of October he furnished Lemon and Company with a freight account, and they neglected payment of it; they were to pay the freight one-third in cash and the rest in bills; but Lowther says they were unwilling to give bills on the cargo, and asked Lowther as he had already possession of the cargo for sale on their account, to deduct the amount of the freight out of the produce of the sale, and so he says, that is, Lowther says, the matter was settled. On the 8th of October Mitchell's portion of the cargo was finally discharged, and stored in his, Lowther's name, so that both the portions of the cargo were stored with the Harbour Commissioners, and so remained on the 19th of October; the portions which had been sold by Lowther were not delivered out in consequence of the intervention of the Marine Investment Company. In addition to what Mr. Lowther had done in the way of advancing them several sums of a £1,000 on the freight, and a £1000 on Mitchell's portion of the cargo and a £1000 on Lemon's portion of the cargo, he had made disbursements on account of the ship to the amount of £300 before the 14th of October, and of that sum £227 consisted of wages paid to the sailors on board the ship; all these things that I have mentioned were done before any intervention in Belfast as between them and Lowther or Lemon of the Marine Investment Company; but shortly after, namely, on the 14th of October, a person of the name of Tribe, who said he was authorized by the Marine Investment Company to intervene in the matter, came to Belfast, and a controversy then arose between him and Lowther as to the ship's registry, which Lowther, as representing Mitchell, had got from the captain of the ship. Certain proceedings took place in regard to the possession of the registry, and the parties went to the police office under the powers of the Act of Parliament, and the controversy continued some time, but ultimately the ship's registry was given up, though before that Mr. Lowther rather complicated the transaction by an act which appears to me to have been possibly within his authority (but very doubtful), but certainly I do not think he was therein well advised; namely, he appointed himself captain of the ship, he being very unfit and incompetent to be the captain of the ship; this led to a great deal of confusion in the matter, but the transaction as to the registry is entirely beside the question we have to dispose of, which regards not the registry of the ship or the ship itself, but the loan, if loan there be, on the cargo or freight. On the 15th of October the Marine Investment Company took the first step which they considered tantamount to taking possession of the ship, namely, they sent a notice to the Harbour Commissioners of their claim to the freight, but this was after all the transactions I have alluded to had taken place between Lowther, Lemon and Company, Wright and Company, Mitchell and all the other parties. In this way the case stood during the month of August, the cargo remained, part of it on the wharf of the Commissioners, and part of it floating in their ponds, which are a part of the wharf. I don't think it necessary to mention any further fact in the case as regards the title of the parties, to show what the position of the parties

was respectively. When the ship arrived in Belfast, and at the time when the Marine Investment Company first made their claim, Lowther had been agent for Mitchell, and was agent for Mitchell still; Mitchell had been owner of the ship, and was owner still, subject, of course, to the claims of the Marine Investment Company. Mitchell was owner of one portion of the cargo, and Lowther was his agent; Lemon was the owner of the other portion, and Lowther was his agent, and Lowther had claims of his own for these sums amounting to £3,000 which I have mentioned. The Marine Investment Company claimed to be absolute owners of the ship, and made their title as such, in the proceedings I shall afterwards allude to. Under these circumstances the Harbour Commissioners, having got the notice from the Marine Investment Company, were placed, undoubtedly, in a position of considerable difficulty; they had received the deals and timber, and had stored them on their wharf in the name of Lowther, they were not advised when Lowther stored them in his name, or any thing connected with the ship and cargo, beyond the fact, that she came into Belfast with deals, and that their wharf was a convenient place to deposit them; they knew nothing at all about the dealings of Mr. Lowther, or in what position he stood in regard to the ship, and still less did they know any thing about the Marine Investment Co. The Marine Investment Company did not stir until two months after the arrival of the ship, or a fortnight or a week, at all events, after the whole of the cargo had been carried out of the ship. Under these circumstances the Harbour Commissioners were advised with this notice, and additional notices served upon them; but these notices appear to me to be perfectly immaterial to the case; the case turns upon rights a good deal more than upon notices, and nothing appears to me to affect the rights of the parties after Tribe intervened and claimed the freight. However, the Harbour Commissioners refusing to give up the property to Lowther, after being warned by the Marine Investment Company, Lowther brought an action in trover against them for the cargo, and the Harbour Commissioners being, of course, embarrassed by those claims of lien, they applied to the Court of Common Pleas, under an Act called the Interpleader Act, to stop that action, and to compel the Marine Investment Company to give up their claim or become defendants in a suit to try the right that was to be tried between them and Mr. Lowther. Well, the case came on before the Court of Common Pleas, and that Court unfortunately differed in judgment and the ground of their difference appears to be that which was, I may say, the great contention before me in the argument here: for on the further argument, they appeared to me to have steered very clear of the rights of the parties, and the arguments were directed to mere matters of form, to the nature of the suit, to the rights of the company, and matters of that sort, far more than to the real question between the parties, which is the question to be decided. Now it is necessary, in order to understand what the effect of the contention was on the part of the Marine Investment Company, to refer to the 68th section of the Merchant Shipping Act [25 & 26 Vic. ch. 63], and by that section it is enacted that "If, at the time when

any goods are landed from any ship, and placed in the custody of any person as a wharf or warehouse owner, the ship owner gives to the wharf or warehouse owner notice in writing that the goods are to remain subject to a lien for freight or other charges payable to the ship owner to an amount to be mentioned in such notice, the goods so landed shall, in the hands of the wharf or warehouse owner, continue liable to the same lien, if any, for such charges as they were subject to before the landing thereof; and the wharf or warehouse owner receiving such goods shall retain them until the lien is discharged as herein-after mentioned, and shall, if he fail so to do, make good to the ship owner any loss thereby occasioned to him." Now, the Marine Investment Company contend that under this Act, they having given notice to the Harbour Commissioners on the 16th of October, that there was a claim on the cargo for freight, they were entitled under the Merchant Shipping Act to put the Harbour Commissioners into this position, that they were bound thereupon to obey, literally, the injunction of the Act of Parliament, and to require the goods holder to lodge the amount claimed by them for freight, and then go through the ceremonies prescribed by the Act of Parliament. No doubt, in a case falling within that Act of Parliament, there could not be a more convenient arrangement than that which is prescribed by the terms of the Act of Parliament. But it is very plain that it relates to a case of a simple character which can easily be disposed of, it relates to a case, in my judgment, and to a case only where the owner of goods takes them out of the ship and puts them on a wharf in his own name or the name of his agent, and the ship owner then, having got rid of the goods, retains still the right to the freight as against the owner of the goods, and can put a stop on the goods in the hands of the wharfinger, and say to the goods owner, "you must not touch them till you pay the freight." Looking at the whole of the sections of the Act of Parliament, it appears to me to be the plain meaning that it is confined to acts between the owner of the ship and the owner of the goods. When the owner of the goods lands the goods, if this arrangement did not exist the lien would be gone. But when the owner of the ship lands the goods, what does he want giving notice to the dock company? He has the goods and he won't part with them. Until the goods owner pays him his freight he retains his lien without any Act of Parliament at all, just as if he had the goods on his own wharf, and he says that he won't give a single inch of them out until he pays his freight; he can't insist on the freight until he delivers the goods, but the other cannot claim them from him till he pays the freight, and, therefore, when the ship owner lands the goods this notice is wholly unnecessary, for in the very nature of the thing he has a lien independent of any Act of Parliament at all. I cannot, then, understand how it is said that this Act applies to the landing of goods by the owner of the ship for he is not bound to give notice to any body. The Act of Parliament, therefore, appears to me only to apply to a goods owner landing the goods, and it is only in default of the freight being paid that the ship-owner can intervene, and by serving this notice save his right to the

lien. The words of the Act of Parliament all concur in this, that the parties to be regarded are the ship-owner on the one side, and the goods owner on the other. That question appears to me to bear on the main question argued, namely, as to the time of serving the notice, and I think that he has had a reasonable interval from the time the goods were landed to serve his notice preserving the lien, but if the Act of Parliament contemplates only the case of a ship owner and the goods owner there is an end to the case. As regards the company this is not the case of a claim as between the ship-owner and the goods-owner; 'tis the case of a claim of a mortgagee and the mortgagor of the ship; it is the case between two claims to the lien; Lemon had nothing to do with that; and this being so, the Act of Parliament never could stand in the way of the rights of the parties; and the Marine Investment Company had no power under the Act to serve a notice to compel the Harbour Commissioners to decide the conflicting claims to the freight. I see no means whatever of trying the question between the conflicting owners of the freight, and yet it was admitted in the argument that, ultimately, under the last clause which directs how the means are to be applied if the question should arise between conflicting owners; it appears to me that this is entirely outside the Merchant Shipping Act in every respect, and that the defendant is entirely wrong. The Court of Common Pleas, however, were divided on the point; and to understand the argument, it appears to have been thought by one of the judges, that when the question was to determine whether the Merchant Shipping Act applied to the case or not, that was not a question of interpleader, but was a preliminary question. Well, it strikes me that preliminary questions are as much within the scope of the authority of the Court as any other question, but it was not decided whether the Act applied or not. The mere fact of the existence of a question of that kind was held to preclude the Court from going into that question, or into any other question. The Harbour Commissioners having applied to the Court of Common Pleas, and that Court having denied them all justice there, it was argued that they were precluded from receiving any relief in this Court; that would appear to me to be a very great denial of justice. If a suitor applies to one court of co-ordinate jurisdiction with three or four others, for relief, and a Court says it will not interfere at all, is that to preclude him from going into another court of co-ordinate jurisdiction and then trying the same question? It occurred to me in the first opening of this case that a *habeas corpus* was an instance of the rule, but it might be said that a different question arose there, namely, as to the imprisonment. The case of a prohibition is more analogous; in the case of a prohibition if you apply to one Court, and that Court refuses to prohibit the act you may go to another, and so Lord Mansfield has laid it down expressly in *St. John's College v. Todington* (1 Burrows, 199.) The Court there refused to grant a prohibition at all, and Lord Mansfield says that this denial is not conclusive; therefore, it appears to me that this refusal of the Court of Common Pleas to interfere could not be regarded as a bar to any other Court that had

jurisdiction, to take its own course as it might be advised. The first section enables the Court to call upon the party to appear to maintain or relinquish his claims, and then comes the second section, the words importing that the refusal of the Court to act is not final and conclusive on the question. It has been said that the Court will not interfere with any defences a party may have to an action, but this question has not been decided at law, and I don't see how I am precluded from entertaining it. Here, after all, we come to the merits of the case; the question before me could not have been decided at law, for at law, as it stood in the dealings, the Marine Investment Company claimed an absolute title in the ship; here it is as plain as daylight, that they are only mortgagees of the ship, as they admit, and, therefore, though they may have the absolute title in point of form, it will not preclude the Court from going into the real nature of the transaction and considering them as mere mortgagees of the ship, therefore the case would fall within that of *Evans v. Bremridge* (8 De G. M'N. & G. 100), where it appears that the decision of a Court of law on an equitable pleading would not determine the merits of the case, and that the Court of Chancery is not prevented from interfering in the same question. On all these grounds I think that it is very clear that the interpleader motion of the Common Pleas being a bar to this application, is not sustainable. Now the Marine Investment Company say "this is not the case of an interpleader at all; we served you with notice, calling on you to hold this cargo for us; but now we tell you, you are not bound to act upon that notice, for you have so dealt with the cargo that you have no defence to the action, the notice is not worth a farthing, and you ought to act in despite of it. We served the notice to be sure, threatening you with all manner of penalties, but you are not bound to obey us, and you have so concluded yourselves, that you cannot raise any question." *Cochrane v. O'Brien* (8 Ir. Eq. Rep. 241) is in point, to shew that a bill of interpleader cannot be sustained if the claim of one defendant is not, at least, colourable. But it is laid down in *The East India Company v. Edwards* (18 Ves. 376), that an act by a party entitled which gives a colour of title to another person is sufficient to support a bill of interpleader. Now, here is a clear claim on the part of the Marine Investment Company, and I think it is a very fit case for interpleader. The books are full of interpleaders in regard to such questions as have arisen in this case. I have nothing here to do with the property in the timber.

There is another question raised here, namely, that this is no case for interpleader, because the property was not placed under the control of the Court. The Court has no wharf and no docks. We cannot take timber and put it under the control of the Court; but the very moment this bill was filed, the Dock Company submitted to abide the order of the Court respecting the goods, and therefore, their wharf is the wharf of the Court for the purposes of this suit, and the property is placed by this bill completely under the Court. Mr. Lowther consented to bring in the amount of the freight on the goods being delivered to him. I thought this a very fair proposition, he was

not bound to do so, but might have refused to do it, but he has done it, so that arrangements were made for placing the property within the dominion of the Court, and I have jurisdiction to determine the whole question, as I have decided that this is a very fit case for interpleader. The merits of it are now all before me. No cross litigation is necessary. I am enabled, as laid down in the books, to dispose of the questions between the parties, which are in my mind, ripe for hearing, and therefore, without the filing of any other bills or cross bills, I should discuss the real merits of the case, as between the parties, having endeavoured to clear away the cloud in which the contention had involved it.

Now, what are the facts of the case? First, as regards Mr. Lowther's title: he represents himself and Mr. Mitchell and Mr. Lemon. Lemon and Company, as the owners of a portion of the cargo, authorized him to collect the freight and to sell their portion of the cargo, and he represents himself as having pecuniary claims on the ship. He is the equitable assignee, at all events, of the £1,000 of this freight. That is a matter on which there cannot be any contention. He took that equitable assignment before the mortgage to the Marine Investment Company was ever given, and certainly, before it was registered; it appears to me then, that his title to that freight is very clear as against the mortgagees. It has been held that the assignment of the freight effected before the mortgage had priority of a mortgage which had not been registered. But here we had nothing to do with that, for Mr. Lowther is the assignee of the freight before any mortgage is made at all, and therefore, it appears to me, beyond all controversy, that Mr. Lowther has a title to this for £1,000, under that equitable assignment of it. He has another charge for £300, which is spent on the wages of the ship, and these charges are paramount to the right of the mortgagees, to the freight. Then, in addition to that, when he landed those goods on the wharf, he was the representative of Mitchell, the mortgagor of the ship, and in that character he had ample powers to deal with it as long as he was not interfered with. Then, as to the right of the mortgagees, no doubt, he has a right to accruing freight—he has a right to the freight that has been earned by the ship during the voyage, though he only takes possession of the ship while it arrives at the port of discharge. But no case has decided that if goods are taken out of the ship and landed on the wharf by the mortgagor, though the mortgagor may have a lien upon them for freight, the mortgagee has also a lien upon them. Here then, it is plain that Lowther could deal with the cargo and freight just as he pleased until the intervention of the mortgagees. It appears to me that whatever arrangements were made with regard to the freight before that interference took place, the mortgagee cannot interpose to disturb it, when he had not before that taken possession of the ship. He leaves the lien in the hands of the mortgagor to be dealt with as the mortgagor pleases, and the mortgagor parts with it for valuable consideration before the mortgagee takes possession. This would appear to conclude the case, and a new arrangement altogether was made between Lowther and Lemon. Lemon had agreed to pay the freight in a particular way, but

that arrangement was abandoned, and therefore, it appears to me that the mortgagee has no right to come in afterwards and disturb it, he, not having taken possession of the ship before that was done; if he had, another question would remain to be determined. It appears to me, therefore, that Lemon and Lowther had so dealt with the freight as to preclude the mortgagee now interposing to put an end to the arrangement made between the other parties. So far then as regards Lemon's portion of the cargo, another question arises, whether those mortgagees have not some claim on Mitchell's portion of the cargo. This portion of the cargo was shipped by him as owner of the ship, and was to be freight free. No doubt, then, it is not possible for the mortgagees to claim any freight on that portion of the cargo, which was not liable to freight at all. The mortgagee cannot claim for the use of the ship as against the mortgagor, and so it was laid down in the case of *Laughton v. Horton* (5 Beav. 9). The claim, then, of the Marine Investment Company to freight on Mitchell's portion of the cargo is perfectly untenable. I do not think I ought to determine the question as to the title of the mortgagees. I cannot say that they have no title; but at all events, it is not here in controversy between them. I have looked upon them as mortgagees, and I don't mean to decide whether they are so or not; but I have got enough of the details to hold that the best mortgagees in the world have no right to the freight in this case, though they may be entitled to retain possession of the ship.

The Belfast Harbour Commissioners, therefore, must have an injunction against both parties. The amount lodged in Court must be handed over again to Mr. Lowther. The Marine Investment Company must pay the costs of the petitioner, but Mr. Lowther has so complicated the case by his conduct in reference to the ship's registry, and making himself captain of the ship, that I do not think his costs should be paid by any of the other parties.

## Court of Exchequer.

Reported by William Albert Sargent, Esq., Barrister-at-Law.

[BEFORE THE FULL COURT.]

FISHBOURNE V. LORD LUCAN—June 2.

*Slander—Demurrer—Privileged occasion.*

*Plaintiff was a carrier of goods to a railway company, and sent his agent to meet objections which had been raised against the validity of a claim made by plaintiff of half-a-crown extra for the carriage of the goods, and defendant, as chairman of the said company, being the proper person to determine as to the validity of said claim, spoke the following words—"while I am chairman of the company not one farthing of that half-crown shall*

*Mr. Fishbourne get. If it cost me £500 I will contest it with him before I submit to such a swindle and imposition." The agent then remarked, that plaintiff had had dealings with different railway companies, and that that was the first time such language had been used of him. In answer to which defendant said—"well, all I can say is, he has been a damned lucky man not to be found out before." To an action brought for these words defendant pleaded justification and privilege on the grounds of his interest in the subject matter. Held—on demurrer (Fitzgerald, B., dissentiente), that as defendant had only pleaded to the words spoken before the agent's remark (which were admitted to be privileged) and not to the subsequent words which imputed general misconduct to plaintiff his defence was demurrable.*

THE summons and plaint was for slander, and the first count averred that the plaintiff, before and at the time of the committing of the grievances hereinafter mentioned was, and hath been hitherto employed in the trade of a forwarding agent, and as such has, and still does carry goods for railway companies and others for reasonable reward, and thereby, as defendant well knew, obtained great gains; and that defendant before and at the time of the committing of the said grievances was, and from thence hitherto, has been Chairman of the Board of Directors of the Great Northern and Western (of Ireland) Railway Company, and that plaintiff had been in the habit of carrying goods for said company for reasonable reward and charges, and in addition to said charges, in consideration of a further sum of half-a-crown agreed to be paid to plaintiff by said board of directors for every ton of such goods so forwarded by plaintiff; and such charges were reasonable, and that defendant had full notice and knowledge of them, yet defendant contriving, and falsely and maliciously intending to injure the plaintiff in his good name and credit as a forwarding agent, and in his said trade, and to cause it to be believed that plaintiff had been guilty of dishonest conduct in said trade, and that plaintiff had exacted exorbitant charges, falsely and maliciously spoke and published concerning the plaintiff and his trade, well knowing the premises, in the presence and hearing of divers persons, to wit, one Benjamin Roome and one Henry Robertson, the false, scandalous, and defamatory words following, viz.—“while I (meaning the defendant) am chairman of the company, (meaning chairman of the Board of Directors of the said Great Northern and Western, of Ireland, Railway Company), not one farthing of that half crown (meaning the said charge of half-a-crown per ton above referred to) shall Mr. Fishbourne (meaning the plaintiff) get. If it cost me (meaning the defendant) £500 I (meaning the defendant) will contest it with him (meaning the plaintiff) before I (meaning the defendant) submit to such a swindle and imposition (meaning thereby that said charge of half-a-crown was an imposition, and that plaintiff had acted dishonestly in his said trade). And in answer to a remark made by said Henry Robertson, that plaintiff had had many dealings with the different railway companies, and that that was the first time such lan-

guage had been used of plaintiff; that defendant then further falsely and maliciously spoke and published, concerning plaintiff and his trade, the defamatory words following, viz.—“well, all I (meaning defendant) can say is, he (meaning the plaintiff) has been a damned lucky man not to be found out before,” (meaning thereby that plaintiff had been guilty of imposition, and of acts, which if known, would have been injurious to his character, and that plaintiff had escaped such injury solely by his good fortune in not having been found out). To the plaintiff's damage of £500. To this the defendant pleaded (inter alia) that before, and at the time of the speaking and publishing of the words mentioned defendant was Chairman of the Great Northern and Western Railway Company, and as such chairman it was part of his duty to receive applications as to sums alleged to be due upon contracts entered into with said company, and to discuss the validity of such claims, and as such chairman he had an interest in the discussion of and right determination of such claims on such contracts. And defendant avers that it was his right as such chairman when applied to by any contractor with the company, or any one on behalf of such contractor, in relation to such claim as aforesaid, to express defendant's *bona fide* and honest opinion upon the facts and circumstances presented by, or on the part of such applicant in relation to such claims and their validity. And defendant avers that shortly before the speaking and publishing of the words alleged, one Henry Robertson, in plaint mentioned, acting on behalf of said plaintiff a contractor with said company and carrier, called upon defendant in London on behalf of the plaintiff, to discuss, and if possible, arrange certain differences which had arisen between said plaintiff as such carrier and contractor and the said Great Northern and Western Railway Company, to wit, in relation to the claim of a sum of 2s. 6d. per ton for the carriage of goods of the said company. And that at the time of the speaking and publishing of the said words complained of, the subject matter of the said differences, and the validity of the claim made on the part of the plaintiff, were then under the consideration and discussion of the defendant as such chairman, and of one Benjamin Roome, as secretary to said company, and of the said Henry Robertson, and no other person was present. And that said Henry Robertson then demanded, on behalf of the plaintiff from said company an additional sum of 2s. 6d. per ton for carriage of goods as aforesaid. And defendant honestly and *bona fide* believing that plaintiff was not entitled to such claim, denied plaintiff's right to it, and then and there, in presence of said Robertson and Roome only, and in discharge of his business as said chairman, defendant expressed his opinion of plaintiff's claim in the words complained of, honestly and *bona fide*, and without malice, believing same to be true, and that said words were spoken on a privileged occasion. Demurrer:—

Plaintiff's points of demurrer to this plea were—(1.) That the alleged duties and interest of the defendant did not legally justify the speaking and publishing of the words complained of. (2.) That the said alleged duties and interest of the defendant did not legally justify the speaking and publishing of words

having the defamatory meanings alleged. (3.) That the facts averred by defendant do not show that the occasion of speaking and publishing the words complained of was a privileged occasion, nor that the publication of the said words was a privileged communication. (4.) That the said defence, though purporting to be an answer to the entire cause of action in the first paragraph mentioned is, in substance, an answer to so much only of the alleged defamatory publication as related to the dealings between the plaintiff and the Great Northern and Western Railway Company of Ireland, and leaves a substantial portion thereof, which relates to the general character of the plaintiff in his trade or business, and to his dealings with other railway companies and the public, wholly unanswered.

G. Fitzgibbon, for the plaintiff, opened the demurrer.—The summons and plaint consists of two distinct slanders—one, the subject matter of which is the carriage of goods for the railway company by plaintiff; the other, the subject matter of which is the general character of the plaintiff with regard to other railway companies and the public generally. Defendant has pleaded privilege only to the first part and left unanswered the second part—*Toogood v. Spyring* (1 Crompt. Mees. & Rosc., 193); *Harrison v. Bush* (5 El. & Bl., 348); *Senior v. Medland* (4 Jur., N. S., 1039); *Tuson v. Evans* (12 A. & E., 733); *McGovern v. Macnamara* (6 Ir. Jur., N. S., 347); *Cooke v. Wildes* (5 El. & Bl., 329); *Ruckley v. Kiernan* (7 Ir. C. L., 75); *Murphy v. Kellett* (13 Ir. C. L., 488). The principle in all these cases is, that the excess of slander was in the same subject matter, and hence held to be privileged, therefore they are not authorities against us—*Halloran v. Thompson* (14 Ir. C. L., 334); *Sayers v. Begg* (9 Ir. Jur., N. S., 338); *Warren v. Warren* (1 Crompt. Mees. & Rosc., 250); *Huntley v. Ward* (6 C. B., N. S., 514); *Fryer v. Kinnersley* (15 C. B., N. S., 422); *Forca v. Warren* (15 C. B., N. S., 806)—see especially the judgment of Erie, C. J., in the last cited case. The question in the present case is, whether defendant has a right to fortify his assertion of the plaintiff's misconduct with regard to his own railway company, by asserting that he has miscondemned himself with regard to other companies.

C. Ferguson contra, (with him Macdonagh, Q.C.) in support of defence.—It is admitted that the words first spoken were privileged. Can it not be said by us, that the meaning of the second part of the alleged slander is, that plaintiff was a lucky fellow in not having been found out before by me? [*Fitzgerald, B.*—We must take it that the words are capable of the meaning alleged by plaintiff unless the contrary be proved.] When once the Court decides that the occasion is privileged, it will not allow the plaintiff to entrap the defendant into admitting something which will be outside the privilege.—*Wright v. Woodgate*, (2 Crompt. Mees. & Rosc. 573); *Clarke v. Roe*, (4 Ir. C. L. 1); *George v. Goddard*, (2 Foa. & Fin. 689); *Beatson v. Skene* (5 H. & N. 838.) The question of relevancy or irrelevancy should be left to the jury. [*Hughes, B.*—What makes it lucky for plaintiff not to have been found out, was the fact of his having been guilty. If he was not guilty he could not be

found out.] *Hemmings v. Gasson* (9 El. Bl. & El., 346); *Brenley v. Latimer* (12 Weekly Reporter, 88); *Whiteley v. Adams* (15 C. B., N. S., 392.)

Macdonagh, Q.C. on same side.—There were but two persons besides defendant present when the words were spoken. The subject was introduced by the plaintiff's agent on his part. The very foundation of privilege proves that words hastily spoken will not destroy the privilege, unless used as a cloak for malice. Suppose counsel said these words to a witness, would they be actionable? The question of malice is always for the jury. [*Fitzgerald, B.*—You are helped by *Child v. Affleck* (9 B. & C. 403); and *Taylor v. Hawkins* (16 Q. B. 321.) *Pigot, C.B.*—The innuendo is ambiguous "trade or business." The words must be taken in *mitiore sensu*. We are now in the same position as if the jury had negatived the malice. Counsel concluded by reading the colloquium, and insisting that the innuendo was impossible.

The Solicitor General (Sullivan) in reply.—Privilege may be lost by excess of language, even when the subject matter is justifiable. If a person passes legitimate bounds in a matter in which he has an interest, he is not to be abridged by a plea of privilege. [*Pigot, C.B.*—If defendant justifies his opinion by saying plaintiff has swindled other companies, is he privileged?] No, certainly not. How can that aid defendant in finding out whether he himself has been swindled? See Lord Campbell's judgment in *Cooke v. Wildes* (5 El. & Bl. 329). In *Huntley v. Ward* (6 C. B., N. S., 514) it was held that the privilege had been exceeded by irrelevancy. [*Fitzgerald, B.*—Does not Robertson make plaintiff's conduct towards other companies relevant to the subject matter by his remark to defendant?] He is not plaintiff's agent to have slander heaped on him. He then cited *Warren v. Warren* (1 Crompt. Mees. & Rosc. 250); *Ruckley v. Kiernan* (7 Ir. C. L. 75); *Child v. Affleck* (9 B. & C. 403); *Taylor v. Hawkins* (16 Q. B., 321). If you transfer from the Court to the jury the question of privilege you destroy all safeguards to character.—*Halloran v. Thompson* (14 Ir. C. L. 338); *Sayers v. Begg* (9 Ir. Jur. N. S., 338); *Beatson v. Skene* (5 H. & N. 838); *Murphy v. Kellett* (13 Ir. C. L. 488.) The words spoken in the second part went beyond what was justified by the occasion.

*Cur. adv. vult.*

June 12.—*Pigot, C.B.*—We are all agreed as to the rule of law applicable to this case; but there is some difference of opinion as to its application. If the words of an alleged slander are relevant, excess therein does not exclude privilege if there is no malice. It is now too late to speculate as to whether it would not have been better to have ruled in all cases that excess should always take away the privilege, and that it should be for the Court to determine when there was excess. From the nature of the rule, the difference as to the application of it is increased by the necessity imposed on the defendant by the Common Law Procedure Act, of setting forth a special defence. This case is an illustration; here the alleged slander arose in the following manner. [His Lordship then stated the facts as set forth in the summons and plaint.] It was most properly admitted that though



the word "swindle" was used, yet that the occasion was privileged on account of the interest which defendant had in the subject matter. As to the first part of the alleged slander, even if the words are very strong, they are plainly connected with the subject matter: but then in answer to Robertson's remark, defendant uses the words in the second part. Now if the meaning of the words in the second part were that plaintiff deserved the imputation of swindling from his conduct in connection with *other railway companies*, I should think that the words would be within the plea of privilege, and a portion of the same subject matter. But the innuendo goes further, and imputes to the defendant the offence of charging the plaintiff with swindling the *public in general*, and not other railway companies only, and as this is an imputation on the plaintiff's *general* conduct in reference to his trade as described in the summons and plaint; and as this travels out of the subject matter, I am unable to say that the imputation alleged in the innuendo was privileged.

FITZGERALD, B.—I am of opinion that the demurrer should be overruled. I quite agree in the doctrine, that occasions exist in which if words are spoken which do not relate to the subject matter, these words are not privileged; and this is a question for the Court, the *bona fides* being one for the jury. There is no question here of *bona fides*, for the first part of the alleged slander is admitted to be privileged; but it is contended that the defendant was not warranted in using the words which he did in reply to Robertson. I am of opinion that he was so warranted, and that the last spoken words following immediately the admittedly privileged ones, are themselves privileged. [His Lordship referred to the facts and continued.] The subject matter was the validity of plaintiff's claim as set forth in a conversation between Robertson, plaintiff's agent, and defendant, and this was a legitimate subject, and I consider the words spoken by defendant to be relevant, as they were spoken with regard to plaintiff's dealings of the same nature as those which he had with defendant.

HUGHES, B.—I agree with my Lord Chief Baron, that the demurrer should be allowed. Robertson says that plaintiff had hitherto been considered an honest man, to which defendant replies he is only honest because he has not been found out, and on no other account. The innuendo gives that fairly, and the words *ca.* not be justified.

DEASY, B.—I am of the same opinion as my Lord Chief Baron, and my brother Hughes. The occasion as stated in the plea was that on which the defendant was to give his *bona fide* opinion as to plaintiff's claim, and the validity of that claim. Then so far as defendant expressed himself with regard to plaintiff's conduct concerning defendant's own Railway Co. it is not disputed that he was privileged; but the innuendo goes further and charges defendant with an imputation on plaintiff's *general* conduct, and in my opinion defendant was not justified in assailing plaintiff's *general* character. He has chosen to give an opinion beyond the legitimate subject matter, and he was not warranted in doing so. My brother Fitzgerald thinks that Robertson's remark brings defendant's second charge within the plea of privilege. I

am unable to give the same construction to Robertson's words. I think there was nothing in them to call for defendant's subsequent remark.

*In accordance with the opinion of the majority of the Court, the demurrer was allowed.*

WARDLE v. HOPKINS.—June 7th.

*Motion that matter be referred back to Master.*

*A brought an action against B to recover £144 16s. 6d. The case was tried, and by consent referred to the master to go through accounts and make an award between the parties. The master found for defendant, and plaintiff moved that the matter be referred back to the master, on the ground that his finding was against evidence and the weight of evidence. Held, that the motion should be refused with costs, and that the Court would not interfere except in case of gross mistake.*

THIS was an action brought by the plaintiff, a grocer, to recover the sum of £144 16s. 6d. from the defendant, a cork manufacturer. The summons and plaint contained all the usual money counts, and a count on a bill of exchange endorsed by defendant to plaintiff. Defendant traversed all these, and pleaded a set off as to £79 0s. 8d., and payment as to £74 17s. 6d. Plaintiff replied, traversing the several pleas, and issue was taken thereon. At the trial at the last Spring Assizes for Naas, before the Lord Chief Justice, it was found that the case involved a complicated statement of accounts between the parties, and by consent it was referred to the Master to go through the accounts and make an award. The Master found for the defendant with costs for part of the sum claimed.

Heron, Q.C., (with him O'Driscoll), for plaintiff, now moved that the matter be referred back to the Master, on the grounds that his finding was against evidence and the weight of evidence. Counsel contended that he was entitled to carry the motion both under the Common Law and the Common Law Procedure Act (1856), sections 6, 11. He went through the accounts before the Master and the examination of witnesses; and insisted that defendant had marked judgment too soon. Counsel cited *Baggalay v. Borthwick* (10 C. B., N. S. 61).

Palles, Q.C., (with him Byrne), contra.—The other side seek to carry this motion on the grounds that we have marked judgment too soon. If the motion is granted we will mark judgment again to-morrow, so nothing will be gained. Counsel cited *Cromer v. Churt* (15 M. & W. 310); *Hare v. Fleay* (11 C. B. 472); 1 & 2 Vict. c. 110 s. 18. The Court has no jurisdiction to send back a case to the Master or to an arbitrator. *Hogge v. Burgess* (3 H. & N. 293); *Hodgkinson v. Fernie* (3 C. B., N. S. 189); *Holloway v. Francis* (9 C. B. N. S. 559); *Baggalay v. Borthwick* (10 C. B., N. S. 61); *Cleary v. Cleary* (10 Ir. C. L. 329). The Court, whether satisfied or not with

the finding ought to abide by the decision of the tribunal appointed by the Legislature.

The Court did not call on *Byrne*, but asked *O'Driscoll* to reply. He referred to *Robson v. Lees* (6 H. & N. 258); *Kendil v. Merrett* (25 Law Journal, N. S., C. B. 252). Is a Master to be invested with higher authority than a judge at *Nisi Prius*?

*Pigor, C.B.*—Upon the facts represented, it is idle to contend that we can adjudicate against the finding of the Master. It was for the Master to decide upon the conflicting evidence, not for us. We could not interfere, unless there was a gross mistake committed. We must treat this as a jury question, and furthermore, when parties have chosen their own forum they must abide by the decision of that forum. With respect to the Master's direction, that the defendant should have the costs, it is not necessary for us to say any more than this, that he only did what naturally sprung from his decision. We must, therefore, refuse the motion with costs.

## Court of Appeal in Chancery.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

IN THE MATTER OF THE ESTATE OF ROBERT KENNEDY, OWNER; JAMES REID, PETITIONER.

May 5, 6; June 7, 8.

*Irish Bankruptcy and Insolvency Act* (20 & 21 Vict. c. 60)—Arrangement clauses, secs. 343 to 353—Word "process"—Judgment Mortgage Act.

On the 19th of April, 1864, the Court of Bankruptcy and Insolvency made an order, under the 343rd section of the 20th & 21st Vict. c. 60, protecting *R. K.* (who was a trader unable to fulfil his engagements with his creditors) his person and property from all process. Before the making said order, one of the creditors, *J. K.* caused a writ of summons and plaint to be issued against said *R. K.*, and on the 21st of April following, while said order was in full force and effect, said *J. K.* obtained judgment by default against said *R. K.* whose estate and effects were in the possession of the official assignee since the said 19th April. On the 14th June following, Judge Lynch confirmed a proposal made to, and accepted by three-fifths of the creditors, whereby it was agreed to take 10s. in the £, secured by the joint promissory notes of *J. K.* and another. On April 23rd, *J. K.* caused said judgment to be registered as a mortgage against certain leasehold premises of *R. K.* On the 11th of October, after the confirmation of said proposal, said *J. K.* presented a petition on foot of said judgment mortgage in the Landed Estates Court, and thereupon Judge Longfield, on the 16th of January, 1865, made an absolute order for the sale of said leasehold premises.

Held, that as at the time of the registration of the said judgment as a mortgage, the estate was in the possession of the official assignee, and under the protection of the Court of Bankruptcy, the order for the sale of the said estate should be set aside.

THIS was an appeal from an order made by Judge Longfield on the 16th January last, and the principal question was whether the registration of a judgment as a mortgage was valid, the registration having taken place while the person and property of the owner were protected from "all process" by an order of the Bankrupt Court, made under the arrangement clauses of the Bankrupt Act, and after an order vesting the owner's estate and effects in the official assignee. Judge Longfield decided that the registration was not "a process" within the meaning of the Bankrupt Act, and that the petitioner was entitled to register his judgment as a mortgage, and proceed to sell the owner's lands in the Landed Estates Court, and from that decision the owner appealed. The facts of the case, as stated in the petition of appeal, are as follows:—That the petitioner being a trader within the meaning of the Irish Bankrupt and Insolvent Act, 1857, being embarrassed in his circumstances, and unable to meet his engagements with his creditors (amongst whom was James Reid) on the 19th day of April, 1864, presented pursuant to the 343rd section of said Act, to the said Court of Bankruptcy and Insolvency, a petition praying that the appellant's person and property might be protected from all process, and that such proposal as he might be able to make (or such modification thereof as by three-fifths in number and value of his creditors might be determined) might be carried into effect under the control of the Court. Accordingly on the said 19th of April, an order was made on the said petition by Judge Lynch, one of the judges of the said Court of Bankruptcy and Insolvency, granting protection to the appellant, pursuant to the prayer of the said petition, until the 13th day of May then next, or until further order. And it was thereby further ordered "that Charles Henry James, the official assignee in the matter, should possess and receive the estate and effects of the petitioner;" and further, that petitioner should call a meeting of his creditors on or before the 26th of April 1864. The several matters by said order required to be performed on appellants' part, were duly performed accordingly, and (amongst other things) notice of the said petition for arrangement and the proceedings thereunder, and of the meeting of petitioner's creditors, to be held on the 25th day of April, 1864, pursuant to the said order, was duly served on Mr. R. Kelly, solicitor for the said James Reid, on the 21st day of April, 1864. That the said meeting of appellants' creditors was duly held on the 25th day of April, 1864, and that the creditors at said meeting unanimously resolved that petitioner's proposal (viz. —to pay 10s. in the pound, at two, four, and eight months, in three payments of 4s., 4s., and 2s., the first two payments to be secured by appellants' promissory notes, and the last payment to be collaterally secured) should be accepted. That such meetings and proceedings (of which the said James Reid had due notice) were had and taken in said arrangement mat-

ter, and such assent was given pursuant to the said Act, on the part of said appellant's creditors to said proposal. And on the 14th day of June, 1864, by an order of that date made by the said Honorable Judge Lynch, appellants' said proposal was duly confirmed, in accordance with said order, appellants' promissory notes for the first and second instalments, and the joint promissory notes of appellant and one Richard Rose Cleland for the last instalment on foot of appellant's debts (including that of the said James Reid) were duly forwarded to, and received by, said several creditors (including the said James Reid). That appellant has always been ready to pay the said promissory notes so received by said James Reid when presented for payment; and has paid all the other said promissory notes. That the said order for protection of the 19th of April, 1864, was, during the said proceedings for arrangement, duly extended from time to time, and was, on the 11th day of October, 1864, hereinafter mentioned, and still is in full force and effect. That before, and at the time of, the filing of the said petition for arrangement, and of the filing of the petition in the Landed Estates Court hereinafter mentioned, appellant was entitled to a certain piece of ground, with the milla, houses, and buildings thereon, situate in the town of Lisburn and County of Antrim, under and by virtue of a lease for thirty-one years, dated November, 1850, from Samuel Kennedy to appellant, and one Thomas Kennedy, since deceased. That appellant being indebted to the said James Reid in the sum of £508 ls. 3d., on foot of a bill of exchange, dated 1st January, 1864, and drawn by the said James Reid upon, and accepted by, R. and T. Kennedy (of whom appellant was the surviving partner) at three months' date, and appellant being unable to pay same when due, the said James Reid served appellant with a summons and plaint on the 6th day of April, 1864, on foot of said bill of exchange, and, on the 21st day of April, 1864, recovered judgment by default in an action against appellant for the amount thereof. That the said James Reid, after having had notice of the said petition for arrangement and order thereon, caused the said judgment to be registered as a mortgage, pursuant to the statute in that behalf, on the 23rd day of April, 1864. That, on the 11th day of October, 1864 (after said proposal had been duly confirmed as aforesaid), the said James Reid presented his petition in the Landed Estates Court, Ireland, on foot of said judgment mortgage, stating as therein, and amongst other things, that he was sole incumbrancer, and praying for a sale of the said leasehold premises for the discharge of the incumbrances affecting same. That, by an order made on said petition by the Honorable Judge Longfield, and dated the 22nd day of October, 1864, it was ordered that the said premises should be sold for the discharge of the incumbrances affecting same, unless cause shown within twenty-eight days from the service thereof on your petitioner. That on the 29th Nov. 1864, appellant's affidavit to show cause against said conditional order being made absolute, was filed in the said Landed Estates Court; and in said affidavit were set forth (amongst other things) the several proceedings had in said arrangement matter hereinbefore referred to; and appellant submitted by said affidavit that the

registration of the said judgment as a mortgage was, under the circumstances, "process" within the meaning of the Irish Bankrupt and Insolvent Act, 1857, and was invalid as against the said order for protection; and further, that the presentation of the said petition for sale in the Landed Estates Court was, under the circumstances, contrary to the policy and spirit of the said Act, and was invalid as against said order for protection; and the retention by the said James Reid of the said promissory notes was an acceptance of the said proposal; and further, that, under the circumstances, in said affidavit stated the said conditional order should not be made absolute. That, on the 16th day of January, 1865, Judge Longfield, by an order of that date, made absolute the said conditional order for sale, notwithstanding the cause so shown by appellant.

*The Solicitor-General (Sullivan)*, with *Seeds*, and *T.P. Lynch*, appeared for the appellants.—Judge Longfield was clearly wrong. By the 343rd section of the Irish Bankruptcy and Insolvency Act, if a trader, unable to meet his engagements with his creditors, present a petition to the Court praying that his person and property may be protected from "process," the Court has the power so to protect him from "process." The question for the Court now to consider is—what is the meaning of the word process?

Is the registration of a judgment as a mortgage a process of the Court? Judge Longfield held it was not; we insist that it was. By the several sections from the 343rd section to the 353rd inclusive, it was not competent for James Reid, after having notice of the order for protection, to affect by sale the property of the petitioner. The petitioner's proposal in the arrangement was duly confirmed pursuant to the 347th section of the Irish Bankrupt and Insolvent Act of 1857; and as no default was made by petitioner in carrying out same, it was not competent for James Reid, after such confirmation and notice thereof, to resort to his original debt or to his judgment or judgment mortgage in respect thereof. By the 353rd section when the resolution or agreement has been carried into effect, the Court is to give the petitioning debtor a certificate to operate as a certificate of conformity. Now, what is a process of the Court? In "*Les Termes de la Ley*" it is said that "There be divers proces after judgment as capias ad satisfaciendum and capias ut legatum, &c. There be other proces and writs judicial, as capias ad valentiam, fieri facias, scire facias, and many others." The word "process" then is susceptible of a signification wide enough to embrace that which has been done in this case. In *Blackmore's case* (8 Rep. 157) Lord Coke says—"And be it known that this word 'process' is taken in law in two significations—in one largely, and in the other strictly; and in the large sense it is taken for all the proceedings in all real and personal actions, and in all criminal and common pleas." If there be any meaning attached to the word it must have the meaning we contend for. Surely a mere writ of summons and plaint cannot be process in the contemplation of the Legislature; it must be something more; it is judgment, or making available that judgment. *Ex parte Hills* (32 Law Times, 213) is a decision on the very word. The

following is extracted from the judgment in that case—"The bankrupt here has filed a petition for arrangement with his creditors under the 211th section; and had previously to the filing of the petition for adjudication, obtained the protection of the Court for his person and property from all process. What then is the true construction of the term 'from all process?' I think the Act must be construed strictly, and for the benefit of the creditors; and looking at it in that view, I think the word "process" here must mean process in a suit for a party's own exclusive benefit." *Naylor v. Mortimore* (10 C. B. N.S. 566). Filing an affidavit in the judgment mortgage then is a process. Judge Longfield was wrong in deciding that it was not. *In re Craig* (Drury, 394.)

*Law, Q.C., May, Q.C., and Andrews*, were for the respondent.—The order of the Court below must stand. The rights of mortgagees under the 13 & 14 Vic. c. 29, enabling judgments to be registered as mortgages are not interfered with by the arrangement clauses of the Irish Bankrupt and Insolvent Act of 1857, s. 343 to 353. It is manifest from the express provisions contained in the 331st sect. of that Act in relation to judgment mortgages in cases of bankruptcies, and from the absence of any provisions in the same Act in relation to judgment mortgages in cases of arrangement, that it was not intended by the Legislature to interfere with the rights of judgment mortgagees under the Act 13 & 14 c. 29, in cases of arrangement. Now, the word process in the arrangement clauses means process by writ of execution, and cannot, upon the true construction of those clauses, be given a more extended meaning. The word process has not the extended signification sought for on the other side. Comyn's Dig. tit. process A. says that the word process generally imports writs which issue out of any court to bring the party to answer, or for doing execution. So exactly in "*Les Termes de la Ley*" the word process is given the same meaning. It is absurd to contend that a mere affidavit as to a certain state of facts is a "process" of the Court. The Court takes no action whatever in the matter.

The LORD CHANCELLOR said that in this case Mr. Kennedy, the owner, had appealed against an order made by the Landed Estates Court, by which they made absolute a conditional order for the sale of a certain chattel interest belonging to him, to pay the debt of the petitioner, Mr. Reid, notwithstanding the cause shown. The circumstances gave rise to some considerations which had not yet been finally determined in any court, but which were of very considerable public importance, having regard to the provisions of the Bankrupt Act, and the code of legislation embodied in those sections of it which are important to be considered in this case, and which enabled a trader, instead of becoming a bankrupt, to effect an arrangement with his creditors, under the jurisdiction and control of the Court, and with its approbation, by proposing a composition for the debts of his creditors, and making that composition binding upon all who are creditors at the time he made the application to the Court of Bankruptcy, provided there was a concurrence of a certain number of creditors in the arrangement. It was obvious to every one that that was a very beneficial code of legislation, so as to

enable a trader to adjust his affairs with more advantage to the creditors than an ordinary adjudication in bankruptcy would effect, and to relieve the trader from his temporary difficulties. That code of legislation had prevailed in England, but for it, there was now substituted a new form of arrangement by deed between the trader and his creditors. That code appeared to be involved in considerable difficulty there, but they had nothing to do with that here. They had only to do with these arrangement clauses which were, in fact, borrowed from similar clauses in the English Act. The facts of the case were shortly these: Mr. Kennedy, the owner, was indebted to Mr. Reid, who commenced an action against him for the purpose of recovering the amount of the debt. He was about to obtain judgment in that action, but two or three days before he obtained it Mr. Kennedy petitioned the Court of Bankruptcy, under the arrangement clauses, and complied with all the requirements of the Act. On the 19th of April three orders were made by the Court of Bankruptcy—one vesting Mr. Kennedy's property in Mr. Charles Henry James, the official assignee; a second appointing a private sitting to receive the proposal of the trader; and the third declaring the person and property of Mr. Kennedy protected from all process. That protection was continued from time to time until the 24th of May. On the 21st of April Mr. Reid had notice of all these proceedings, and on the 23rd of April he registered his judgment under the Judgment Mortgage Act, and he now claimed to be the mortgagee of Mr. Kennedy's interest in virtue of the Statute. Mr. Reid then proceeded to present a petition for the sale of the property in the Landed Estates Court, and obtained from that Court a conditional order for sale. On the 16th of January, 1865, Judge Longfield, having heard all the parties, made the conditional order absolute. Shortly after the judgment mortgage was so registered, Mr. Kennedy proceeded with his arrangement matter. The first private sitting was held on the 13th of May, 1864, and the second on the 14th of June, 1864, and on that day's proposal of a composition by Mr. Kennedy was confirmed by the Judge, and a certificate given him to that effect. Therefore, on the 14th June, Mr. Kennedy stood in the position of a debtor who had complied with all the forms of the arrangement clauses, and the arrangement so confirmed was binding, and of full force, as well against all who were then creditors as against all persons who were creditors at the date of his petition, and had notice of the proceedings. Now, the judge of the Landed Estates Court having made an absolute order, the Court of Chancery Appeal was now called upon to consider whether the order of sale should be affirmed, or should be reversed. The owner relied upon the several sections of the Act of Parliament, and *prima facie* he appeared according to the words of the Act at all events to substantiate his position. Mr. Reid contended that he was entitled, notwithstanding that arrangement proceedings, to go on with his action to obtain judgment upon it, and to register it as a mortgage—in other words, to transfer to himself by force of the Act of Parliament the property of the trader, that property being at the time under the protection of the Court of Bankruptcy and in the possession of

the official assignee, under the order of the Court of the 19th April, 1864.—The main question in the case was, what construction should be given to the word "process" in the Act of Parliament which enabled the Court of Bankruptcy to protect the person and property of the trader from all process. Mr. Kennedy contended that to turn a judgment into a mortgage was a process, or in the nature of a process, against the property, and that, therefore, being in violation of the Act of Parliament, it could not be relied on by Mr. Reid. On the other hand, for Mr. Reid it was argued that that was not the proper meaning of the word process, and that the Court could not extend the operation of the Act. If that were the only question in the case, it might be very difficult to say that the registration of the judgment as a mortgage was of a different character from the registration of a judgment in England, which had been held in that country not to be a process, but at the same time it would require very strong reasons to hold that the registration did not amount to a process within the meaning of the Act. There has been, in fact, no absolute decision upon the meaning of the word process in Ireland. The 211th section of the English Bankrupt Act is nearly word for word, the same as the 343rd section of the Irish Act—*Fleuster v. McClelland* (8 C. B., N. S., 357) was a decision on the English Act; the marginal note of that case is as follows:—"The 211th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, provides that the person and property of a trader petitioning under the private arrangement clauses shall be protected from "all process." *Semble*, that this means process by way of execution against his person or goods, and does not extend to prohibit a judgment creditor from registering his judgment under the 1 & 2 Vict. c. 110, s. 113; and Willis, J. there says—"If process were to issue against these defendants in violation of the 211th section of the Statute, I have no doubt of their right to come to this court for relief, or possibly they may bring trespass." In that case there it was held that registering a judgment under the 1 & 2 Vict. c. 110, s. 13 did not amount to a "process" in England. Well then, that case is no help to us here; it does not decide what a process is; but it does decide what does not amount to a "process." By the 243rd section of the Act it is provided that "any such trader unable to meet his engagements with his creditors, and desirous of laying the state of his affairs before them, under the control of the Court, and of submitting himself to the jurisdiction of the Court, in manner hereinafter mentioned, may present a petition to the Court, setting forth the true cause of such inability, and praying that his person and property may be protected from process until further order; and the Court on such petition shall have power to grant such protection, and may renew the same from time to time as it shall think fit; and if the petitioner be in prison or custody for debt may, except in the cases next hereinafter mentioned, order his release, either absolutely or on condition, and may take bail for his attendance at the several sittings of the Court hereinafter mentioned." What was now the question before the Court?—They had to consider in what condition the case now was as between these parties, in consequence of the

confirmation of the composition arrangement by the judge of the Bankrupt Court. The composition was to be secured by bills at certain dates, and the last of them was to be secured by a gentleman who came forward as surety for the trader and bound himself to pay the composition. These bills had been given to all the creditors who signed the composition arrangement, and to others; and they had been actually left at Mr. Reid's house. There was some controversy as to whether he had received them, but at all events he had them, and when they became due he might get the money also; and the question was, whether he could at the same time *pari passu* or at all go on with the proceedings for a sale of the property in the Landed Estates Court. The Act of Parliament was somewhat silent as to the disposition of the property of traders. If they completed the arrangement, whatever property they had remained under the control of the Bankrupt Court, and the judges might dispose of it as they liked. For obvious reasons it may remain so, because it may be disposed of by the Court in aid of the composition. They may consider, where a surety comes in to assist a trader, that it is a very fair thing for the Court to hold its hand on the property for the protection of the person who does come forward. But could a creditor repudiate the whole of the transactions and say that he was not liable to be bound by it? When the arrangement had been carried out the Judge of the Bankrupt Court could give a certificate, which had the same effect as a certificate of conformity under the Bankrupt Act. That stage had not yet been reached; but when such a certificate had been obtained, if it should be obtained by Mr. Kennedy there would arise the question as to its barring effect. It was said that the word "thenceforth" was only to make the certificate effective from the day of its being granted. I speak of the word "thenceforth" in the 347th section of the Bankruptcy and Insolvency Act. That appears to me to be a construction entirely subversive of the whole principle of the arrangement clauses, the certificate under which was to operate as a certificate of conformity under the bankruptcy. To give a reasonable interpretation to the clauses they must hold that the certificate was good as against those who were creditors at the time of filing the petition.

Now it was said that creditors under a bankruptcy who had security by mortgage were not affected by the bankruptcy, and that therefore as Mr. Reid had a mortgage he was entitled to proceed to a sale of the property. That was begging the whole question: for Mr. Reid, when the petition was filed, was a creditor without security. What would Mr. Reid gain by this judgment mortgage? He must have taken just what Mr. Kennedy had; and here was an order of a court of competent jurisdiction placing that estate under the control of the Court, and directing the official assignee to hold it; in fact, taking the administration of it into its own hands. Well, *McAuley v. Clarendon* (8 Ir. Ch. 121) settles the question that the owner of a judgment-mortgage must take the judgment-mortgage with all its equities; that if the debtor has a legal estate, it is transferred to the creditor subject to the same equities as it was liable to before the registration. The final

stage of the case had not been reached. For anything that was known to the contrary, Mr. Kennedy might never get a certificate of having complied with the provisions of the Act, so that the whole of the proceedings might fall to the ground. If he did not pay his creditors they will fall back on their original debts as if nothing had taken place. In the meantime they ought not to allow the property to be swept away until it was ascertained whether Mr. Kennedy would obtain a certificate. If he did the whole question would be as to the meaning of the word "process," and as to the barring effect of the certificate. In the meantime no step should be taken to preclude the parties from raising the questions that may arise in this case. The Court must hold its hand for the present; and in order that none of the parties should be prejudiced, the absolute order for a sale which was made by Judge Longfield, must be set aside without prejudice to any application on the part of Mr. Reid to have it made again when the Court of Bankruptcy had decided upon Mr. Kennedy's application for a certificate.

The LORD JUSTICE OF APPEAL concurred.

The Court then made the following order:—

"The Court doth order and declare that the making absolute the conditional order of the Landed Estates Court, dated the 22nd of October last, by the order of the said Court dated the 16th of January last, was premature, and accordingly it is further ordered, that the said absolute order for sale be and the same is hereby set aside. And it is further ordered that the said Robert Kennedy do have his costs of showing cause against the said conditional order as part of his costs in said matter in the Landed Estates Court, this order to be without prejudice to the right of the said James Reid to renew his application to make absolute the said conditional order for sale after any decision made by the Court of Bankruptcy and Insolvency, on any application which said Robert Kennedy may make for a certificate under the provisions of the Irish Bankruptcy and Insolvency Act, 1857; and it is further ordered, that all parties do abide their costs of this appeal."

BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.

IN RE LYNCH'S ESTATE.—June 8.

*Landed Estates Court—Jurisdiction—Powers of Court to sell a policy of insurance.*

In 1850, P.C.L. mortgaged to an insurance company certain estates of which he was seised, for a sum of £5,500, and as collateral security, a policy of insurance on his own life was assigned by P.C.L. to said company. From 1857 to 1863, the annual premiums payable on the policy were paid out of the rents of said estates by a receiver under the Court of Chancery, and the premium of 1864 was paid out of

the proceeds of the sale of the aforementioned estates.—P.C.L. in 1860, mortgaged to R.C. his equity of redemption in said lands, and as a collateral security assigned to R.C. said policy of insurance, subject to the mortgage to the said company. In March, 1864, said company was fully paid off out of the proceeds of the sale of said lands. Said policy having been lodged in the Landed Estates Court, it was ordered by that Court that same should be sold, and that the proceeds of the sale thereof were chargeable with the premiums paid out of the fund in Chancery. Held, (affirming the order of Judge Hargreave) that the Landed Estates Court had jurisdiction to sell said policy under the peculiar circumstances of the case.

THIS was a petition of appeal presented by Robert Cook, of No. 18 Warwick-street, London, from an order pronounced by Judge Hargreave, on the 30th January, 1865, directing a policy of insurance to be sold, and the proceeds to be chargeable with the premiums paid out of certain funds in certain causes in the Court of Chancery. The petition stated, that by indentures, dated respectively the 30th March, 1850, and the 23rd Sept., 1853, the estates in this matter were mortgaged by the owner Patrick Crean Lynch, for the purpose of securing to the Trustees of the Palladium Insurance Company (now the Eagle Insurance Company) the principal sums of £1,600 and 3,900, (making together the sum of £5,500), and interest for the same. That a certain policy of insurance, effected by the said owner Patrick Crean Lynch upon his own life on the 16th September, 1853, for the sum of £5,750, with the said Palladium Insurance Company, and numbered 3,213, was assigned by said owner to the said trustees of said company, as collateral security for payment of said principal and interest moneys respectively. And that the annual premium (amounting to the sum of £210 11s. 10d.) payable on said policy of insurance, was paid by the said owner out of his own moneys from the time of its being so effected, until the month of September, 1857, from which time to the month of September, 1863, inclusive, the same was discharged by a Receiver of the Court of Chancery in Ireland, appointed pursuant to an order of that Court dated the 23rd day of October, 1857, and made in certain causes or matters of *Campbell v. Lynch*, *Queely v. Lynch*, *Lazarus v. Lynch*, *Egan v. Lynch*, and *Smith v. Lynch*, depending in said Court (being suits instituted by creditors to obtain payment of judgment debts recovered against the said owner), and the premium payable on the 16th September, 1864, has been paid out of the proceeds of the sale already had in this matter. The petition then stated that by six several indentures, dated respectively the 13th September, 1860, the 10th October, 1860, the 23rd November, 1860, the 15th January, 1861, the 6th March, 1861, and the 8th January, 1862, the said owner mortgaged the said estates in this matter to petitioner, for securing the principal and interest moneys therein mentioned, and upon foot of which there still remained due to petitioner the principal sum of £1,384, with interest thereon. That by the last-mentioned indenture of the 8th January, 1862, the said owner duly

assigned to petitioner, as collateral security with said mortgages, the said policy of insurance for £5,750, effected on his own life, subject to the said mortgage thereof executed by said owner to the said trustees of the said Palladium Insurance Company, as before-mentioned. That petitioner gave notice of the said assignment to him of the said policy to the said Palladium Insurance Company on the 22nd January, 1862. That the said incumbrance upon the said estates in this matter, which was so vested in the said trustees of the said company, and with which the said first-mentioned assignment of the said policy was so executed as a collateral security was, on or about the 5th day of March, 1864, fully paid off and satisfied out of proceeds of the said sale in this matter, and there is now no claim or demand whatever subsisting upon foot thereof, or of the said collateral assignment. That upon such payment and satisfaction being so made as aforesaid, and on or about the 13th May, 1864, petitioner filed a bill in the Court of Chancery in England against the said trustees of the said company, for the purpose of having his rights in respect of the said policy of insurance declared and determined, and an order was pronounced in said cause on the 3rd day of June, 1864, whereby all documents relating to the said suit (including the said policy of insurance) in possession of the said defendants were ordered to be brought in and lodged in the said Court. That on or about the 1st June, 1864, petitioner's solicitor was served with notice of an application to be made to the Honourable Judge Hargreave in this matter, for the purpose of having the said policy of insurance brought in by the said trustees of said company and lodged in court; and petitioner appeared upon and opposed such motion upon the ground that said suit was pending in England in relation to said policy, and that petitioner was entitled thereto. Upon the hearing of said motion, Judge Hargreave was pleased to order that the policy should be lodged in court, and that the same should not be delivered out of court without an order to be made upon notice to petitioner. Accordingly said policy was brought in and lodged in the Landed Estates Court, and the same still remains deposited therein. That in December, 1864, an application was made to Judge Hargreave to have the said policy so lodged as aforesaid given to the solicitor of the petitioner in this matter, in order that same might be disposed of with the approval of the Court for the benefit of the unpaid creditors or the said owner Lynch, upon the ground that the premiums that became payable on foot thereof from the 16th September, 1853, to the present time, had been paid out of the rents and profits of the estates of the said owner. Whereupon the Court ordered that the policy "be sold, but no proceedings towards a sale to be taken till the expiration of one month from this date, in order to give petitioner an opportunity of bringing in and lodging to the credit of this matter the amount of the last premium, viz.:—£210 11s. 10d., with interest at 5 per cent., and instituting a motion for the purpose of establishing his claim as against the policy, but the sale of the policy not to prejudice Mr. Cook's (petitioner's) rights in case he should not bring forward any motion. The Court declares the petitioner entitled to his costs of

this motion as costs in the matter, but reserves Mr. Cook's (petitioner's) costs." That pursuant to said order, notice of an application on petitioner's behalf was given upon the 23rd January, 1865, for an order that said policy of insurance should be given up to him, and the motion came on for hearing before the said learned Judge on the 30th January, 1865, when the following order from which the present appeal was taken was made:—"The Court doth refuse the motion and doth direct the said policy to be sold, and doth declare the proceeds chargeable with the premiums paid out of the funds in Chancery, with interest at 5 per cent., the said Robert Cook to be repaid the sum of £210 11s. 10d. lodged by him" (meaning the sum of £213 14s. 7d., so lodged by petitioner as aforesaid) "in respect of the last's year's premium on the policy; and this order to be without prejudice to any application Mr. Cook" (meaning petitioner) "might make against the residue of the proceeds of the sale of the policy, after refunding the aforesaid premiums, Mr. Cook's costs of this motion to be added to his demand."

The appellant, Robert Cook, appeared in person in support of the appeal. The Landed Estates Court had no jurisdiction to deal with the policy of insurance. The preamble of the Landed Estates Court Act recites that—"Whereas it is expedient to create a permanent court for the sale and transfer of land in Ireland," this recital shows the purpose for which the Act had passed; namely, the sale of lands and not of policies of insurance; this then, being so, the Landed Estates Court Judge had no right whatever to interfere with the policy in this case, and his order must be set aside. I am in this case the assignee of the policy of insurance, and having given notice of that assignment to the Palladium Company, I have acquired an equitable charge prior to any of the creditors in this case.

*P. Blake, Q.C., with Henry O. N. Burke, contra.*—The Landed Estates Court has power to dispose of the policy of insurance equally with a Court of Equity. The 37th section of the Landed Estates Court Act empowers it in the terms following:—"The said Landed Estates Court (Ireland), shall be a court of record, and shall have all the powers, authority, and jurisdiction of a Court of Equity in Ireland, for the investigation of title, and for ascertaining and allowing incumbrances and charges, and the amounts due thereon, and settling the priority of such charges and incumbrances respectively, and the rights of owners and others, and generally for ascertaining, declaring, and allowing the rights of all persons in any land, in respect of which, application may be made under this Act, or in the money to arise for sales under this Act, upon such applications, and shall have the like authority and jurisdiction for enforcing, rescinding, or varying any contract for sale made under this Act, and in other matters incident to or consequent on a sale under this Act, as are vested in a Court of Equity in relation to a sale under the direction of such court," &c. The Court then has jurisdiction to dispose of all questions which arise incidentally in reference to any estate or fund under its control, and it was so decided in *Ronyane's estate* (13 Ir. Ch. 446). [*The Lord Chancellor—How*



could the Court of Chancery where there was a bill filed for the sale of an estate direct the sale of a policy of insurance?] The Court would not interfere, so as to sell the policy, unless it appeared that the policy was kept up out of the estate, and then by filing a supplemental bill the Court of Chancery would step in.

THE LORD CHANCELLOR.—I am of opinion in this case that the decision arrived at by Judge Hargreave must be affirmed. Here the party has in his hands the policy of insurance, and the Landed Estates Court says that, in having that policy, the premiums of which have been paid out of the rents, you have the rents. Mr. Lynch is not substantially the owner of this policy, and I take it for granted it was assigned for value. It appears to me, then, that the Landed Estates Court has full and ample jurisdiction has, I should say, a collateral jurisdiction or right to sell this policy under the peculiar circumstances of this case.

THE LORD JUSTICE OF APPEAL concurred.

## Court of Queen's Bench.

[Reported by William Woollock, Esq., Barrister-at-Law.]

THE QUEEN v. REA.—Jan. 25, 30, 1865.

*Information—Slander—Mayor of borough.*

*Defamatory words spoken of and to the mayor of a borough in the execution of his office, while presiding at a meeting of the town council, are properly the subject of a criminal information. So Held, per Lefroy, C.J. and Hayes J. (dissentientibus Fitzgerald and O'Brien, JJ.)*

MOTION in arrest of judgment. The case was one of a criminal information. The information contained nineteen counts. The first count stated that at a meeting of the town council of the borough of Belfast, in the County of Antrim, duly held, to wit, at Belfast aforesaid, in the County of Antrim aforesaid, on the 1st day of December, in the year of our Lord 1862, one John Lytle was duly elected to serve as mayor of the said borough, for and during the residue then to come, and unexpired of the said year of our Lord, 1862, and that the said John Lytle has been, to wit, from the said 1st day of December, in the year of our Lord 1862, and from thence hitherto, and still is, the mayor of the said borough; and that the said John Lytle whilst he was such mayor, to wit, on the 13th day of December, in the year of our Lord 1862, in exercise of his powers, and in pursuance of his duties as such mayor, duly presided at a special meeting of the town council of the said borough, held in the town hall of the said borough, to wit, at Belfast aforesaid, in the county aforesaid, for the transaction of certain municipal business of the said borough; and that the said John Lytle, whilst he was such mayor, to wit, on the 1st day of January, in the year of our Lord 1863, in exercise of his said powers, and in pursuance of

his said duties as such mayor as aforesaid, also presided at a certain other meeting of the said town council, held in the town hall of the said borough, to wit, at Belfast aforesaid, in the County of Antrim, for the transaction of certain municipal business of the said borough; and that one John Rea, during all the time aforesaid, was one of the town councillors of the said borough of Belfast, and as such town councillor, attended the said respective meetings so held on the said 13th day of December, in the year of our Lord 1862, and the said 1st day of January, in the year of our Lord 1863: and that at the said last-mentioned meeting, a certain resolution was duly moved and seconded, to wit—"That Alexander Crossett, Samuel Glenn, and Robert Brown (who had for several years acted as collectors of police and borough rates, imposed by the town council of the said borough of Belfast), should be, and they are hereby, severally appointed collectors of police rate, this day made by the council, and of the arrears of all former rates, and that any, or either of them, be, and they are hereby, authorized to collect and receive the said rates, or any part thereof, and the arrears aforesaid;" whereupon the said John Rea, then and there, addressed the said town council, at the said meeting, with reference to the said resolution, and, in so doing, introduced certain statements which the said John Lytle, who was then presiding as chairman in execution of his said office of mayor, at such meeting, considered to be of an improper and irrelevant character, and then and there stated to the said John Rea that he, the said John Lytle, would not permit; and the said John Lytle, as such chairman, then and there informed the said John Rea that if he (the said John Rea, persisted in pursuing the line of argument he was then doing, to wit, in introducing said statements, he, the said John Lytle, would put the question without further notice; whereupon the said John Rea, being a scandalous and ill-disposed person, and wickedly and maliciously intending and contriving to scandalize, vilify, degrade, and bring into contempt the said John Lytle, in the execution of his office as such mayor, as aforesaid, during the said last-mentioned meeting, so held at the place last aforesaid, and the time last aforesaid; and whilst the said John Lytle, as such mayor as aforesaid, was duly, and in execution of his said office, presiding over said last meeting, wickedly and maliciously, in the presence and hearing of divers good and liege subjects of our Lady the Queen, and burgesses of the said borough, did speak, publish, declare, and say with a loud voice to, and of and concerning the said John Lytle, as such mayor of Belfast as aforesaid, and to and of and concerning the said John Lytle, in the execution of said office of mayor as aforesaid, and to and of and concerning the said John Lytle whilst he was so presiding over such meeting, as aforesaid, amongst others, the several false, scandalous, malicious, and defamatory words hereinafter mentioned; that is to say, "I" (meaning the said John Rea) "respectfully say that until I" (meaning the said John Rea) "am dragged out of this room by your officers" (meaning the officers of the said John Lytle, as such mayor) "at your" (meaning the said John Lytle's) "individual peril, and at the peril of those whom, and you" (meaning the said John Lytle) "will not put this resolution

until I" (meaning the said John Rea) "have concluded my argument; and I" (meaning the said John Rea) "insist upon you" (meaning the said John Lytle) "hearing me" (meaning the said John Rea) "explaining the law of conspiracy, and showing that these tax collectors" (meaning the said Alexander Crossett, Samuel Glenn, and Robert Brown) "are liable to conviction immediately on trial, and are not entitled to be public officers of Belfast; and furthermore, if you" (meaning the said John Lytle) "suppress this debate, and don't hear what any judge in the land will hear, I" (meaning the said John Rea) "will, beyond all question, put you" (meaning the said John Lytle) "in the indictment as a co-conspirator with them. That is my" (meaning the said John Rea's) "answer to your" (meaning the said John Lytle's) assertion; now execute your" (meaning the said John Lytle's) orders. There was no part of my" (meaning the said John Rea's) "argument more relevant;" and that thereupon a discussion arose and took place at said meeting, during which one William Bell then and there, who was also a town councillor of said borough of Belfast, present at said meeting, rose to speak; whereupon the said John Rea interrupted the said William Bell, and stated that he, the said William Bell, had no right to proceed; and thereupon the said John Lytle, addressing the said John Rea, then and there, stated to the said John Rea, that he, the said John Lytle, was the judge of order there, meaning at said meeting; whereupon the said John Rea further wickedly and maliciously intending and contriving as aforesaid, wickedly and maliciously, in the presence and hearing of divers good and liege subjects of our Lady the Queen, and burgesses of the said borough, to wit, at the time and place last aforesaid, did speak, publish, declare and say in a loud voice, to and of and concerning the said John Lytle in the execution of his said office as mayor, and to and of and concerning the said John Lytle, whilst he was so presiding as such mayor, over said meeting as aforesaid, the further false, scandalous, malicious, and defamatory words next following, that is to say—"So long as you" (meaning the said John Lytle) "are acting *bona fide* in the execution of your" (meaning the said John Lytle's) "duty, I" (meaning the said John Rea) "charge you" (meaning the said John Lytle) "with acting corruptly in the execution of your" (meaning the said John Lytle's) "duty, I" (meaning the said John Rea) "charge you" (meaning the said John Lytle) "as a conspirator with Brown, Glenn, and Crossett," (meaning the said Robert Brown, Samuel Glenn, and Alexander Crossett) "and several others, in packing the burgess roll, and I" (meaning the said John Rea) "say that you" (meaning the said John Lytle) "would never have been town councillor, alderman, or mayor of Belfast, if the burgess roll had not been packed from year to year. Now I" (meaning the said John Rea) "impeach you" (meaning the said John Lytle) "with a breach of the laws of the land, which you" (meaning the said John Lytle) "are bound to observe; I" (meaning the said John Rea) "charge you" (meaning the said John Lytle) "as a conspirator, with degrading your" (meaning the said John Lytle's) "office."

And that the said John Rea, being then and there interrupted in his observations, further wickedly and maliciously intending and contriving as aforesaid wickedly and maliciously, in the presence and hearing of divers good and liege subjects of our Lady the Queen and burgesses of the said borough, to wit, at the time and place last aforesaid, did speak, publish, declare, and say with a loud voice, to and of and concerning the said John Lytle, as such mayor as aforesaid, and to and of and concerning the said John Lytle in the execution of his said office of mayor, and to and of and concerning the said John Lytle whilst he was so presiding over said meeting as aforesaid, the further false, scandalous, malicious, and defamatory words next following, that is to say—"I" (meaning the said John Rea) "was interrupted at the most legitimate part, at a part which the Chief Justice—"I" (meaning the said John Rea) "sit down, because I" (meaning the said John Rea) "have said all I" (meaning the said John Rea) "had to say; and when you" (meaning the said John Lytle) "sit down, I" (meaning the said John Rea) "will rise again. Why don't you" (meaning the said John Lytle) "execute your" (meaning the said John Lytle's) "orders now, when I" (meaning the said John Rea) "charged you" (meaning the said John Lytle) "with corruption—I" (meaning the said John Rea) "am in order now;" and that, thereupon, the said John Lytle, as such chairman as aforesaid, and whilst presiding over such meeting as aforesaid, stated, amongst other things, that he would proceed to put the resolution, whereupon, afterwards, one other member of the said town council, that is to say, Charles Duffin, a town councillor of said borough, objected to the resolution being put until the said charges were proved or disproved. Whereupon the said John Lytle, as such chairman, replied to the said Charles Duffin that he might vote against it, and that thereupon the said John Rea further wickedly, falsely, and maliciously, in the presence and hearing of divers good and liege subjects of our said Lady the Queen, and burgesses of the said borough, to wit, at the time and place last aforesaid, did speak, publish, declare, and say, with a loud voice, to, and of, and concerning the said John Lytle, as such mayor as aforesaid, and to, and of, and concerning him in the execution of his said office as mayor, and to, and of, and concerning the said John Lytle whilst he was so presiding over said meeting, the further false, scandalous, malicious, and defamatory words next following—that is to say—"I" (meaning the said John Rea) "object to your putting it. I" (meaning the said John Rea) "charge you" (meaning the said John Lytle) "as a co-conspirator with these collectors" (meaning the said Robert Brown, Alexander Crossett, and Samuel Glenn); "and I (meaning the said John Rea) "will apply to the Lord Chancellor to deprive you" (meaning the said John Lytle) "of the commission of the peace, and I" (meaning the said John Rea) "will proceed against you" (meaning the said John Lytle) "by criminal information in the Court of Queen's Bench. I" (meaning the said John Rea) "will indict you" (meaning the said John Lytle) "at the next assizes for your gross misconduct at the last meeting of the council. Again I" (meaning the said John Rea)

"require you" (meaning the said John Lytle), if you are a man, to drag me" (meaning the said John Rea) "from the room, and justify your" (meaning the said John Lytle's) "conduct before a jury." And, thereupon, the said John Lytle, having proposed the said resolution to said town council so assembled for their adoption, the said John Rea then and there further wickedly and maliciously intending and contriving as aforesaid, wickedly and maliciously, in the presence and hearing of divers good and liege subjects of our Lady the Queen and burgesses of the said borough, did speak, publish, declare, and say with a loud voice to and of and concerning the said John Lytle, as such mayor, and to, and of, and concerning him in the execution of his said office of mayor; and to, and of, and concerning him, whilst he was so presiding, as such mayor, over said meeting as aforesaid, to wit, at the time and place last aforesaid, the false, scandalous, malicious, and defamatory words hereinafter stated—that is to say, "After I" (meaning the said John Rea) "charged you" (meaning the said John Lytle) "with acting corruptly and maliciously, in the execution of your office (meaning the office of the said John Lytle, as mayor of the borough of Belfast), "you" (meaning the said John Lytle) "were afraid to have me" (meaning the said John Rea) "dragged from the room. Ha! Ha! The gallant Mayor of Belfast! Worthy mayor and worthy chief magistrate; you" (meaning the said John Lytle) "were afraid of a jury £5,000 damages and costs;" "you" (meaning the said John Lytle) "are as liable as if you had dragged me out of the room, although you don't know it now," to the great scandal, degradation, and damage of the said John Lytle, as such Mayor of Belfast, and of the said John Lytle, in the execution of his said Mayor of Belfast, aforesaid, and to the degradation of the said John Lytle, as such mayor, and in contempt of our Lady the Queen and her laws, to the evil example of all others in the like case offending, and against the peace of our Lady the Queen, her Crown and dignity. Counts 2 to 12 each set out separate portions of the same words. The thirteenth, fourteenth, fifteenth, and sixteenth counts were for the same words, alleging them to have been uttered with intent to provoke the prosecutor to a breach of the peace. The seventeenth count was as follows:—And the said coroner and attorney of our Lady the Queen, who prosecutes as aforesaid, further gives the Court to understand and be informed that the said John Lytle, heretofore, to wit, on the 1st day of December, in the year of our Lord 1862, and from thence until and at the time of the publishing by the said John Rea of the false, scandalous, malicious, and defamatory libel hereinafter mentioned was, and still is, mayor of the borough of Belfast, to wit, at Belfast, in the County of Antrim; and that the said John Lytle, in the execution of the duties of his office, as such mayor, presided as such mayor at a certain meeting of the town council of the said borough, which meeting was duly held, to wit, at the town hall of the said borough for the transaction of certain municipal business of the said borough, to wit, on the 18th day of December, in the year of our Lord 1862, at Belfast aforesaid, in the County of Antrim aforesaid, and that a certain resolution was duly passed at said meeting that the

business of said meeting should be transacted with closed doors, with the exception of the press. And the said coroner and attorney of our Lady the Queen who prosecutes as aforesaid, further gives the Court to understand and be informed, that the said John Rea during all the time last aforesaid was a town councillor of the said borough, to wit, at Belfast aforesaid, in the County of Antrim aforesaid, and as such town councillor attended the said last-mentioned meeting of the said town council, held as aforesaid on the said 13th day of December; and that one Thomas Green during all the time last aforesaid was chief constable of the municipal police of the said borough of Belfast, to wit, at Belfast aforesaid, in the County of Antrim aforesaid; and that the said John Rea, contriving, and unlawfully, wickedly, and maliciously intending to scandalize, vilify, and prejudice the said John Lytle as such mayor, and to deprive him of his fame, credit, and reputation, and to degrade and scandalize him in his said office of mayor, to wit, on the said 1st day of January, in the year of our Lord, 1863, at Belfast aforesaid, in the County of Antrim aforesaid, unlawfully, wickedly, and maliciously did write, compose, and publish, and cause and procure to be written and published, a false, scandalous, defamatory, and malicious libel, of and concerning the said John Lytle, and of and concerning the said John Lytle as such mayor, and of and concerning the said John Lytle in the execution of the duties of his office of said mayor, and which libel was according to the tenor and effect following, that is to say:—

"To the mayor, aldermen, and burgesses of the borough of Belfast.

"Sir—Take notice that I (meaning the said John Rea) hereby require your instant attention to the notice served on Mr. Thomas Green (meaning thereby the aforesaid chief-constable), at the hour of eleven o'clock last night, at his office, in the police office of the town hall (meaning thereby the town hall of the said borough of Belfast); and take further notice that, referring you thereby to the original in his (meaning the said Thomas Green's) possession, I append a printed copy thereof hereto for your information:—

"Town Hall, Belfast, 31st Dec. 1862.

"To Mr. Thomas Green, Chief Constable of the Municipal Police.

"The mayor (meaning thereby the said John Lytle) proposed that the business should be transacted with closed doors with the exception of the Press—(Extracted from draft minutes of Belfast Town Council meeting of 13th December, 1862.)"

"Sir—The above is an exact copy of the resolution passed at the last meeting of the town council (meaning the said meeting so held on the 13th December, as aforesaid.) I (meaning the said John Rea) am clearly of opinion that it was passed illegally, and that every person concerned in knowingly procuring it to be so passed, is indictable as a conspirator, if knowledge can be traced or is admitted by him. In any event, the resolution can have no reference to any meeting of the council except that one at which it was passed. On reference to standing order No. 1, and the antecedent preamble in the book I (meaning the said John Rea) have already delivered you (mean-

ing the said Thomas Green) will at once see that the right of the burgesses and other ratepayers to be present at the town council meetings, cannot be disputed, and that they cannot in any way be legally deprived of such right until the resolution of the town council called standing order No. 1, is legally rescinded in the mode required by the municipal law, the bye-laws, and resolutions of the town council, which, when legal, are a part of the municipal law of the land. The police committee having twice broken up without the matter referred to being discussed, obviously because some of the members were anxious to suppress and avoid discussion, even after evidence was submitted to the said committee, which led to a reasonable presumption that a serious breach of the peace may take place to-morrow, between the burgesses and the municipal police, in the event of the said police being again instigated or compelled to exclude the burgesses from the town hall be excluded by force, or threats, or show of force, I (meaning the said John Rea) think it my (meaning his, the said John Rea's) duty as a member of the said committee, and of the town council, and also as an officer of the Queen's Courts, and a well-disposed subject of her Majesty, to suggest everything I (meaning the said John Rea) can to you, calculated to prevent your (meaning the said Thomas Green) "being involved in proceedings for which others should be accountable, and also to prevent any breach of the peace whatever. I (meaning the said John Rea) must therefore advise you (meaning the said Thomas Green)—

"1st.—Not to obey any orders from the mayor (meaning the said John Lytle), or any other member of the town council, or any number of such members, or any person or persons whomsoever, to exclude or threaten to exclude any burgesses or ratepayers from the town hall, between the hours of 10 o'clock in the forenoon, and 4 of the afternoon, or from the council chamber, during the period of the sitting of the town council.

"2nd. In the event of your (meaning the said Thomas Green's) receiving such orders; respectfully to require that the same shall be given to you (meaning the said Thomas Green) in writing, and if that be refused, immediately to take a note of the effect of the parol orders, and send a copy of your note in such a manner, that you (meaning the said Thomas Green) can afterwards prove service thereof, on the person or persons giving you (meaning the said Thomas Green) such orders, and that they may not be able to dispute your accuracy or credibility in the event of your (meaning the said Thomas Green) being examined as a witness in a Court of Justice against them, or of their endeavouring to shift the responsibility on you, by pretending that any serious consequences resulted from your exaggeration or misinterpretation of their orders to you.

"3rd. To lay this letter and book of bye-laws and standing orders before some competent solicitor, and be guided by such advice as such solicitor may give you (meaning the said Thomas Green) in writing, drawing his attention, while requesting his advice, to the section of the Municipal Act, requiring three clear days' notice to be given to every member of the town council, before any proposition whatever can be dis-

cussed or decided; also, to the standing orders in reference to the mode of rescinding resolutions, and also to the fact that there is no notice on the summons for the town council meeting for 1st January, 1863, or any motion for the purpose of excluding the burgesses and ratepayers from the council chamber, or of rescinding such standing order.

"I (meaning the said John Rea) think it well also to inform you (meaning the said Thomas Green) that I (meaning the said John Rea) have felt it my (meaning the said John Rea's) duty to advise all burgesses and rate-payers, that they (meaning the said burgesses and rate-payers) have right (each for himself individually, and not in any way in combination with any other burgesses or rate-payers, or other person or persons whomsoever) to use as much force as may be necessary to gain entrance into the said town hall (meaning the townhall of the said borough of Belfast) and the offices thereof, if they have business in any of such offices between the hours of ten o'clock in the morning and four of the afternoon; and also to use as much force as may be necessary to gain entrance into the council chamber while the town council (meaning the town council of the said borough of Belfast) may be sitting, in the event of such burgesses and ratepayers, from curiosity or any other legitimate motive whatsoever, being inclined to avail themselves of their privilege of being present while the town council (meaning the town council of the said borough of Belfast) is voting away public funds, and ordering the imposition of rates, or otherwise, in any way whatsoever, disposing of public business; you (meaning the said Thomas Green) "will be good enough to understand that I (meaning the said John Rea) "have expressly instructed such burgesses and rate-payers, each immediately to retire to his residence, on being pushed back, no matter how slightly by you (meaning the said Thomas Green); and that there will therefore be no necessity whatever, in the event of any collision, such as I (meaning the said John Rea) anticipate for you (meaning the said Thomas Green) using more violence than will be sufficient to give each burgess and rate payer a right of action for an assault as against all persons or any person requiring you (meaning the said Thomas Green) to execute illegal orders, or against yourself (meaning the said Thomas Green) or altogether at the discretion of the several burgesses and ratepayers aggrieved, in the event of any misunderstanding arising between such burgesses and ratepayers and the municipal police; I (meaning the John Rea) undertake if you (meaning the said Thomas Green) give me (meaning the said John Rea) notice thereof instantaneously to use my (meaning the said John Rea's) utmost influence to promote good feeling, to prevent any excessive violence, or any language which might lead thereto, or any other act by such burgesses and ratepayers, beyond what is necessary to put the law in motion.

"As I (meaning the said John Rea) mean to bring the mayor (meaning the said John Lytle) and several other members of the town council before the magistrates to answer certain charges which I (meaning the said John Rea) shall prefer in reference to the proceedings relative to the last town council meeting (meaning the said meeting of the 13th of December),

I (meaning the said John Rea) require you (meaning the said Thomas Green) forthwith to take a note of everything you (meaning the said Thomas Green) can now recollect, so that, if possible, no material fact may escape your (meaning the said Thomas Green's) memory; and I (meaning the said John Rea) also require you (meaning the said Thomas Green) not on any account to part with the custody of any document you (meaning the said Thomas Green) may have received, and to preserve this notice, to be used for or against you (meaning the said Thomas Green) as may be necessary hereafter. I (meaning the said John Rea) have already explained to you (meaning the said Thomas Green) at length, the danger to yourself (meaning the said Thomas Green) of obeying illegal orders, whether in writing or not; and on that point I (meaning the said John Rea) "consider it requisite, for the purpose of showing the great necessity for caution on your (meaning the said Thomas Green's) part, simply to remind you (meaning the said Thomas Green) that, once you execute such orders, you (meaning the said Thomas Green), are entirely at the mercy of the party injured, who may use you (meaning the said Thomas Green) as a witness, or proceed against you (meaning the said Thomas Green) as a defendant, just as he may think fit, without being obliged to give any reason for so doing; while you (meaning the said Thomas Green) would not be able to recover damages from the person whose illegal orders you (meaning the said Thomas Green) should have disregarded or defied.

"JOHN REA, TOWN COUNCILLOR."

"And take further notice that, in the event of any of the municipal police, of the burgesses and ratepayers, or any other inhabitant of Belfast, being killed in any scuffle arising out of any attempt to execute the illegal orders which were carried into effect on the 13th day of December last (meaning thereby the orders issued for the exclusion of the public from the meeting of the council on the 13th December, in pursuance of the resolution thereof passed as aforesaid), I (meaning the said John Rea) will use this notice to charge such of you as absent yourselves from your duty without reasonable and sufficient legal cause, with the felony of manslaughter.

"And take further notice, that as regards those whom, with the mayor (meaning the said John Lytle) I (meaning the said John Rea) mean to have returned for trial to next assizes for the conspiracy alleged (meaning thereby alleged by the said John Rea) to have been carried out on the 13th day of December last, I (meaning the said John Rea) will, if they (meaning the said John Lytle and those members of the said town council who supported and concurred in the said resolution so proposed at the said meeting of the 13th day of December) again conspire illegally to exclude the burgesses and rate-payers from the town hall, use this notice to charge the said persons accused (meaning thereby the said John Lytle and those members of the said town council who supported and concurred in the said resolution so passed at the said meeting of the 13th day of December) as conspirators with the felony of murder.

"JOHN REA, TOWN COUNCILLOR."

Dated this 1st day of January, 1863."

Meaning thereby that the said John Lytle had as such mayor, and while acting as such mayor and contrary to his duty as such mayor, improperly, illegally, and knowingly conspired with certain persons, being town councillors of the borough of Belfast, who had been present at the said meeting of the said 13th day of December, and concurred in the said resolution passed thereat, that the business of the said meeting should be transacted with closed doors, and that the said John Lytle had thereby rendered himself liable to be indicted criminally, therefore, to wit, at Belfast aforesaid, to the great damage, scandal, and disgrace of said John Lytle, as such Mayor of Belfast, and of the said John Lytle in the execution of his said office of Mayor of Belfast, to the evil example of all others in the like case offending, and against the peace of our Lady the Queen, her crown, and dignity.

Counts 18 and 19 varied the charge made in the 17th count. The jury found the traverser guilty upon all the counts of the information, and further found that certain special pleas put in by him were not true in substance and in fact. The prosecutor afterwards by leave of the Attorney-General entered a *nolle prosequi* on the 13th, 14th, 15th, and 16th counts. The traverser now moved in arrest of judgment upon the rest of the information. The reader is referred upon the case generally to *The Queen v. Rea* (8 Ir. Jur. N.S. 382); *The Queen v. Rea* (9 Ir. Jur. N.S. 221); and *Rea v. Nagle* (9 Ir. Jur. N.S. 81).

*Butt*, Q.C. and *M'Mahon* for the traverser, argued that as to the slander counts, although an information would lie for words spoken of and to a justice of the peace in the execution of his office, the same rule did not apply to the case of the mayor of a town, presiding at a meeting of the town-council, held for ordinary municipal purposes. As to the libel counts they contended that, notwithstanding the finding of the jury, it was open to the Court to arrest the judgment upon them, and that the words were not libellous.

*Brewster*, Q.C., *Harrison*, Q.C., and *Bruce* for the prosecutor, argued that it was clear that an information would lie in the case of a justice of the peace, that the mayor by virtue of his office was a justice, and that it was impossible to separate that branch of his character from his position as President of the Town council, and that therefore, the counts were good and judgment should not be arrested. As to the libel counts, they contended that the matter published was clearly libellous.

The authorities referred to are fully noticed in the judgments of the learned judges.

*Cur. adv. vult.*

January 30.—*FITZGERALD*, J.—This case came before us on the 25th January. The information contained originally nineteen counts, and to these there was a plea of not guilty pleaded, and also special pleas. There was a verdict against the defendant who has now moved to arrest the judgment. The first twelve counts in the information charged the defendant with using certain slanderous language to the prosecutor who was Mayor of Belfast, in order to vilify him in the execution of his office. The 13th, 14th, 15th, and 16th counts charged the use of the

same language, with intent to provoke a breach of the peace. The last three counts are for a malicious libel. The prosecutor has entered a *nolle prosequi* on the 13th, 14th, 15th, and 16th counts. The motion before us is to arrest the judgment on the first twelve, and the last three counts. The defendant submits on the last three that although the jury in the exercise of their power to decide both upon law and fact have decided that the publication complained of is a malicious libel, it is open on the Statute 33 G. 3, c. 43 (1r.) to the Court to hold that it is not libellous, and that we should not give judgment upon those counts. So far the defendant is right, as Fox's Act preserves the right to arrest judgment just in the same manner as before the Act passed. The last three counts are founded on the same publication, and it is not necessary for me to refer to it. This part of the case was not much pressed on the Court. It seems to me that on the just construction of the language it was a libel on the prosecutor, intended to bring him into public discredit for forming a conspiracy, and on the happening of certain events the traverser says that the prosecutor and others would become guilty of the felony of murder. My opinion is that judgment should be given against the defendant, and for the prosecutor, on those three counts. As to the other counts, it is only necessary to state the first of them. (His Lordship then read the first count of the information and continued):—I would call attention to the dates which are given, as they afford a key for the interpretation of one portion of the libellous matter, and with the view to show that at the time that this defamatory matter was uttered, the prosecutor as mayor had not and could not have presided at any court for the revision of the burgess list. I should observe that the resolution spoken of was one relating to the re-appointment of certain tax-collectors, and that it was in the course of a speech which Mr. Rea was making, and which the mayor interrupted as containing irrelevant observations (which he had a right to do), that the language complained of was uttered. At one time he accuses the mayor with being in a conspiracy with Crossett, Glenn, and Brown. He says—"So long as you are acting *bona fide* in the execution of your duty I charge you with acting corruptly in the execution of your duty: I charge you as a conspirator with Brown, Glenn, and Crossett, and others in packing the burgess roll." That is the passage to which I alluded when I said that as mayor he could not be concerned in it. The language in the other counts is similar, though put rather differently, and the same rule must apply to all. There is no doubt that the language is very gross. It imputes corruption, but so far as it does so in his conduct as mayor we cannot see what the corruption is. It does not say what the corruption is; but it has a tendency to vilify the mayor in the borough. It is important to say that the mayor was presiding at a fiscal meeting, and it was not when he was presiding as a magistrate that the language was used. The duties of mayor are settled by the Municipal Corporations Act, 3 & 4 Vict., c. 108. Sec. 67 provides for his election. Section 84 makes him *ex-officio* a justice of the peace for the borough, and gives him precedence in the borough. Section 8 enables him to admit Freemen and revise the Free-

men's roll; and section 9 gives an appeal from him to the Court of Queen's Bench. Sections 45 & 46 empower him, aided by assessors, to revise the list of burgesses and settle the mode of proceeding to do so. And sections 49 & 50 regulate the mode of appealing from the decisions of the Court of Revision. The fiscal business of the borough is managed by the Town-council, of which the mayor is one. Section 82 enacts that all acts and questions to be done and decided by the Town-council are to be decided by the majority of the members present at the meetings to be held in pursuance of the Act, and the mayor is to preside at those meetings. At these meetings every member is entitled to be present and to speak, and take a part in the deliberations; every question to be settled by a majority. The mayor has thus three capacities. He is *ex-officio* a justice of the peace; he is also a judicial officer for the admission of freemen and burgesses; and he is further, chairman of the council at meetings for ordinary purposes. It was while the prosecutor was presiding in the latter capacity that the language complained of was addressed to him, in the course of a debate on a fiscal matter. The defendant's counsel contended that as a general rule an indictment or an information did not not at common law lie for defamatory words, unless calculated to provoke a breach of the peace, and so laid; and that though there were certain exceptions on grounds of public policy this case did not come within them, and that there was no precedent for an information like the present. The prosecutor's counsel on the other hand contended that the case was governed by decision, and that on general principles to threaten a public officer of such a position while in the execution of his duty, was a grave offence, and punishable by indictment or information. A number of cases were referred to of informations for language used to a justice of the peace. It seems to have been held from an early period that an indictment lay for defamatory language to a justice of the peace, addressed to him while he was acting in the execution of his duty. It was urged by the defendant that there were cases of interruptions of public justice, and therefore, not applicable here. It is to be borne in mind that justices of the peace are judges of record appointed by the Queen for the preservation of the peace and the punishment of offenders against law. A justice of the peace as such is at common law protected in the execution of his office, and if he is insulted in the execution of his duty the offender may be indicted or perhaps committed for contempt. Having regard to these considerations, it seems to me that the defendant's contention is well-founded. The effect of the cases as to justices is limited also by further cases, from which it appears that an indictment cannot be had for language spoken of a justice of the peace, but not to him. For example—*The King v. Wrightson* and *The King v. Burford*. The words there were vilifying a justice, but not in his business. So, *The King v. Langley* (2 Salk. 698). So, *The King v. Pocock* (2 Str. 1157); and *King v. Wehtje* (2 Campb. 142) where Lord Ellenborough gives his opinion, saying "the words not being spoken to the justice, I think they are not indictable." The jury found for the defendant in that case. Some principles were

urged in the course of this discussion, which as they bear on the argument I ought not to pass over in silence. It was suggested that an information may lie for a charge on which no indictment would lie. There is no authority for that proposition; and unless I am coerced by authority I must abide by the common-law doctrine on the subject. That doctrine is that the ancient mode of proceeding is by indictment, and that the proceeding by information is an innovation. Next, it is said that the mayor might as mayor have committed the defendant for contempt. I can only say that there is no authority for this suggestion, and I must hold the notion that a corporate officer could commit for contempt to be unfounded. Again: it was said that a criminal information lies for all cases where the Court would commit for contempt. The proposition is too large. The class of misdemeanours coming under the class of contempt can only be reached summarily, and they must be taken *flagrante delicto*. The case of *Hodges v. Humpkin* (2 Bulstr. 139) was pressed on us. It came on upon a return to a writ of habeas corpus, and the certificate of the mayor of Liskerrett for cause of the imprisonment of one Hodges; and the mayor certified the cause to be *quia se male gessit*, and for using of indecent speeches to him; and that in his hall with a spit *insultum fecit, et conatus est eum vulnerare*. The defendant Hodges was discharged by the Court. It is not easy to make the case intelligible; and I should rather infer from some of the observations that the mayor was a justice of the peace, and that the assault was committed and the language used against him in that capacity. Haughton, J. is represented as saying—"the mayor is *conservator pacis* of every place, and may keep the peace from being broken as against himself;" that is, he had a right to keep the peace by committing the offender. Croke, J. says—"This return is not good, but altogether uncertain and insufficient here: both the mayor and Hodges ought to learn how to behave themselves. Here the speeches used by Hodges are very unseemly speeches, and unfit to be used by him to anyone, much less to such a person as the mayor was, being a person in authority and an officer of the king." He further says—"For one to say that the mayor is a liar, this is punishable; for this is the ready way to bring him into contempt, and therefore he ought—and that deservedly—to be punished for this;" but he adds, "but the manner of this punishment ought to be observed." This was the passage that was relied on as being of importance. But he puts all this on the ground that the mayor is "a person of authority and an officer of the king." I do not understand that, unless there was something in the patent of the borough which is not noticed in the case, and unless he was a justice by virtue of his office. The manner of the punishment to which Croke, J. calls attention to, may be by sureties for good behaviour. It may be observed that though Croke, J. took such a part in the decision, it is not reported in Croke's own reports, nor is it in any of the contemporaneous reports; and Bulstrode's reports have that which detracts from their authority, that they were not published in his lifetime. *Simmons v. Sweet*, in Croke Eliz. 78, was also referred to. It is said there—"Yet if the mayor had been in a

public place of justice, and he had called him by such opprobrious words, he might imprison him." I can interpret only that "public place of justice" as meaning sitting in a place of justice; and I infer that the mayor was a justice, and that the meaning is—that if opprobrious words were used of him while sitting as a magistrate, he might have committed the offender. *King v. Langley* is another important case. The best report of it is in 2nd Lord Raymond. It becomes important to observe it on account of the language used by Lord Holt. The defendant there was indicted for speaking certain words of the mayor of Salisbury. The language was very indecent; and from the report, one cannot but see that it was used not merely of him, but to him. To the indictment there was a demurrer. Mr Eyre, for the prosecution in that case, when the distinction was taken between the case and that of a magistrate in court, puts it as a reason for maintaining the indictment that it concerns the public to maintain the honour of magistrates. Magistrate, of course, may mean mayor, but the inference which I deduce from the case is, that the word meant a mayor who was *ex officio*, or, under the charter of the borough, a justice of the peace. Holt, C.J. says "the mayor had done well if he had bound the defendant to his good behaviour." I do not see how he could have done that unless he was a justice, or had taken him to a justice. Powell, J. expresses some doubt. He says in his observations—"What is the meaning of the words, in a commission of *oyer and terminer et de propalationibus verborum*?" Holt, C.J. gives the true answer—that "they mean words against the government, or which amount to a *scandalum magnatum*. But this is an extraordinary thing to indict a man for these words." Mr Ward, the counsel for the traverser, says there is a difference between an officer appointed by the Queen as a justice of peace, and by a corporation. Holt, C.J. says "it does not appear that the mayor of Sarum is a man of worship—that he is a justice of the peace; for though he be mayor, it does not follow that he is a justice, for that must be by a particular grant in the charter." It is finally concluded that judgment was given that the indictment should be quashed. Holt, C.J. says—"I am not satisfied that these words will support an indictment. It is not said that the mayor is a justice of peace, nor that he was in the execution of his office. These words are cause to bind the defendant to his good behaviour. If the defendant had abused him in writing, that would have been indictable, as in *Somer's case* (1 Sid. 270, 271—1 Lev. 139), for that is a libel, and the mayor might also have his action. A man was indicted for saying of an alderman, that whenever he put on his gown Satan entered into him; but it was quashed, as not being indictable. See 1 Ventr. 16." And Powell, J. says, "they are rude words. The mayor should have bound him to his good behaviour." That case is, in my judgment, no authority for the prosecution. In *The King v. Granfield* (5 Mod. 203), the defendant was indicted at the sessions held for the borough of Hatfield for speaking these words—"The mayor and the Aldermen of Hatfield are a pack of as great villains as any who rob on the highway, and we will take away their charter." He was found guilty of speaking the



words, and there was a motion in arrest of judgment. It does not appear what was done in 5th Mod., but the motion was renewed in the form of a motion to submit to a small fine, and is reported in 12 Mod. 98, where the Court says—"We are not satisfied that the words are such as he may be indicted for; for what is it to the Government, that the mayor, &c. are a pack of rogues?" I have now adverted to the cases which were most relied on, and, in my judgment, none of them afford an authority to support the information. There is much to be found in them to support the defendant. My brother O'Brien has referred to two cases: one is a case of *Regina v. Rogers* (2 Lord Raym. 777). In that case there was an information in the mayor's court in London against the defendant for having made an assault upon Sir Robert Jefferyes, one of the aldermen of the city, while he was presiding at a wardmote, and for having on the same occasion used opprobrious language towards him. The information was moved into the Queen's Bench by certiorari, and on the return a custom to proceed by information in the Mayor's court was set out. As to the assault, the Court declared they would grant a *procedendo*, but as to the opprobrious language, Holt, C. J. said—"That since no information or indictment will lie for these words at common law, it was a great question whether a custom to proceed in another manner than the common law would allow for words would be good; for the common law has provided a proper method for punishment of scandalous words, viz. binding to the good behaviour, such words being a breach of the peace." The other case is *The Queen v. Nuns* (Gilb. 36). It is worthy of attention, as showing the grounds on which an indictment lies for defamatory words spoken of a justice of the peace in the execution of his duty; and the words are, that it is a vilifying of the authority of the king's commission, and so a crime. *The King v. Darby* (Carth. 14) is to the same effect. There it was held that an information would lie for words against a magistrate, as being words reflecting on the public government. There is a class of cases very numerous, cases in which members of municipal corporations have been deprived of their office for misconduct contrary to their duties as officers of the borough; but I am not aware that the use of language to the head of the corporation was a cause of deprivation. If there is such a case it has not been cited. From all this I am led to deduce, first, that an indictment or information cannot be for defamatory words merely, unless they are such as would lead to a breach of the peace; secondly, that an indictment or information lies for such words spoken to a justice of the peace in the execution of his office; thirdly, that words spoken of, but not to, a justice of the peace are not the subject of an indictment or information; fourthly, that none of the authorities before us support the information. The case comes, then, before the Court as one not supported by authority or precedent. The argument becomes more forcible when we consider the great number of our corporations, and that from their popular nature instances of such language must have been of frequent occurrence. It was suggested that if a precedent was wanting we should make one. Hawkins in his treatise on the Pleas of

the Crown, vol 2, p. 7, treating of the Court of Queen's Bench, says if it meets with an offence contrary to the first principles of common justice, and of dangerous consequence to the public if not restrained, the Court will adopt such a punishment to it as suitable to the heinousness of it; and that it has jurisdiction over all misdemeanours of a public nature tending to a breach of the peace, or to the oppression of the subject, or to the raising of faction, controversy, or debate, or to any manner of misgovernment. The doctrine of Hawkins would be, to use his own words, of dangerous consequence if not restrained within limits; and if it is to be taken as asserting for the Court a power to add to the category of crimes because it considers an offence to be contrary to the first principles of common justice, and of dangerous consequence to the public if not restrained, I would be disposed to disclaim such a power as dangerous and unconstitutional, and there is nothing in the present case to make us do it. In *Bagg's case* (11 Rep. 93 b), it is said that to the Court of King's Bench "belongs authority not only to correct errors in judicial proceedings, but other errors and misdemeanors extra-judicial tending to the breach of the peace or oppression of the subjects, or to the raising of faction, controversy, debate, or to any manner of misgovernment, so that no wrong or injury, either public or private, can be done, but that it shall be (here) reformed and punished by due course of law." But it is said that this goes far beyond the point of controversy in the case, for in a note at p. 98 (a) are given some observations of Lord Ellesmere, who says—"The point in question only was, what cause was sufficient for a corporation to remove a Burgess from his place; he digresseth from his matter and saith it was resolved that to the court of King's Bench belongeth authority not only to correct errors in judicial proceedings, but other errors and misdemeanors extra-judicial tending to the breach of the peace or oppression of the subjects, or to the raising of factions, controversies, debates, or to any manner of misgovernment, so that no wrong or injury, either public or private, can be done, but that this shall be reformed or punished by due course of law. Herein (giving excess of authority to King's Bench) he hath as much as insinuated that this Court is all sufficient in itself to manage the state; for if the King's Bench may reform any manner of misgovernment (as the words are) it seemeth that there is little or no use either of the King's royal care and authority exercised in his person and by his proclamations, ordinances, and immediate directions, nor of the council-table, which, under the king, is the chief watch-tower for all points of government." Those are the observations of a very great judge, and according to the light of his age, a very great constitutional judge, and which is subject to the observation that it was produced by the controversy going on between the Queen's Bench and the Court of Chancery, which is matter of history. The conclusion to which I have arrived is—that on the first twelve counts judgment should be arrested. I announce that with great hesitation. The consequence of holding this information to be sustainable for defamatory or opprobrious language spoken of a mayor or chief officer would appear to me of great consequence to the pub-

lic. First, it would necessarily extend to all municipal officers, for I cannot distinguish between the mayor of a borough, such as Belfast, and the head of the humblest corporation in the land; and therefore it would necessarily involve the application of the same doctrine to language used to a chairman of town commissioners. Under an Act recently passed every town is entitled to have a *quasi* incorporation. It becomes then a *quasi* corporate body. Town commissioners are elected, and there is a chairman of the town commissioners, and he may be, and frequently is a justice of the peace in the town; so that every principle which would make this information maintainable for words spoken of the chief magistrate of a city, would apply to the chairman of town commissioners. It was further pointed out that it would be equally applicable if any of the aldermen had presided in the absence of the mayor. Further: how can you stop short at the head in corporate bodies and not go further, and hold that words spoken of any person in office, such as a chairman of a board of guardians, or some similar officer, should not be the subject of indictment or information. I should be unwilling to come to the conclusion that such words were the subject of an indictment, so that we should interfere with the freedom of speech which in reference to such bodies is essential. Of course in protecting freedom of speech we do not intend to protect the abuse of it. But see the consequences of holding an information such as this to lie. The chief officer can shut his adversary's mouth even though the language used may be justifiable. He cannot plead the truth of the language, for though the pleas put in in this case allege that the language was true, yet I cannot doubt that if there was a demurrer to these pleas the Court would have come to the conclusion that they were not maintainable. Such are the consequences which must ensue from our decision. But, on the other hand, let us see if in determining that this indictment was not maintainable, any evil consequences would flow from it. The presiding officer is undoubtedly clothed with certain powers; he may preserve the peace, and he may exclude any person who is disturbing the meeting. I have no doubt of that. If he is himself a justice of the peace he may have him bound in sureties or commit him in default; or if not a justice himself, he may take him before one and make the matter a subject of bail. My conclusion is—though I state it with hesitation and doubt as to the correctness of my conclusion—that the indictment does not lie; and I can only rejoice, that from the spirit shown in this case, I can entertain no doubt but that an opportunity will be afforded of having the question determined by the highest court on writ of error. There is no inconsistency in our granting an order for words which we now conceive not to be the subject of an information. Some doubt there was originally as to whether the order could be made. I expected a discussion on the subject; the other members of the court also expected a discussion. My recollection is, that the defendant appeared in person and said that it was not his intention to show cause, but challenged an opportunity of showing what his conduct had been; and so the order was made absolute. On these grounds I think judgment should be arrested on these counts.

HAYES, J.—As to the last three counts there is no difference of opinion among us. We all think that they disclose matter of information. With respect to the first twelve counts the objection is—that they do not show on the face of them any offence known to the law, and therefore that this Court has not a right to allow an information. I do not accept this as a correct statement of the law. Hawkins says as to the power of the Court, that this Court of Queen's Bench is entrusted with the highest jurisdiction over all misdemeanors tending to a breach of the peace or oppression of the subject. So that whatever crime is manifestly against the public good, it comes within the cognizance of this Court; and in that I do not understand the writer as erecting an authority to make new crime, but merely to expound what should be crime. And he goes on to say—"Neither is it necessary in a prosecution of any such offence in this Court to show a precedent of the like crime formerly punished here agreeing with the present in all its circumstances; for this Court being the *custos morum* of all the subjects of the realm, whenever it meets with an offence contrary to the first principles of common justice, and of dangerous consequence to the public, if not restrained, will adapt such a punishment to it as suitable to the heinousness of it." This Court, then, having the power to punish offences of this character, is there anything in the mode of proceeding by criminal information which renders it inapplicable in the present case? I am inclined to take the authority of Hawkins, who says—"It hath been holden that the king shall put no one to answer for a wrong done principally to another without an indictment or presentment, but that he may do it for a wrong done principally to himself. But I do not find this distinction confirmed by experience, for it is every day's practice agreeable to numberless precedents to proceed by way of information, either in the name of the Attorney-General or of the Master of the Crown Office for offences of the former kind; as for batteries, . . . libels, seditious words, . . . and in general any other offences against the public good, or against the first and obvious principles of justice and common honesty." The mayor of a borough is the head of the corporation, and by section 84 of the Municipal Corporations Act is a justice of the peace. It is his duty to reside within the borough, and he is the person appointed to preside at meetings of the town council; and if he is not present, some other member is to preside. It is his duty to preserve order and have the business of the council transacted with decorum. For all these purposes it is highly important to the public not only that the office itself, but also the individual elected to fill that office, should be respected. If his authority be recklessly gainsaid it is manifest that the public interests of the municipality must suffer; that the affairs of the borough must go to neglect and ruin. If such be the consequence it seems to me that this Court would ill discharge its duty as *custos morum* if it refused to give protection to the officer to whom the Legislature has given such duties. It has been argued that the protection here sought ought only to be given to justices who have been insulted in the discharge of their duty. No doubt, many cases have been cited in which that protection has been given, and that is

done out of the great regard which the Court has for the due administration of justice; but that does not embrace all the objects of the Court's protection. In the present case the mayor is a justice; but I do not rest on that. I think any other member of the town-council, though not a justice, would be entitled equally to protection, that being for the sake of the public for whose benefit the office exists. In either case the injury to the public is the same. I am therefore of opinion that the motion in arrest of judgment ought to fail.

O'BRIEN, J.—As to the last three counts I concur that they are sustainable. The libel complained of in them charges Mr Lytle with a conspiracy. No matter whether the resolution was legal or not, the publication charged him with having by illegal means interfered to procure it. That clearly comes within the definition of a conspiracy, and therefore the document is libellous; and being punishable by indictment, is sufficient to sustain counts on a criminal information. But as to the first twelve counts the question is different. The case has been argued entirely on the first count. The only difference between it and the others is, that the first count recites altogether the whole of the proceedings at the meeting referred to, and that the others subdivide them. The language used by the traverser can only be characterized as gross and unwarrantable. It is very abusive in its terms, and makes charges of corruption against the prosecutor in the office of mayor. But still, though reprehensible and groundless, and though if made the subject of a civil action, they might have been made the ground of solid and substantial damages, the question for us is—whether such language used on the occasion that it was, and with the object and intents that are charged in the counts, is the subject of criminal proceedings by information or indictment. I am strongly impressed with the opinion, as a rule, that a criminal information will not lie for an offence which is not indictable. In the chapter of Hawkins upon criminal information, he not only does not say that the criminal information will lie for offences not indictable, but he states that there is no difference between the two but the form of procedure; that this Court standing in the place of a grand jury, dispensed with the preliminary inquiry; but there is nothing in Hawkins to support the doctrine, and I should view with apprehension the doctrine, that it would lie for an offence not the subject of an indictment. In the books of practice, as in Archbold, it is said that an information will only lie for such offences as are matters of indictment, though there are crimes the matter of indictment which are not matter of information. The case was argued with great research and ability. The general rule is—that slanderous words, however defamatory, are not *per se* the subject of criminal procedure unless they are words of seditious and blasphemous character, or tending to provoke a breach of the peace. So words spoken of and to a magistrate while sitting in the discharge of his duty are the matter of indictment; and we have now to consider whether we are authorised to bring within the exception the case of a mayor presiding as such. Now, as mayor of Belfast Mr Lytle was also a magistrate; but it not only does not appear, but it was not suggested in the argument,

that on the day of the meeting at which the language complained of was used, Mr Lytle was performing any function of a magistrate. The information states that having been elected as mayor, he presided at two meetings on the 13th December and 1st January as mayor, they being held for the transaction of municipal business, and one of the matters of business being a resolution for the appointment of certain persons as collectors of police rate. Now, the prosecutor's counsel contended that these words, though spoken to him not as a magistrate, are subject to the same rule that I have stated as to words spoken of a justice of the peace. We have been referred to several cases. I believe, with the exception of one or two, that search could not afford any other authorities. In four of them—*The King v. Burford* (1st Vent. 16), *The King v. Darby*, *The King v. Wrightson*, and *The King v. Revel*—the words were spoken of a magistrate, and not of a mayor. There appears to have been some conflict as to whether words spoken of a magistrate were or were not indictable. We may consider that as settled by *The King v. Darby*. We may also take it as settled that unless the words are spoken not merely of but to him, the rule will not hold. Now in one of those cases, *The King v. Wrightson*, Holt, C.J. makes this remark—"To say a justice is a fool, or an ass, or a coxcomb, or a blockhead, or a beetle-head, is not indictable." There are other cases in which the words were spoken not of but to him. So the several cases cited by my brother Fitzgerald of *Simmons v. Sweet*, and *Hodges v. Humpkin*. As to *Simmons v. Sweet*, it appears to be clear that the observations relied on by the prosecutor's counsel refer to cases of a mayor acting as a magistrate, and that refers to the power of commitment. Now, with regard to that power, Mr. Brewster pressed that where under the power of commitment any offence rendered a party liable to be committed, it was therefore the subject-matter of indictment. I think no such proposition can be maintained; and we find in *The King v. Rogers* (2 Ld. Ray. 777), that Lord Holt repudiates that doctrine, and decides stating that this is not so. It therefore cannot be maintained that supposing the mayor to have the power of committing, it follows from that that the misconduct was such as would render the party indictable. The power to commit is doubtful if he was not a magistrate. He might summon him before a magistrate and require him to find sureties, but I think there would be some difficulty in framing a warrant of committal which would stand for a moment in an action of false imprisonment. In *The King v. Baker* (2 Keble 594, s. c. 1 Mod. 35) the indictment was for saying that "whenever a burgess of Hull comes to put on his gown Satan enters into him." There was a defect in the frame of the indictment which was quashed. Keeling, J. is represented to have thrown out that the words were indictable, because they were a scandal to the government. If so, that is directly in the teeth of subsequent cases. As in the case of *The Corporation of Salisbury*, where the decision was, that the indictment could not be sustained. But much reliance was placed on the observations of Holt, C. J. and others in the progress of the argument. That case is reported in 2nd Lord Raymond, p. 1029; but reading the ob-

servations carefully, and comparing them with the facts, I think it is clear that none of the judges intended to lay down the rule that words spoken of a mayor in the execution of his duty would be indictable, and that the words, "execution of the office" refer to the case of his being also a magistrate. Otherwise it would be unnecessary to take the distinction taken in that case between the case of a party holding the commission of the peace under the Crown, and the case of an officer holding under a corporation, and that distinction is one much relied on. Indeed, Powell, J., at one time, expressed his opinion that they were indictable, because the mayor was the head of the body politic. But that case was very much argued, and he came round to the opinion that the words were not indictable. Holt, C. J. concludes that stating that words which directly tend to a breach of the peace are indictable, but we held that the words used in that case were not so. We were referred to *The King v. Symonds* (cases temp. Hardwicke, 240). It does not apply much here. It was a case of assault, in which, having regard to the position of the party assaulted, the Court would not interfere. Two other cases were referred to—*Alston v. Blagrave* (2 Lord Raym. 1369); and *Onslow v. Horne* (3 Wils. 179). I do not think they touch this case. One was a case of words used of a justice of the peace in execution of his office; and the other of words spoken of a member of parliament. In the former case it was held that words spoken of any person in regard to his trade or profession were actionable. In the case of *Onslow v. Horne*, judgment was arrested on the ground that one of the counts was not good in law. Then, in the cases of *King v. Pocock* (ubi. supra.), and *King v. Souly*, referred to in 2nd Salk. 698, it was held that an indictment did not lie. Well, the case of *The Queen v. Rogers*, though the facts were different from these, appears to me important: First, because that Mr. Jeffreys, the magistrate, was presiding as alderman at a meeting of the corporation. And there the Court held that though they would allow the information which had been filed in the mayor's court to proceed as to the assault, they would not for the rest. It was argued in support of the information that it was a custom to indict for offensive words spoken of an alderman. But with regard to that, Holt, C. J. says—"It was a great question whether this custom to proceed in another manner than the common law would allow for words would be good." It appears to me that the case is valuable for the exposition of the law as laid down by Holt, C. J. In *The Queen v. News* (Gilbert), it was held, that the indictment did not lie for the words there used, because they were not intended to provoke a breach of the peace. That was the reason stated for the indictment not lying. Now, we have therefore heard a list of those cases down to the present, but none has been cited, and I believe, because none existed, to show that slanderous words spoken to a mayor, as such, in the execution of his office, are indictable. Corporations have existed since that time. There are precedents of indictments for words tending to provoke a breach of the peace for words of seditious and blasphemous character; but the research of counsel has been unable

to direct our attention to cases to show that an indictment would lie in such a case as the present. It is difficult to imagine that some such case would not have been found if the right had existed. But the case does not rest merely on the absence of authority, because it seems to me that the case of *Ex parte the Duke of Marlborough* (5 Q. B. 955) has an important bearing on the law in the present case, on account of the exposition of the law given by Lord Denman, expressing not only his own opinion, but those of the judges with him, settling what was the real foundation of the rule for granting a criminal information. The words were spoken of the Duke of Marlborough in his absence, and some of them in his character as a justice. They were of a most offensive and scandalous character, of a character that the Court would not have been disinclined to lay hold of if they could. The words which were spoken of the duke as a magistrate referred to a person named Harris, and stated that "two magistrates before whom he was first brought refused to convict him. He was then brought before the duke, a fit judge in his own cause; and sitting on his own dog-kennel with a glass of ale in his hand. The Duke of Marlborough himself convicted Harris, and sent him to gaol." I have read that to show that, considering the duke's position, the words were of a most offensive character. The Court refused to grant a criminal information. But it cannot be said that the Court refused to interfere in that case, because they thought the duke had acted wrongly. The duke denied the charges, and Lord Denman says the denial is conclusive; "but," he says, "we find no precedent for granting a criminal information in such a case." Well, with respect to the words which I said had no reference to the duke's conduct as a magistrate, Lord Denman says—"It is clear, upon all the authorities, that words merely spoken are not the subject of a criminal information. The exception is in those cases where the words amount to a provocation to break the peace, by their inciting either to personal violence or to a challenge. We have, however, felt some doubt as to that charge which imputes corruption in the character of a magistrate. As to this, the denial on the part of the duke is conclusive. But we find no precedent for granting a criminal information in such a case. It has been often said that the Court will not interfere except where the words are uttered at the time when the magistrate is performing his duty, and the reason of that exception is, that there is a direct obstruction to public justice. The magistrate in such a case may treat the words as contempt; but in my opinion it is then far more expedient that this Court should interpose." But Lord Denman, in these observations, states the reason of its having been held that such slanderous words spoken to a magistrate were indictable, namely, that thereby an obstruction was raised to the administration of justice. [His Lordship read the remainder of Lord Denman's judgment, and continued]: It might, perhaps, be desirable that the Legislature should in this case interfere as it has done in other cases, and give the power of committing or punishing by fine and imprisonment, as was done by the Revision Act of 1850, where the power is given to the Court established by that Act. It may be very ex-

pedient by legislation to give such power, but I confess with every respect for those who differ from me, and with no farther doubt than such as arises from differing from them, I consider the information not to be maintainable on those counts.

LEFROY, C. J.—In this case I agree with my brothers as to the last three counts. I differ from two of them as to their judgment respecting the first twelve. The intermediate counts are out of the case as a *nolle prosequi* has been entered on them. With respect to the first twelve in which the traverser is charged to have used the defamatory and insulting language towards the prosecutor as mayor which is complained of, it would appear to me that the question raised is of very great importance as to the future conduct of such meetings, as that at which the language was used, and as to the authority of the officer who, under the Municipal Corporations' Act is called upon to preside at them. Undoubtedly, if the Court should be of opinion that a criminal information would not lie in such a case as this, it would afford a ready prescription for defaming and vilifying every mayor in Ireland. I say that advisedly, in case the traverser in this case should be acquitted upon the principles on which the case has been rested for him with great ability and great ingenuity, but I must say with great respect to the learned counsel who argued it so ably, upon a sophism as little founded in logic as the authority which he cited was founded in law. I am not about to go through the numerous cases which have been adverted to. I only would wish to refer to them for this one purpose, to show that from the earliest times the mayor and a magistrate have been held to be *in pari jure*. We find the most eminent judges before whom those cases occurred speak of the protection of a mayor as being *pari jure* with that of a magistrate, and although there were no foundation for that opinion, the Municipal Corporation's Act has made it essential for the protection of every mayor in Ireland, that he should have at least the same protection which he was considered to have in reference to his municipal duty in some of the cases to which I have referred. It is not necessary for me to contend whether what has occurred here is in the nature of an indictable offence. We are at present upon a criminal information involving the question whether in such a case the Court has authority to grant such an information, nor am I bound in the least to contend further than this, that since the Municipal Corporations Act has imposed upon mayors the duties which are imposed upon them, if they be not protected in the manner in which by this criminal information it was designed to protect them, the traverser in this case may, indeed, say, as he said during some of his insulting observations—"Ha, ha, Mr. Mayor." Now, the ground on which I go is this, that by legislative provision the mayor is obliged to discharge the duties of his office in three several respects. I admit that it must be shown that the offence was committed in his presence, and further, that it must have been defamatory in respect to the duties of his office; but if it is shown that the defamation was in respect of one of the departments, as I may call them, of his office, even though when the defamation was uttered he was acting in another, I

think he is entitled to any protection which he would have in any of the departments of his office. He bears three offices in himself. He is a justice of the peace, a judicial officer for the revision of the burgess roll, and also, president of the town-council. Is a man who wants to make a charge against him in one of those capacities, to be allowed, while the mayor is exercising his judicial function of seeing who is to be upon the burgess-roll, to stand by and prepare an abusive charge of his exercising that function corruptly, but not make that charge then in the presence of the magistrate, lest he be committed for the offence, but to postpone making the charge till he meets the magistrate in the discharge of another duty of his office, that is while he is presiding at the municipal board? If he waits, therefore, till that occasion of insulting the magistrate while he is presiding at a municipal board, is he to be allowed to make this as a defence: "I did not make this charge in the presence of the magistrate and while he was discharging the duties of his office?" Does not the mayor bear about him since the Act of Parliament, in whatever capacity he is acting, the protection of the three characters in which under the statute he is bound to act? Under the Act he has first imposed upon him the office of magistrate. Secondly, he has a judicial duty imposed on him in deciding who is to be on the burgess-roll. These are distinct duties, but they are all imposed on one and the same person, and it would be a monstrous thing while he as the same person discharged these various duties that you should be allowed to libel him in respect of one when you find him discharging another of the duties imposed on him in a capacity which he has a charge to make against the mayor in one capacity, but he defers that charge until he finds that same mayor presiding in the discharge of another duty; but a duty as much cast upon him, and as much to be protected as any other duty which he has. He watches his opportunity, and when he finds him presiding at a municipal meeting, he says—"I now charge you, I do so with safety, for now you are only the president of a municipal corporation: you are not now acting magisterially." But I say, if such a subterfuge is to be allowed, I do not know what man will undertake the duties of a mayor, if he is thus to be deprived of the protection which belongs to him in his entire character, because in the exercise of one department he does not act magisterially, and because it is said there is no precedent for a criminal information or for an indictment, unless the thing occurs in respect of his office as justice of the peace, and the accusation was made against him when he was acting as president of the municipal corporation. That would be very well if he had but a single office; but when the Legislature has invested him with three offices, he is entitled to the same protection in the exercise of all, because he is equally bound to perform all. I therefore am of opinion that every circumstance which entitles a party to redress in this Court has concurred in the present case. That the defamation was respecting this party as to his judicial office, and that the defamation was of the grossest kind—for he says—"You never would have been mayor but for the corrupt act of others." And it is vain to argue that the defendant is to suc-

ceed, because he took the precaution of reserving his defamation till the mayor was not discharging a magisterial duty, but only the duty of president of the town-council. It would be making an authority given by the whole Legislature, much less than an authority given by the Crown. He is invested with a variety of duties. Is he not to have the same protection in all? Under these circumstances it does appear, without looking to any other authority than that which results from the position in which the mayor is placed by the Legislature, that we should not deprive him of that protection to which he is entitled, and that in doing so, we should be wanting in the exercise of that authority which belongs to this Court, and violating a principle of the Court. I do not seek to establish a new principle, but to carry out an established principle under every variety of circumstances in which the law may be violated. The principle is that the party is to be protected to the full extent that the law casts a duty on him.

The consequence of our difference on this latter point, is that there is to be no rule on the motion for arrest of judgment.

### Court of Common Pleas.

[reported by J. Field Johnston, Esq., Barrister-at-Law.]

O'REILLY v. MERCER.—May 11, 1865.

#### *Privilege from arrest.*

*The plaintiff in an action having been arrested for the costs of it in his affidavit to support an application to be discharged from custody, deposed that from the 23rd of March to the 3rd of May he was attending certain works in Monasterevan, and that he came up to Dublin for the sole purpose of attending a civil bill process brought against him in the Recorder's Court, and was arrested on the 4th of May, on which day the civil bill process was in the Recorder's list but was not heard. The Court ordered him to be discharged.*

THIS was an application that the plaintiff in this case might be discharged from custody, he having been arrested for the costs in the action of *O'Reilly v. Mercer*. The motion was grounded upon the affidavit of the prisoner, stating that from the 23rd of March to the 3rd of May he was attending certain works in Monasterevan, and that he came up to Dublin for the sole purpose of attending a civil bill process brought against him in the Recorder's Court, and lodged in No. 24 Lr. Mecklenburgh-street; that he was arrested on the 4th of May at the corner of Sackville-street, at 5½ p.m.; that the civil bill process, *O'Neill v. O'Reilly* was in the Recorder's list, but was not heard on that day; that he showed the *subpoena* to the bailiff, who said if he had seen it he would not have arrested him, but could not let him go then.

Heron, Q.C. for the motion referred to *Ferguson's Practice*, 337.

*Sidney, Q.C. contra.*

MONAHAN, C.J.—O'Reilly leaves his business for the purpose of attending the trial, as far as we see, intending to return as soon as it was disposed of. We shall discharge him. It is not a case for costs.

*Application granted.*

### Court of Exchequer.

Reported by William Albert Sargent, Esq., Barrister-at-Law.

HUNTER v. KANE.—June 9.

#### *Wrongful dismissal of servant—Pleas set aside for embarrassment.*

*In an action brought by a chemist's boy against his master for wrongful dismissal, plaintiff averred that it was agreed that he should be in defendant's employment for a year certain, on the terms that he should not engage in any other employment for himself, or for any other person, and to use his best exertions; and that defendant wrongfully dismissed him. Defendant pleaded that plaintiff did not use his best exertions for defendant's sole benefit, and thereupon defendant dismissed him. Held—that this defence should be set aside, with costs, as vague, embarrassing, and double.*

THIS was an action for wrongful dismissal brought by a chemist's boy against his master. There were several counts and pleas but two only of each need be referred to, as only two pleas were embarrassing. The first count averred, that by an agreement in writing, under seal, plaintiff and defendant agreed that defendant should engage plaintiff as assistant in the manufacturing department of his chemical works, for one year certain, at £200 a-year; and plaintiff agreed not to engage for himself, or for any other person, in any other employment during said term, and to use his best exertions for the sole benefit of defendant according to the instruction he should receive; and that plaintiff fulfilled his part of the contract, but defendant wrongfully dismissed him. The second count was similar, alleging a promise on the part of defendant to fulfil the contract as above, and breach thereof. To these counts defendant pleaded—"that the plaintiff did not, whilst he was in the defendant's employ under the said agreement, use his best exertions in attending to the machinery, apparatus, and manufacture at said works, in all its branches and details, for the sole and exclusive benefit of the defendant, and according to the instructions he, from time to time, received according to the provisions of said agreement, therefore the defendant, before the end of the year, in said agreement and said count mentioned, did dismiss the plaintiff and refuse to retain him in said employ for the remainder of said year." To the second count defendant pleaded a traverse of the promise, and as a further defence (and this was the second plea held to be embarrassing and vague) set forth the agreement in writing as above, and alleged

that "plaintiff did not use his best exertions," &c., as in plea to first count.

*Pallas*, Q.C. (*Monahan* with him), now moved to set aside the above pleas on the ground of embarrassment, and contended that the pleas should have set forth the particular acts of misconduct alleged to have been committed by plaintiff, and relied on by defendant as justifying plaintiff's dismissal. Counsel cited *Horton v. M'Martry* (5 H. & N., 667); *Lush v. Russell* (5 Exch., 203); *Bullen & Leake*, 381, 483.

*S. Ferguson*, Q.C., contra.—There was no notice served for particulars. This defence is on the authority of *Lomax v. Arding* (10 Exch., 734).

*Serjeant Armstrong*, on the same side.—If plaintiff did not do our business we were entitled to discharge him. The pleas are to be taken either as in confession and avoidance, or else as traverses, and are good in either case. The learned serjeant referred to *Mercer v. Wall* (5 Ad. & El., N.S., 466); *Ridgway v. Hungerford Market Company* (3 Ad. & El., 171).

*Monahan*, in reply.—If the pleas are held good as traverses, it will follow that the least deviation of a servant from his duty, even for a moment, will be sufficient to sustain the plea of traverse of wrongful dismissal, but this is not law. Even if allowed to be a traverse it is double.

*Ordered per Curiam, that pleas be set aside, with costs.*

SMITH v. FOTTELL.—June 10.

*Motion to set aside plea of set-off.*

*Plaintiff sued defendant for £30. Defendant pleaded a set-off in these words:—"Defendant says that before and at the time of the commencement of this suit, the plaintiff was indebted to the defendant in the sum of £40 sterling, being so much money lent by the defendant to the plaintiff, and which sum or a sufficient portion thereof, the defendant is ready to set-off against the said claim of the plaintiff."* Held—that plea should be set aside, because defendant had not used the words—"Plaintiff was and still is indebted to defendant;" but that defendant should be allowed to amend, and that the costs should be costs in the cause.

THE summons and plaint contained two counts. One for £30, for money payable by defendant to plaintiff—for money found to be due from defendant to plaintiff on account stated between them. The other, for interest for the forbearance by the plaintiff at the defendant's request of monies due and owing from the defendant to the plaintiff. Defendant traversed both counts, and as a further defence said that "before and at the time of the commencement of this suit the plaintiff was indebted to the defendant in the sum of £40 sterling, being so much money lent by the defendant to the plaintiff, and which sum or a sufficient portion thereof the defendant is ready to set-off against the said claim of the plaintiff."

*Sidney*, Q.C., now applied that the plea of set-off should be set aside as a sham. It should have averred

that plaintiff "was and still is indebted to defendant" in the sum of £40. Again—the words "money payable to defendant" are left out.

*Keogh*, contra.—Are they really embarrassed by this plea? The original defence contained the words, "money payable to defendant," though, by a clerical error they are left out in some of the copies. The original stood thus:—"In the sum of £40 being so much money payable, i.e., payable in present." [*Pigot*, C.B.—Yes, provided the words will not bear two meanings.] *Fagg v. Nudd* (3 E. & B. 650). There Lord Campbell, C.J., refers to the words of the Common Law Procedure Act, that no deviation should be injurious so long as the substance was preserved. I have merely substituted "being money payable" for "and is still;" and one is tantamount to the other. [*Pigot*, C.B.—If the word "being" is doubtful, is not the plea embarrassing. We ought to hold strictly against those who wait till the last moment to file pleadings, which you have done in this case.] This is a *bona fide* plea, not pleaded for the purposes of delay.

*Per Curiam.*—Let the plea be set aside. The defendant be allowed to amend, and the costs to be costs in the cause.

GLENNON v. O'DONOGHUE—June 12.

*Motion for costs of plaintiff's attorney notwithstanding settlement of action.*

*The Court must be perfectly satisfied that there has been collusion between the parties to the action to deprive an attorney of his costs by settling the action before it will interfere.*

THE summons and plaint was for malicious prosecution and false imprisonment. The defendant accused the plaintiff of stealing some tea, but the action was settled, and *Heron*, Q.C., applied, on behalf of plaintiff's attorney, either that he should be allowed to mark judgment notwithstanding the alleged settlement, which was made to deprive plaintiff's attorney of his costs, or that the costs of plaintiff's attorney should be paid by defendant—*Swain v. Senate* (2 B. & P., N. R., 79); plaintiff's attorney served defendant with a notice for his costs.—*Welsh v. Hole* (1 Doug. 237); *Gould v. Davis* (1 Dow. 288).

*Sidney*, Q.C., contra, for defendant (with him *Keogh*).—Defendant has made no affidavit for there is nothing for him to controvert. *Swain v. Senate* was not a case in point. They must make out a case of collusion indisputably. Plaintiff's affidavit does not aver that he ever asked for costs, it merely says, that the plaintiff was a waiter out of employment, and his wife a cook, also out of employment. There is no authority to show that plaintiff's attorney may apply to the Court to oblige plaintiff to go on with the action notwithstanding a settlement. The Court should check speculative actions. There is not a scintilla of evidence of collusion between plaintiff and defendant to entitle plaintiff's attorney to succeed in this motion.—*Chapman v. How* (1 Taunt., 341); *Har-*



*bison v. Wilcox* (11 Ir. L. R., 500); *Mulligan v. Gilligan* (3 Ir. L. R., 323); *Storrard v. Lord Mil-town* (5 Law Recorder, N. S., 24); *Morrison v. Summers* (1 B. & Ad., 559); *M'Mahon v. O'Cal-laghan* (1 Law Recorder, N. S., 116).

*Keogh*, on same side, was not called on.

*Coates* in reply.—I admit it rests on us to prove collusion. In none of the cases cited on the other side was there any collusion. The attorney cannot do more than swear to his belief that there has been collusion. It is a meritorious thing for an attorney to take up the case of a needy client, and he should not be made to lose by so doing. On May 23rd, Messrs. Lawless & White, defendant's attorneys, ceased to act in the matter. On the 26th a notice was served on defendant's attorneys to pay the costs of plaintiff's attorney, Mr. Parsons. The settlement had been made on the 25th, and on the 27th an answer came from Messrs. Lawless & White stating the settlement and cautioning Mr. Parsons not to go on with the action. A person of the name of Fox, unconnected with Messrs. Lawless & White, prepared the settlement, and this is a proof of collusion. Lawless & White knew nothing of the settlement till it had been completed, and in that settlement there was a proviso that the costs of plaintiff's attorney should be paid. The witness to the settlement is an aunt of defendant's.

*Poor, C.B.*—The principle on which the Courts act in such a case as this is quite clear. If the Court was satisfied that there was collusion between the plaintiff and defendant to defraud plaintiff's attorney of his costs, it would grant this motion, but it should be satisfied of that affirmatively before interfering between parties who are *domini litis*. Parties may be in various difficulties to make them compromise an action. I am far from saying that we should discourage attorneys from acting for clients who are in humble circumstances and poor. On the other hand demands made by indigent persons may be wielded to the great oppression of suitors. We have no grounds for believing that here the plaintiff has dispensed with his attorney's assistance, and that, even if proved, would not be collusion. The affidavit only alleges that plaintiff was unable to pay the costs, and that defendant knew this. The settlement drawn up by Fox was grounded on a substantial sum of money paid down, £20. There is some suspicion cast on the case, owing to the fact that there is no affidavit by defendant, but we are not entitled, merely on suspicion, to rule that defendant should be further sued. There is evidence that plaintiff's attorney was told by plaintiff's wife that she thought part of the arrangement was, that the costs of plaintiff's attorney were to be paid ultra the sum in the settlement. The settlement contradicts this allegation, for it states that the £20 paid by defendant was to be in full discharge of all claims on him by plaintiff, and then follow these words written by plaintiff—"I undertake to pay out of this sum my attorney's costs," so that we must hold it to be either a mistake or a misrepresentation on the part of plaintiff's wife. We do not complain of Parsons' conduct in not expressly alleging that there was collusion; on the contrary, we think he acted properly in omitting so to do. Upon the authorities

we are bound, there being no collusion proved, to refuse the motion, but without costs.

## Court of Appeal in Chancery.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

*M'ERLANE v. O'NEIL*.—May 8, 9, 10; June 5.

*Injunction—Fishery—Letters Patent.*

*The O'N.'s claimed the fisheries in the river Bann under royal letters patent of 19th Charles 2, which letters granted said fisheries in said river to the parties in that patent mentioned. At that time the waters flowed in a circuitous course from a point on Lough Neagh to a point on Lough Beg. At a subsequent period said two points were connected by a right line called "the new cut," through which "cut" a great portion of the waters thenceforward flowed, and in this cut, now, though not at the time of the patent, called the Bann, the M'E.'s fished. The Master of the Rolls restrained by injunction, bearing date the 5th of Nov. 1864, the M'E.'s from fishing in the river Bann "within the limits of the several fishery granted" by the aforesaid letters patent. Held, that the injunction ought not to have been granted, inasmuch as the place in which the M'E.'s fished did not form any part of the river in which the several fishery was created by said letters patent.*

THIS was an appeal from a decision of the Master of the Rolls restraining the appellants from fishing in the river Bann, in the county of Antrim. The respondents, who obtained an injunction from his Honor, claimed a several fishery in the Bann under letters patent of King Charles II., dated 20th November, 1669. The appellants denied that they had fished in said river, but admitted that they had fished in what was called the "new cut," which they insisted was not part of the river Bann; that said "cut" was made since the patent, and that no right of fishing therein could be set up by the respondents.—The Bann is a river which takes its rise in the southern portion of the county of Down, and thence flowing in a north-westerly direction through the whole length of said county, it passes through a portion of the county of Armagh, and enters Lough Neagh at the south-western angle thereof, on the western bank of which lake lies the county of Tyrone. Leaving said lough at a point in its north-western angle, the said river flows, as it were, in an arc of a circle through a distance of one mile to the most southerly point of Lough Beg, and it separates in its downward course between said two points, the county of Antrim, which lies on its right bank, from that of Derry, which lies on its left. What is called the "new cut" forms the chord of the said arc between the points aforesaid, and said "new cut" or chord lies entirely in the county of Antrim. From Lough Beg to the sea on the

northern sea board of Ireland the said river divides the said two counties; and it was the fishing and the right thereto in said "new cut" which was the cause of the contention in the present case. On the 6th of October, 1863, the Lord Chancellor granted a conditional order for an injunction restraining the respondents (the now appellants) from fishing in the river Bann. On the 19th of February, 1864 the Master of the Rolls directed an issue substantially to try the question in dispute (as hereinafter mentioned), and his Honor, on report of the findings, and on motion by appellants to set aside said verdict, on the 5th of November, 1864, made the said conditional order absolute in the terms following:—"That the respondent's motion to set aside said verdict at law be, and is, hereby refused with costs; and also that the cause shown by the said respondents against the said conditional order of the 6th day of October, 1863, be and is hereby disallowed with costs, including the costs of the trial of the issues in this matter, said respective costs to be paid by the said respondents to the petitioners when taxed and ascertained. And it is further ordered that the said conditional order of the 6th day of October, 1863, be and is hereby made absolute, with costs to be paid by the said respondents to the said petitioners when taxed as aforesaid; and accordingly it is further ordered that an injunction do issue in this matter to restrain the said respondents, Patrick M'Erlane, Hugh M'Erlane, Henry M'Erlane, and James Lavery, their servants, workmen, and agents, from erecting or keeping erected any weir, and from keeping or using any net for the purpose of taking any fish, and from any way taking fish or fishing in any part of the river Bann within the limits of the several fishery granted and created by the royal letters patent, dated the 20th day of November, in the 19th year of the reign of King Charles the Second, in the cause petition in this matter mentioned; and from in anywise hindering or preventing or interfering with the petitioners in the exercise of their respective exclusive rights of fishing within the said limits." The petition of appeal then stated that John O'Neill, John Colgan, Patrick Meenan, (respondents hereto) filed their petition for an injunction on the 2nd October, 1863—said conditional order of 6th Oct. 1863, was made absolute on said 5th November, 1864, and from that absolute order the present appeal was brought. Said petition alleged that there was a long established several fishery of eels in the River Bann where it flows from Lough Neagh, between the counties of Antrim and Londonderry. That King James the First had by letters patent granted to Arthur, Lord Chichester, all the fishings and fishing places in Lough Neagh and the River Bann, from the lough to the salmon leap in said river, with the soils of said lough and river, and that said grant was afterwards confirmed by letters patent of Charles the Second to the then Earl of Donegal. That George Augustus, Marquis of Donegal, being entitled to all the estate and interest derived under said letters patent on the 1st of August, 1827, demised the same by lease to the then Earl O'Neill for a term of 5000 years; and that on the 8th day of September, 1850, Viscount O'Neill, in whom the said term was then duly vested, conveyed said several fishery to the Commissioners of Public

Works in Ireland, who, on the 25th day of June, 1855, assigned and conveyed said several fishery to the petitioner, John O'Neill, who in said year 1855, demised same for fourteen years to petitioners, John Colgan and Patrick Meenan. That petitioners having three weirs in the said River Bann, respondents (who are now appellants) for the first time in the said year 1863, had fished above the third of said weirs; and by placing nets there had intercepted the eels that would otherwise have passed into same; and that petitioners had prosecuted and convicted appellants under the statute in that behalf for having done so; but that notwithstanding said convictions appellants still continued to fish there; and that as respondents were poor, petitioners' only adequate remedy was by the intervention of the Court of Chancery.

Appellants showed cause against said conditional order by their joint affidavit, filed Oct. 20, 1863, and by the affidavit of George M'Erlane, filed on the same day; and, on moving to show cause, they also relied on the Down survey, showing the River Bann flowing between Lough Neagh and Lough Beg in one continued stream, being the boundaries between the counties of Antrim and Londonderry. On said motion, the deeds evidencing same were produced in Court; but they, by their counsel, alleged that no lease had ever been executed by said John O'Neill to said Colgan and Meenan, and none was produced; and by the lease of 1827 it appeared that the demise was confined to all that eel fishery and fishing place near Toome Bridge within the River Bann, called the Toome Eel Fishery, formerly in the occupation of persons therein named, with appurtenances thereunto belonging and enjoyed therewith, within the known and accustomed limits of said fishery; and there was no evidence to show that the limits of said eel fishery extended to the Salmon Leap, or that they were conterminous with the fishery granted by said letters patent, said Salmon Leap being many miles from Toome. Respondents, now appellants, denied that they had ever fished in the River Bann, but alleged they had done so only in the New Cut, which is between the Bann and Lough Beg, and is no part of the River Bann, and never was reputed to be so, and did not pass, and never had been enjoyed as having passed by said letters patent; and they said that the granting part of said letters patent of Car. II. is in the words following, "We do give, grant, and confirm unto the said Arthur Earl of Donegal, his heirs and assigns, all the said fishings and fishing places of what kind soever in the said lough or poole of Lough Neagh and Tome otherwise Lough Sidney, alias Lough Chichester aforesaid, and in the river of Bann, and also all the islands in the said lough, and the soyles of the said lough or poole of Lough Neagh and Tome, alias Lough Sidney, alias Lough Chichester, and of the said River Bann, and every and either of them, with all and singular their and every of their appurtenances from the lough or poole aforesaid unto the rock or fall of water called the Salmon Leap in the said river, being in the counties of Down, Armagh, Tyrone, Antrim, and of the county of Londonderry, in our province of Ulster, in our kingdom of Ireland aforesaid, or in some of them together with also the Eale Weirs in and upon the said river of the Bann in the said counties, or some of

them, and also the full power to come to the banks of the lough, pools, and river aforesaid, within the bounds and rivers aforesaid, and thereupon to lay and put their nets and all other necessities for fishing," &c., and that said New Cut was entirely in the county of Antrim and in the townland of Breacart therein; that a portion of said townland is now formed into an island, being surrounded by the New Cut, the River Bann, and Lough Beg; that all the islands in the Bann are by said patent granted to Lord Chichester, and that neither he nor any one deriving under him had ever enjoyed or pretended title to any part of Breacart; that thus it appeared that said place was not an island when the patents were passed; and that consequently the New Cut, by which it became an island, did not exist at that time, but that said New Cut was, as its name imported, of recent and artificial formation; that said New Cut so appeared on the Ordnance Survey, while on the Down survey there is no trace of it; and that the third weir in the petition mentioned, which was erected in said New Cut by said Meenan and Colgan, is not within the limits of the said several fishery granted as aforesaid, or within said River Bann at all. That respondents, by their said affidavit, assert and show title to the places in which they fished respectively, the fixtures employed by them for that purpose being permanent, and long continued without interruption, save by the Board of Works for temporary purposes, and in the assertion and exercise of the rights and powers given to said board, under and by virtue of the statute in that case made and provided. That petitioners, the present respondents, by their affidavit in reply, did not dispute the fact that the New Cut was a water-course different and diverging from the stream that is the boundary between the said counties of Antrim and Londonderry; but they alleged that the said New Cut was formed by the natural action of the water of the River Bann partially changing its course; and insisted, in consequence, that such water of the Bann, though flowing through a different channel, was the Bann, which was in effect alleging that, by law, the water, and not its bed or channel, constituted the river. That, by the order of the 19th day of February, 1864, the Master of the Rolls, after reciting the petition and the several affidavits, deeds, and documents filed and produced respectively in the cause to which appellants refer, was pleased to direct four issues to be tried by a jury of the county of Antrim, wherein said petitioners should be plaintiffs, and said respondents defendants, which issues were in the terms following:—First.—Whether the place where the respondents or any of them used or placed any net for the purpose of taking fish, or fished as in the 8th paragraph of the cause petition in this matter mentioned, is part of the River Bann. Second.—Whether the place where the respondents or any or which of them used or placed any net for the purpose of taking fish, or fished, is part of what is called the New Cut. Third.—Whether the said part of the New Cut is part of the River Bann. Fourth.—Whether petitioners or any person or persons deriving under them were for three years before the 2nd day of October, 1863, the day of the filing of the cause petition in this matter, in the quiet and peaceable possession (save the disturbance in the said cause petition mentioned)

of the fishing place or fishery in which the respondents placed any net for the purpose of taking fish or fished. That said issues came to be tried on the 22nd day of March last, at Belfast, before the Right Hon. Justice Fitzgerald, and a special jury of the county of Antrim, and that the three first of said issues were material, and directed for the purpose of ascertaining whether the place in which it was agreed by petitioners and respondents that respondents had fished, was or was not within the limits of the several fishery in the River Bann, granted by said letters patent; and respondents' fishing having been confined to the New Cut, the question for the jury upon said issues was, whether the New Cut was within said limits or part of the River Bann. That petitioners, now respondents, as plaintiffs upon the trial of said issues, having undertaken to prove that said Cut was part of the River Bann, within said limits, offered no evidence material or relevant thereto, but confined their evidence almost entirely to the 4th issue. That it appeared by evidence in the case that the Board of Works had, for the purposes of inland navigation, widened and deepened the New Cut, so that much of the water from the river now flows through it in a direct and continuous stream, of width and breadth apparently equal to that of the river itself, and so passes into Lough Beg, while the river which takes a winding course to Lough Beg from where the Cut joins it, is now comparatively narrow and shallow, so that the Cut now appears to be part of the Bann. That appellants produced the Down survey, whereby it appears that the Bann flows between the counties of Antrim and Londonderry in one continuous stream, which stream it was proved is still the boundary between the counties; appellants further proved that the New Cut is entirely in the county of Antrim. That the learned judge having charged the jury, left to them on the first three issues the question whether the New Cut is part of the River Bann, and his Lordship in his report of the trial, stated that the jury informed him that the New Cut is now a part of the River Bann, but there was no evidence to lead them to the conclusion that any part of the River Bann flowed where the New Cut now is, at the time of the patent to the ancestor of Lord Donegal, or that there was then any other channel in the River Bann than the one channel which divided the counties of Antrim and Londonderry, and that there was no evidence to show that the New Cut had been formed by natural causes, such as by the action of the water forcing its way by the shorter course into Lough Beg; and they also informed the learned judge that the evidence did not satisfy them that the New Cut was the result of artificial cause alone. Appellants submitted that this statement of the jury, which they also embodied in a written memorandum, amounted to a verdict for appellants upon said three first issues—it thereby appearing that, in the opinion of the jury, the plaintiffs had not proved that the New Cut was part of the River Bann or within the limits of the said several fishery, and same having been reported to the Right Honorable the Master of the Rolls, should have satisfied him that plaintiffs had failed to prove what, in order to obtain an injunction, they were bound to prove, viz.:—That the respondents to the petition of appeal had title to the place in which appellants had

fished, and that having failed to establish such title, the fishing by appellants was not an act of which they had a right to complain, or to ask the High Court of Chancery to restrain appellants from committing in future. It was therefore submitted that the said order of the 5th day of November, making said conditional order absolute with costs, was erroneous and ought to be reversed, and that the cause shown against said conditional order ought to be allowed with costs. That the findings of the jury, which were for plaintiffs on all the issues, were entered by the direction of the learned judge, but were not intended, and do not in fact control or affect the opinion expressed by them that plaintiffs had not proved their case, and were not so intended by said learned judge.

The answer of O'Neill to the above petition of appeal stated that by the said royal letters patent the several fishery therein granted and confirmed is described as "all the fishings and fishing places of what kind soever in the lough or pool of Lough Neagh, also Lough Sidney, also Lough Chichester, in the river of Bann, from the lough or pool aforesaid unto the rock or fall of water called the Salmon Leap in the said river of Bann, being in counties of Down, Armagh, Tyrone, Antrim, and the county of Londonderry, in Ulster, or some of them, or in the confines of them, or some of them," together with certain eel weirs in and upon the said river of Bann. That the said cause petition stated that the estate and interest of the grantee under the said letters patent descended to the late George Augustus, Marquis of Donegal, who, in consideration of a sum of £7,384 12s. 3d., by indenture of lease bearing date the 1st August, 1827, demised to the late Earl O'Neill for the term of 5000 years, and at a rent of £369 4s. 7d. per annum, "the eel fishery and fishing place within the River Bann, near Toome-bridge, in the county of Antrim, called or known by the name of the Toome eel fishery formerly in the occupation of" persons therein named, "and all and singular the weirs, dams, watercourses, rights, privileges, commodities, advantages, and appurtenances to the said fishery belonging or appertaining and usually enjoyed therewith, for the purpose of catching and taking eels within the known and accustomed limits of the said fishery, with full and free liberty to erect, make, set up, and place new or other eel weirs or traps in said River Bann, within the limits aforesaid;" and the said Earl O'Neill thereby covenanted, amongst other things, to maintain all existing and future eel weirs within the limits of the said fishery. That the estate and interest of the said Earl O'Neill, under the said demise, afterward, on his decease in the year 1841, became vested in his brother, the late Viscount O'Neill. That afterwards the Commissioners of Public Works in Ireland, in order to carry on certain works for the purpose of improving the drainage of the district, and the navigation of the River Bann between Lough Neagh and Lough Beg, agreed to purchase the interest of the said Viscount O'Neill in the said Toome Eel Fishery; and accordingly, by deed-poll, bearing date the 28th September, 1850, the said Viscount O'Neill, in consideration of the sum of £1,625, assigned his interest in the said eel fishery to the said commissioners, which

said deed-poll is as follows:—"I, the Right Honorable John Bruce Richard Viscount O'Neill, of Shane's Castle, in the county of Antrim, in consideration of the sum of £1,625 paid to me by the Commissioners of Public Works in Ireland, being the commissioners acting in execution of an Act made and passed in the 5th and 6th years of the reign of her Majesty, &c. do hereby grant, assign, release, and make over to the said commissioners All that eel fishery and fishing place within the River Bann, near Toome-bridge, in the said county of Antrim, called or known by the name of the Toome Eel Fishery, formerly in the tenure or occupation of, &c., and all and singular the weirs, dams, watercourses, rights, privileges, liberties, commodities, advantages, and appurtenances to the said fishery belonging or appertaining, and usually enjoyed therewith; and also all cots, tanks, and fishing gear thereunto belonging (except as in the original lease hereinafter mentioned is excepted and reserved), and all the estate, right, title, and interest of the said John Bruce Richard Viscount O'Neill in and to the same, and every part thereof, to hold (except as before mentioned) to the said commissioners and their successors, according to the true intent and meaning of said Acts, for and during all the rest, residue, and remainder of the term of 5000 years now to come and unexpired, granted in and by a certain indenture of lease, bearing date the 1st day of August, 1827, and made between the Most Honorable George Augustus, Marquis of Donegal, of the first part, the Rev. Arthur Chichester Macartney of the second part, and the Right Honorable Charles Henry St. John Earl O'Neill of the third part, subject, however, to the payment of the rent, and to the performance of the several and respective covenants on the lessee's part in said indenture of lease contained. In witness whereof I have hereunto set my title of honour and seal on this 26th day of September, in the year of our Lord 1850. O'NEILL (Seal)." That the said commissioners accordingly commenced and executed the said works, upon the completion of which they agreed to assign their interest in the said fishery to the present respondent, John O'Neill; and accordingly by indenture, bearing date the 25th day of June, 1855, the said Commissioners of Public Works in Ireland, in consideration of the sum of £2,800, assigned the lessee's interest in the said eel fishery to the said John O'Neill for the remainder of said term in the words following, that is to say—"All that eel fishery and fishing place within the River Bann, near Toome-bridge, in the barony of Upper Toome, and county of Antrim, called and known by the name of Toome Eel Fishery, formerly in the tenure or occupation of, &c. And the said John O'Neill doth hereby for himself, his heirs, executors, administrators, and assigns, covenant and agree with the said Commissioners of Public Works, their heirs, executors, successors, and assigns, that the site for fishing said fishery shall be confined, as regards permanent fixtures, to that portion of the said River Bann extending from the foot or tail of Toome regulating weir to a point one hundred yards on the Down stream side of the iron latticed bridge, and that fixtures of a temporary character which are to be removed at the close of each fishing season shall not be

erected or fixed at more than two points between Toome-bridge and Lough Beg, as shall be approved of by the said commissioners or their successors previous to erecting or fishing same; and also that all fishing-weirs which shall or may be erected within the limits aforesaid, subject to the provisions in that behalf hereinbefore contained, shall be subject to the previous approval of the said Commissioners or their successors as to their position (within the limits aforesaid) and the mode of construction; and that any such weir shall be so constructed as not in time of flood to throw back water upon the apex of the regulating weir which is situate in said river immediately above the fishing site hereinbefore mentioned. That after tracing the title to the said several fishery as aforesaid the cause petition alleged that from the 25th day of June, 1855, when petitioner (now respondent), John O'Neill, became the proprietor thereof as aforesaid, he had by himself and his lessees enjoyed the said fishery without interruption, and used for that purpose three weirs, and that petitioners (now respondents), John Colgan and Patrick Meenan (who in the year 1855 became his tenants at a yearly rent of £950), had continued so to enjoy the same; and that until shortly before the filing of the cause petition, the respondents (now appellants) never asserted any right to fish or fished above the third or lowest weir of petitioners (now respondents), but that in the course of the season then being they for the first time commenced so to fish, and greatly injured the fish of the petitioners (now the respondents) by intercepting fish on their way down to the said third or lowest weir. That respondents (now appellants) by their answering affidavit alleged that the said third or lowest weir was not in the River Bann but in the New Cut, and that consequently petitioners (now respondents) had no right to fish there; and they also asserted that they, the said respondents (now appellants), had a right to fish in the said New Cut; but petitioners (now respondents) say that the said respondents (now appellants) did not show any title whatsoever to the places in which they fished; and the engines employed by them were not, and were not alleged to be, permanent, but were in fact moveable poles and nets which, when used, were generally put down by night and removed in the daytime; and the present respondents stated that they for a long time permitted the present appellants to fish below their said third weir, where the said respondent's fishery could not be in any way interfered with; and the said respondents say present appellants never showed any title whatsoever to fish in any part of the said New Cut, as they admit having done, and had no such title, and were in fact (save so far as they were permitted by these respondents as aforesaid) trespassers without any color of legal right.

That in an affidavit made by the now respondent, John Colgan, in reply to the answering affidavits of respondents (now appellants), it was shown that the former course of the said River Bann, between the upper extremity of the New Cut and Lough Beg, is always stagnant in summer; and the said New Cut, although so called, is in fact of great antiquity and unknown origin, and is the outlet and channel by which the water flows from Lough Neagh to Lough Beg, and was always used as a several fishery by the

O'Neill families under their title aforesaid by means of permanent or fixed weirs. That, upon the state of facts so disclosed to the Court, the petitioners (now respondents) contended that the New Cut was a part of the River Bann, and that the right of fishing in its water passed under the said demise of the said Toome Eel fishery, and is part of the right of fishing granted by the patents before referred to; that the fishery in the said New Cut had been long, uninterruptedly, and exclusively enjoyed by petitioners (now respondents) and their predecessors in estate, under and by virtue of the said demise; and that they had established their title to the relief sought as against the respondents (now appellants), in whom there was no color of legal title, and who were mere trespassers. That on the said trial the petitioners (now respondents) produced a number of witnesses who proved that the New Cut is now the main and frequently the only channel through which the waters of Lough Neagh flow down to Lough Beg; that its dimensions were increased by the operations of the said Commissioners of Public Works in the execution of said works of drainage and navigation; but that long previous thereto, and as long as living memory ran, the said New Cut had existed and had been uniformly and exclusively used for fishing by the O'Neill family until the purchase by the Board of Works hereinbefore mentioned; and that since the assignment to the present respondent, John O'Neill, it had been so used and enjoyed by the petitioners (now respondents). That petitioners (now respondents) had previously produced before the Master of the Rolls a copy of the Ordnance Survey of 1832, in which the New Cut is laid down, and in which it appears to be as broad as it is at the present day; and a plan used by the Board of Works in the execution of their operations, and taken from the said Ordnance Survey, was also produced on the trial of the issues, and was relied on by the petitioners (now respondents) in support of their case. That it was also proved by petitioners that during the time when the said fishery was in the occupation of the said Earl and Viscount O'Neill respectively under the said demise from the Marquis of Donegal, there was a permanent weir in the part of the New Cut where the said third weir now is, which weir was used and fished by the said Earl and Viscount and their tenants uninterruptedly as part of the Toome Eel Fishery, and remained, and was so used, up to the time when the Commissioners of Public Works entered as aforesaid; and it was also proved that there had been another fixture for fishing which was likewise used by the said Earl and Viscount, at a place called the Black Stone, lower down than the said third weir, and at the point where the said New Cut opened into Lough Neagh. That it was likewise proved that when the Commissioners of Public Works entered as aforesaid, they, for the purpose of improving the navigation of the River Bann, removed all the weirs and other obstructions to navigation which were in the New Cut and deepened a part of its channel. That the respondents (now appellants) produced and relied upon a tracing of the Down Survey, showing only one channel of the Bann at the point in question, as evidence that the New Cut was not in existence at its date; but it was pointed out that the

Down Survey is very meagre in its delineation of rivers in the district in question which is therein described as "unforfeited land," and the delineation of the river therein contained is manifestly incorrect, and probably was not taken from survey or inspection; and the jury had the said tracing before them when considering their findings. That the respondents (now appellants) produced several witnesses who gave no evidence of the origin of the said New Cut, or of its having any historic origin whatever. That thereupon and after the charge of Mr. Justice Fitzgerald, who tried the issues, the jury found "for petitioners (now respondents) all the four questions submitted to them under the direction of the judge, which direction was founded upon a special finding of the jury, certified by him to be as follows—that is to say, "that they were of opinion that what is called the New Cut is now part of the River Bann, but they (the jury) had no evidence that at the time of Lord Donegal's grant there was any other outlet for the water except the Bann separating the counties of Derry and Antrim; also that they had no evidence that the New Cut was made by natural means, or that it was made by artificial means alone, and that they found for the plaintiffs (who are now respondents) on the fourth issue."

*The Attorney-General (Lawson), the Solicitor-General (Sullivan), and M'Mechan* were for the appellants.—The order of the Master of the Rolls was erroneous. This injunction should not have been granted, restraining the appellants from fishing within the limits of the several fishery, inasmuch as they never fished within the limits of the several fishery at all. We admit having fished in the New Cut, and the jury have found that that cut was not part of the River Bann at the time of the granting of the patent, though it now is. The Master of the Rolls then having regard to this finding of the jury ought not to have issued and made said conditional order absolute. The cause petition does not aver that the New Cut is part of the River Bann. The only material question now for the Court to consider is, whether the New Cut was within the limits of the several fishery? There was no evidence one way or the other as to when this New Cut was made, yet the name implies that it was cut by the hand of man. At the date of the patent it cannot be contended that the fishery was included in that of the Bann, or that the cut was part of the Bann at all. A river may insensibly alter its course, and if it do, the river in its altered course is still known by the same name, and preserves the same grants, rights, and privileges as were connected with said river before its alteration, as for example whatever rights were granted by patent before the gradual change remained there after; it is, however, quite otherwise where the alteration is sudden, as if the cut were made by the hand of man, and so the law is laid down in Lord Hale, *De Jure Maris*, part 1, ch. 1—"If a fresh river between the lands of two lords or owners do insensibly gain on one or the other side, it is held (22 Ass. 93) that the property continues as before in the river. But if it be done sensibly and suddenly, then the ownership of the soil remains in the former bounds;" and again, part 1, ch. 4, "If the mark remain or continue, or extent be reasonably certain, the

case is clear."—*Ford v. Lacey* (7 Hurl. & Nor. 151); *Rex v. Lord Yarborough* (3 B. & C. 91); *The Abbot of Ramsay's case* (Dyer, 326, b.)

*Brewster, Q.C., Harrison, Q.C., and Porter, contra.*—The Bann is a navigable river, and we submit that if a river change its course, the right of fishing follows the water, and still further we say if this change be by artificial means, yet even so will this same law prevail.—*Taylor v. Whitbread* (Douglas, 745). In *1 Hawkin's Pleas of the Crown*, 698, sec. 4, it is said that "a highway may be changed by the act of God; and therefore it hath been holden that if a water which has been an ancient highway, by degrees change its course, and go over different ground from that whereon it used to run, yet the highway continues in the new channel in the same manner as in the old."—*Vide also* 1 R. Abr. 390. The board of works purchased this fishery under the 65th sect. of the 5 & 6 Vict. ch. 89, which authorizes the commissioner to purchase land for the purposes of the Drainage Acts, and the interpretation clause of the 159th section extends the term "land" to weirs.

If this New Cut were made naturally, and not by artificial means, there would be no argument about it. [*The Lord Chancellor.*—Don't assume that; that is a most debatable position.] Supposing it had altered naturally, they could not have prevented us from following the fishing. [*Lord Chancellor.*—Could you put down weirs in the new soil?] That is not this case. [*Lord Chancellor.*—It is this case. I think you are pushing this question extremely far.]

June 5.—THE LORD CHANCELLOR.—In this case in which the petitioner claimed the right of fishing in the River Bann, the Master of the Rolls granted an injunction to restrain the respondents, Patrick M'Erlane and others, from erecting, or keeping erected, any weir, and from keeping or using any net for the purpose of taking fish, and from any way taking fish or fishing in any part of the River Bann within the limits of a several fishery granted by letters patent of Charles the Second, and from and in anywise hindering or preventing, or interfering with the petitioners in the exercise of their respective and exclusive rights of fishing within the limits of the River Bann. The Master of the Rolls, before issuing this injunction, directed four issues to be tried. Those issues have been tried, and have resulted in favour of the petitioner. A motion was then made before His Honor to set aside that verdict, and he disallowed the cause shown, and he gave all the costs, including the costs of the trial, against the respondents. Well, what has this verdict decided? Has it decided anything? The cause petition claims the right of fishing in the River Bann, and it traces title to the patent of Charles II., and it alleges that those three weirs for catching eels are in that river. Well, the jury find that that river upon which the weirs exist, and known by the name of the New Cut, was not then in existence. The petitioners, it appears to me, have no right at all to have this injunction; it does not appear that they have any right to fish in this New Cut. The proprietors of the lands would have the right to the fish on their respective sides, which generally extends *ad flum medium aquas*. The Scotch cases go to show, indeed, that he might follow his fish over the soil of another.

The conclusion, then, I have arrived at is, that we ought to allow the cause shown against the conditional order, and I am of opinion that the respondents ought not to be put to the costs of the cause petition. The patent was passed, and it was said that the New Cut now was part of the River Bann. The petitioners have failed in establishing this allegation, and from the beginning to the end, petitioners have relied upon the patent alone as the foundation of their title. Well, this was not a plenary suit, but what is known in this country as a possessory suit. Questions of title cannot be called into account therein; therefore, supposing the thing had existence at all, it is enough to show that they were three years in possession, in quiet possession, and if so they are entitled to file this possessory bill; but the thing must have had existence. Now, the question is, had it existence? The whole bias of the petition is, that their fishery was granted by King Charles the Second, so that the point to be determined is, was the right of fishing granted by that patent. The jury found that the New Cut is part of the Bann now, but was not at the time of the grant. A great number of cases have been cited, many of them not material. Still the question remains behind as to the right to fish in this new cut in the year 1668, and the real question is, was the New Cut part of the River Bann at that time. The order of the Master of the Rolls there is quite useless; it does not appear that M'Erlane fished in the River Bann itself, then why grant an injunction when no act has been done on the river itself, and when there has been no complaint made? We shall therefore reverse the order of the Master of the Rolls, and shall allow the cause shown against making absolute the conditional order of the 5th of November, 1864. We shall dissolve, then, the injunction, with costs to be paid by the petitioners to the respondents; and refer it to the Master to inquire and report what damages, if any, the respondents have incurred by reason of the injunction. This order should not, in any way, prejudice the question as to the right to fish in the "New Cut." This injunction ought not to have been granted, inasmuch as the place in which the M'Erlanes fished did not form any part of the river in which the several fishery was created, and which fishery was granted by letters patent of 19 Charles II.

THE LORD JUSTICE OF APPEAL.—It is impossible to maintain the injunction which follows the prayer of the petition. The petition is based on the petitioners' title, and they have not shewn that the New Cut was the river which was granted; therefore failing to prove this, he must fail in obtaining his injunction, and he having failed in one, must, it follows, fail in the other. Now suppose we left the order to stand, that order would be nugatory, and would produce endless and fruitless litigation. We must then reverse the order of the Master of the Rolls.

## Court of Chancery.

Reported by Oliver J. Burke, Esq., Barrister-at-Law

COOPER v. PHIBBS AND OTHERS.—May 31;  
June 1, 2, 14.

*Error in law—Error in fact—Relief—Principle upon which the Court acts.*

*When money has been paid or a conveyance executed in ignorance of a point of law, relief may be granted by the Court of Chancery; but relief will not be given when it would be against good conscience that the party who made the mistake should be freed from the consequence of his own error.*

THIS was a cause petition presented by Edward Henry Cooper of Markree Castle, in the county of Sligo, against the respondents William Phibbs, Arthur Warren, and Laura his wife, Charlotte S. Cooper, Emma M. Cooper, Selina E. Cooper, and Leahy H. Cooper:—the petition prayed that a certain agreement made between the petitioners and Mr. Phibbs might be cancelled, and it also prayed for an injunction to restrain Mr. Phibbs from suing at law upon this agreement, or from enforcing same. The agreement which the petition thus sought to have cancelled was as follows:—"Memorandum of agreement bearing date the 14th October, 1863, between Colonel Edward Cooper of the one part, and William Phibbs, administrator of Joshua Edward Cooper, deceased, of the other part, whereby the said William Phibbs agrees to let, and the said Colonel Cooper agrees to take for a term of three years to be computed from the 1st day of November next the salmon fishery of Ballysodare, county Sligo, together with the Rapids Cottage, coach-house, and gate-house, at the yearly rent of £550 sterling, said rent to be payable half-yearly on every first day of May and first day of November in each year. And it is further agreed that said Edward Cooper shall during the said tenancy keep proper books showing the receipts and expenditure of said fishery, and weights in pounds of the number of fish taken, and shall allow the said William Phibbs or any person authorized by him to inspect said books at all seasonable times, and to have free access at all times to said fishery. And the said William Phibbs agrees to keep roofs of all the buildings and inside work in repair during the said term; the nets and cobbles to be valued before entry, and on the expiration of the term the difference in value to be paid by Colonel Cooper if they have been deteriorated, but it is optional with Colonel Cooper to take them or not, and if deemed necessary, a lease to embody these terms shall be prepared." This agreement was then signed by Edward Henry Cooper, and William Phibbs. The petition stated that the petitioner was ignorant of his rights when he entered into the agreement by which he became tenant of the fishery, which, in point of fact, was his own. It appeared that the Right Honorable Joshua Cooper, who was the great grandfather of the petitioner, had two sons, Joshua Edward and Edward Synge. Joshua Edward, in after life, became a lunatic, and died without issue. Edward Synge married, and had two sons, Edward Joshua Cooper, who represented



the county of Sligo in Parliament for many years, and Richard Wordsworth Cooper. Edward Joshua Cooper died in 1863, without male issue, but leaving daughters, who were made respondents; and the petitioner Edward Henry, was the eldest son of Richard Wordsworth Cooper. The petition alleged that the tolls and customs of Ballisodare, and of the markets thereof, and also the salmon fishery, and all other fisheries thereof, formerly belonged to the Crofton family; and that in 1806, Sir Edward Crofton, in consideration of £1500 granted same to Joshua Edward Cooper. Between the years 1806 and 1821 Joshua Edward Cooper became a lunatic, and his brother, Edward Synge Cooper, was appointed his committee. In 1821 on the occasion of the marriage of Edward Joshua Cooper, his eldest son, with Miss Sophia L'Estrange, Edward Synge Cooper put into the settlement certain properties of which he was then possessed, and covenanted with the trustees that within six months after the lunatic's death, intestate, and without issue, he would convey all the lunatic's estates to the trustees, upon trust (amongst others) for himself for life, remainder to his son, Edward Joshua, for life; remainder to his (Edward Joshua's) sons by that marriage in tail male, with remainder over. Miss L'Estrange died shortly after the marriage; and in 1827, on the occasion of Edward Joshua's second marriage with Miss Sarah Frances Wynne, Edward Synge Cooper, his eldest son, Edward Joshua Cooper, and his second son, Richard Wordsworth Cooper, severally covenanted with the trustees that all the property of the lunatic, with the appurtenances thereto, should, after his decease, be conveyed to the trustees, upon trust, for Edward Synge Cooper and his son, Edward Joshua severally for life; remainder to Edward Joshua's sons in tail male; and, in default thereof, to Richard Wordsworth for life, remainder to his sons in tail male. Edward Synge Cooper died in 1830, in the lunatic's lifetime and Edward Joshua was appointed the committee. The lunatic died in 1837. Richard Wordsworth Cooper, the petitioner's father, died in 1850, and Edward Joshua Cooper died in 1863, without issue male, whereupon the petitioner became entitled to all the estates as tenant in tail male under the limitations of the settlement of 1827. It appeared that in 1837, Edward Joshua Cooper, who was tenant for life, obtained a private Act of Parliament (1 Vict., cap. 89) "to establish and protect the salmon fishery in the lakes of Owenmore and Arrow, and in the Ballisodare river;" and the petitioner alleged that said Edward Joshua Cooper informed him that under the Act of Parliament he became owner in fee of the fishery, and that until after his death, and until lately, the petitioner continued under that impression; but he was now advised that the salmon fishery formed portion of the premises comprised in the settlement of 1827, and therefore, that he was the owner thereof, and that the agreement which he had entered into with the respondent, Phibbs (who was the administrator of Edward Joshua Cooper), for a lease of the fishery, while he was under the erroneous impression that his uncle was the absolute owner, should be set aside and not be held binding on him.

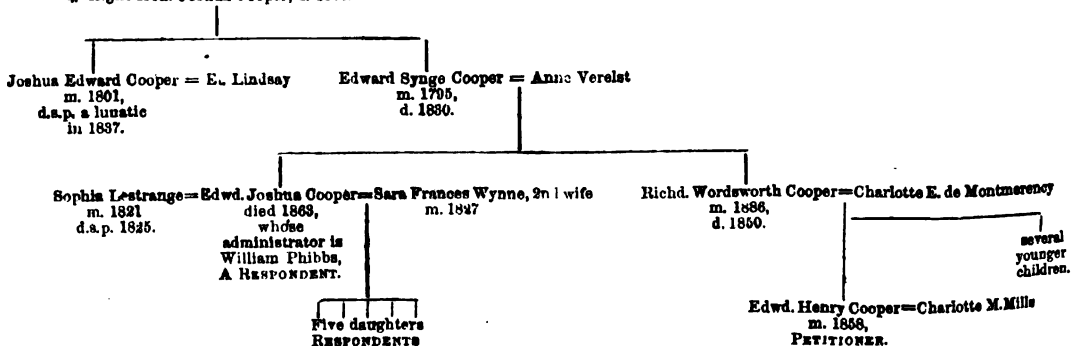
The respondent's case was that Sir E. Crofton had not in 1806 any several or exclusive fishery in the Ballisodare river; that before the making of the private Act of Parliament the right was vested in the Crown, or in other parties whose rights Edward Joshua Cooper purchased at his own expense, and for his benefit; that there was no mention of a fishery or a salmon fishery in the deeds of 1821 or 1827, and therefore the salmon fishery was not included in the covenants in those deeds, and was not bound by the trusts of those deeds, but was vested by the Act of Parliament in Edward Joshua Cooper, discharged from any trusts; that if the petitioner was under a mistake as to his right, such mistake was a mistake of law, which could not be rectified; that by deed executed by the trustees of the settlement of 1827, the fishery was conveyed to Edward Joshua Cooper absolutely, in consideration of £25 1s. 3d., and that the fishery conveyed by Sir E. Crofton in 1806 (if any) was that in about half a furlong of the river below the town, and where the tide ebbed and flowed.

The facts of this case are minutely stated in the judgment of the Lord Chancellor. For the better and more clear understanding of the case the pedigree of the Cooper family so far as the same is connected herewith, is given in the subjoined note.\*

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*Brewster, Q.C., with Warren Q.C., and William Fetherstone H.* appeared in support of the petition.—In mistake of law the petitioners considered when they took the lease of the fishing in question that they were dealing with the absolute owner in fee of the fishing, while in truth we were the owners ourselves in fee. That being so, it is perfectly competent to this Court to relieve against mistakes in law as well as against mistakes in fact—*Stone v. Godfrey* (5 De G. M'N. &

\* Right Hon. Joshua Cooper, d. 1800.



Gord. 76); so in *Boughton v. Hunt* (3 De Gex and Jones 501); there the marginal note says that where the heir at law of a shareholder in a company, the shares in which were personal estate, being ignorant of the circumstances and supposing himself to be liable in respect of the ancestor's shares, executed a deed of indemnity to the trustees of the company, it was held that he was entitled in equity to have his execution of the deed cancelled, as having been obtained under a mistake of fact and law—*Smith v. Kay* (7 H. L. C. 751). The private Act of Parliament (1 Vic. ch. 89) does not extend or enlarge the estate of Edward Joshua Cooper, which was a mere life estate in those lands and in the appurtenances thereto, not an estate in fee. The fee then under the settlement of 1827 in the lands and fisheries was not in Edward Joshua Cooper, and we therefore ask to be relieved of what has been done owing to our mistake of our rights in law.

*The Attorney General (Lawson) the Solicitor General (Sullivan) John E. Wulsh, Q.C., and R. Griffin,* were for the respondents. —We have laid out enormous sums on this fishery, and it would be preposterous to suppose that one farthing would have been laid out on this fishery if the parties had merely a life interest therein. It is absurd to contend at this hour of day that this Court has power to correct a mistake in law though there is ample jurisdiction when there is error in fact—*Directors of the M. G. W. Railway of Ireland v. Johnson* (6 H. L. 798). The cases relied on on the other side are inapplicable, inasmuch as that case turned on surprise and also upon mistake of facts; but there is no one case in the books where two parties acting in equal ignorance of law, and mistaking their respective rights, were relieved by a court of equity. *Stockley v. Stockley* (1 Ves. & Beames 23) was a case where third parties were permitted to act upon the conception of rights, not questioned at the time by the person who though they might have objected, had acquiesced, yet they were not afterwards allowed to object. A mistake in law shall not be reformed by this Court unless that mistake was brought about or induced by fraud. —*Story's Eq. Jurisprudence*, sections 113—116; *French v. Coppinger* (6 Ir. Ch. 568). Next as to the deed of 1827, that deed did not convey the fishery at all for the fishing is omitted though the lands are made the subject of the settlement, and the fishing in question could not have passed as an appurtenant, inasmuch as it was a separate hereditament being a royal fishery: the fishery then being omitted it could not pass under the deed of 1827.—*Acheson v. Fair* (3 Dr. & War. 512.) We submit then that this Court will not afford relief to the petitioners, the error complained of being an error in law, and upon that error thousands of pounds having been laid out—no *mala fides* being imputed—the rights of third parties having since accrued and everything that was done being done in good conscience.

*Warren, Q.C.*, in reply relied on *Hill v. Browne* (6 Ir. Eq. 403); *Creagh v. Creagh* (13 Ir. Ch. 504); *Re Saxon Life Insurance Company* (2 Johnson & Hem. 408.) The Court frequently steps in and relieves parties from mistakes in law.—1 *Story Eq. Jurisprudence*, sections 122, 130, if the eldest son who is heir at law of all the undisposed of fee simple estates of his ancestors, should in gross ignorance of the law,

knowing however that he was the eldest son, agree to divide the estates with a younger brother, such an agreement would be held in a court of equity void, and relief would be granted.—*Leonard v. Leonard* (11 B. and Beatty, 182.)

June 14.—THE LORD CHANCELLOR.—This cause petition, in which Mr. Edward Henry Cooper, of Markree Castle, in the County of Sligo, is petitioner, and Mr. Phibbs and others are respondents, seeks to set aside and have cancelled a certain agreement made between the petitioner and Mr. Phibbs, and prays an injunction to restrain Mr. Phibbs from suing at law upon or enforcing this agreement, upon the petitioner undertaking to submit to any terms which the Court may think fit. This agreement was one by which Mr. Edward H. Cooper agreed to take from Mr. Wm. Phibbs a certain fishery of Ballysodare, with the grounds attached to it, and the fishing house and other premises belonging to it for a term of three years, to be computed from the 1st day of November, 1863, and Mr. Cooper, the petitioner, now seeks to recall this agreement, and get rid of its effects, on the grounds that it was entered into by him by mistake, and in ignorance of his rights, and at a time when in point of fact he was the owner of the fishery so demised. In other words, that by mistake he has taken an agreement for a lease of a part of his own lands, the fact of which would be prejudicial to him during the currency of the term of the lease, and might be injurious to the title to other portions of his property. The facts of the case are very plainly and distinctly stated in the cause petition, I mean the facts so far as they relate to the title of the parties to this fishery, and I cannot do better than briefly refer to these facts in the order in which they are there put forward. Certain amendments have been made to the cause petition, which carry the title back to an earlier date, but it appears to me to be best to point out the title as it is set out in the cause petition. In 1806, Sir Edward Crofton made a grant of the fishery, the subject of the present suit, to Mr. Joshua Edward Cooper, the grand uncle of the petitioner. That grant was in the following terms:—"All that and those the town and lands of Knockimdowney, otherwise Ballysodare, together with the tolls and customs of the fairs and markets thereof, and the salmon fishery, and all other the fisheries of the river commonly called the river of Ballysodare," with the appurtenances, to hold unto and to the use of the said Joshua Edward Cooper, his heirs and assigns, for ever. It appears that Mr. Joshua Edward Cooper, immediately after the execution of that deed, became a lunatic, and was found to be so by a commission duly issued under the great seal of Ireland, and continued to be a lunatic up to the time of his death. At the time that he was under this disability, he was seised in fee of extensive estates consisting of various other lands along with those which had been granted to him by Sir Edward Crofton. Mr. Joshua Edward Cooper had a brother, Edward Synge Cooper, who was his only brother and heir-at-law, and who had been appointed committee of his estate. Mr. Edward S. Cooper had only two sons, the elder of whom was Edward Joshua Cooper, and the younger Richard Wordsworth Cooper, the father of the petitioner. The lunatic, Mr.

Joshua Edward Cooper, was thus the grand uncle of the petitioner, and Mr. Edward Synge Cooper was his grandfather and the committee of the lunatic's estate. By indenture of settlement, dated the 24th of December, 1821, being the settlement made on the occasion of the marriage of Mr. Edward Joshua Cooper with Miss Sophia Lestrangle (all the Markree estates being vested at that time in the lunatic, Mr. Joshua Edward Cooper, and it being consequently impossible for any regular conveyance of it to be made) the parties of the first part, that is to say, Mr. Edward Synge Cooper and Mr. Edward Joshua Cooper, as they were perfectly well qualified to do, covenanted that in case certain of the estates of which the lunatic was then seised should descend to Mr. Edward Synge Cooper or Mr. Edward Joshua Cooper, as heir-at-law of Mr. Joshua Edward Cooper, the lunatic, these lands should be settled to the use of Mr. Edward S. Cooper for life, with remainder to the use of Mr. Edward Joshua Cooper for life, with remainders in the manner provided by this deed. Mr. Edward Joshua Cooper's first wife, Miss Sophia L'Estrange, died without issue very shortly after the execution of this settlement, and on the 13th of February, 1827, Mr. Edward Synge Cooper and Mr. Edward Joshua Cooper joined in making another settlement on the marriage of Mr. Edward Joshua Cooper with Miss Sarah Frances Wynne. By this deed Mr. Edward S. Cooper, Mr. Edward J. Cooper, and Mr. Richard W. Cooper, covenanted that in the event of certain estates which were vested in the lunatic descending to them, they would settle the lands in the way therein provided, and this deed comprises the lands of Ballysodare, which had been omitted from the former settlement. Upon the effect of this deed a great deal has been said in the course of the argument, but this question, although discussed at great length, can hardly be considered to be properly raised in the present case. The covenant in this deed is to the effect that if the lands vested in Mr. Joshua Edward Cooper, the lunatic, in fee, and not comprised in the settlement of the 24th of December, 1821, should descend to Mr. Edward Synge Cooper or to Mr. Edward Joshua Cooper, or to Mr. Richard Wordsworth Cooper, then "the same lands and premises which should so descend, and every part thereof, with all profits, emoluments, advantages, and appurtenances to the said lands and premises belonging or in anywise appertaining, or with them or any of them held, used, occupied, or enjoyed or accepted, reputed, deemed, or taken as part, parcel, or member thereof, should be conveyed to the use of Mr. Edward S. Cooper for life, with remainder to the use of Mr. Edward Joshua Cooper for life, with remainder to the use of his first and other sons in tail male, with remainder to the use of Mr. Richard Cooper for life, with remainder to the use of his first and other sons in tail male, with remainders over." Mr. Edward Synge Cooper died in the month of August, 1830, leaving his two sons and his brother, Mr. Joshua Edward Cooper, the lunatic, him surviving. On the 8th of June, 1837, Mr. Joshua Edward Cooper died intestate, and without issue, leaving Mr. Edward Joshua Cooper, his nephew and heir-at-law, him surviving, and thereupon the several lands included in the settlements of the 24th of De-

cember, 1821, and of the 13th of February, 1827, respectively, became legally vested in Mr. Edward Joshua Cooper in fee, but bound by and subject to the covenants contained in these two settlements. Mr. Edward Joshua Cooper being so seised, proceeded to get an Act of Parliament, which purported to be an "Act to enable Edward Joshua Cooper, Esquire, to establish and protect a Salmon Fishery upon the Lakes and Rivers of Owenmore and Arrow, and also within the Bay of Ballysodare, in the County of Sligo in Ireland," and this Act recites the original conveyance from Sir Edward Crofton to Mr. Joshua Edward Cooper, and the subsequent enjoyment of the exclusive right of fishing by Mr. Joshua Edward Cooper to the time of his death; it recites the death of Mr. Joshua Edward Cooper, and recites further that there were certain channels and passages in this Ballysodare fishery which the salmon were unable to ascend from the precipitous nature of the rocks which lie at the entrance of the river into the bay, and then enacts that Mr. Edward Joshua Cooper should be empowered to make certain canals, reservoirs, and passages, for enabling the salmon to ascend into the lakes and rivers, and gives Mr. Edward Joshua Cooper power to contract for the absolute purchase of existing rights and privileges of fishing for salmon in the bay of Ballysodare, with provisions for conveying and vesting these rights, and with powers to keep up and maintain the fishery when so established and improved. The effect of all this is, that Mr. Edward Joshua Cooper was now in a position to make an extensive and valuable fishery in Ballysodare, and accordingly Mr. Edward Joshua Cooper proceeded immediately to carry out the powers conferred on him by the Act of Parliament, and by the purchase of other lands and the rights of other persons, by the widening, or deepening, or improving of the old existing channels, so as to enable the salmon to ascend to the upper waters, he so extended and improved the fishery, that instead of being a mere adjunct or appurtenance to the estate, it now became a large fishery, and a very important addition to the Markree property; and so that which had been worth some very insignificant sum, £50 or £60 a year, was now valued at £500 or £600 per annum. So far, the statement in the petition is a statement of mere matters of fact, and the whole proceedings so far are very fully set out in it. It then states that Mr. Richard Wordsworth Cooper died in the month of March, 1850, leaving the petitioner, his eldest son and heir-at-law, him surviving, who thereupon became entitled to an estate of inheritance in tail male in all the lands and premises comprised in the two indentures of settlement. The petition then states that Mr. Edward Joshua Cooper "was, as your petitioner verily believes, under the impression that the said private Act of Parliament had the effect of vesting the fee simple in the said fishery in him the said Edward Joshua Cooper, discharged from the limitations and covenants of the said settlement of the 13th day of February, 1827, and the said Edward Joshua Cooper, in his lifetime, several times represented to your petitioner that the said fishery was vested in him, the said Edward Joshua Cooper, absolutely, and your petitioner remained under that impression until after the death of the said Edward

Joshua Cooper, and the execution of the agreement," which is now sought to be set aside. It then states a matter of very great importance in the consideration of the present case, namely the indentures of the 6th of August, 1858, which were made on the occasion of the marriage of the petitioner, Edward Henry Cooper with Miss Charlotte Maria Mills. At that time Mr. Edward Joshua Cooper was the first tenant for life under the settlements of the 24th of December, 1821, and the 13th of February, 1827, and as such, protector of the settlement, and accordingly Mr. Edward Joshua Cooper and the petitioner joined in executing a disentailing assurance of the lands and premises comprised in these former settlements. By another deed of the same date, the 6th day of August, 1858, the lands and premises included in the two settlements already referred to, including, as the petitioner is advised, the fisheries already mentioned, were settled on the petitioner for life, with remainders in the usual course of strict family settlement. During the lifetime of Mr. Edward Joshua Cooper, and it is alleged in consequence of his innocent but erroneous representations, the petitioner, according to the statement in the cause petition was always under the impression that Mr. Edward Joshua Cooper was seised in fee-simple absolutely of this fishery of Ballysadere, and consequently he was led to join in a lease to Mr. Edward Joshua Cooper for three lives renewable for ever of a certain portion of land which was considered necessary for the enjoyment of the fishery; and this piece of ground is now part of the fishery in question. Upon this land so demised, Mr. Edward Joshua Cooper erected a messuage known as Rapids Cottage, and also a coach house and gatehouse. It is then submitted on the part of petitioner, that as this lease was not warranted by the leasing power contained in the settlement made on the occasion of his marriage, and was made subsequently to it, it would not be binding on the petitioner's issue, even should it be held to be binding as against his estate for life. In April, 1863, Mr. Edward Joshua Cooper died intestate, and without any male issue, leaving five daughters, his co-heiresses at law, him surviving. In the course of the same year, in the month of October, Mr. Phibbs, who was the administrator of Mr. Edward Joshua Cooper, and who was acting as agent and trustee on behalf of the co-heiresses at law of Mr. Edward Joshua Cooper, entered into a treaty for leasing the fishery to the petitioner, and an agreement was ultimately entered into on the 14th of October, 1863, between the petitioner and Mr. Phibbs, by which Mr. Phibbs agreed to let, and the petitioner to take, for a term of three years from the 1st of November next ensuing the salmon fishery of Ballysadere and the Rapids Cottage, coach house, and gatehouse, at the yearly rent of £550. The petitioner then alleges that at the time of the execution of this agreement he had never read a copy of the Act of Parliament relating to the fishery, but had been told, and was always under the full belief and impression, that by this Act the fishery was vested in Mr. Edward Joshua Cooper in fee-simple, discharged from all the limitations of the settlement of the 13th of February, 1827. Some time after the execution of this agreement, however, it occurred to him to purchase a copy of this Act of Par-

liament for the purpose of ascertaining what were his rights and powers as lessee of the fishery; and having got a copy of it and read it, he perceived, or thought he perceived, that the Act did not give to Mr. Edward Joshua Cooper any further or other rights than those of a tenant for life. He accordingly submitted a case to counsel as to the effect of this Act of Parliament, and was advised that the Act had not given to Mr. Edward Joshua Cooper any other estate or interest than that of a tenant for life. Having discovered this mistake, the petitioner applied immediately to Mr. Phibbs to deliver up the agreement to be cancelled, but Mr. Phibbs refused to accede to any such course. The petitioner then submits that the Act of Parliament had not the effect of making Mr. Edward Joshua Cooper owner in fee of the fishery, or giving him any other interest than that of a tenant for life, and that the fishery was the freehold property of the petitioner for life, with remainder to his children at the time when in ignorance of his rights he consented to take a lease from Mr. Phibbs. This then is the equity upon which the cause petition is barred; that, in point of fact (supposing the facts to be true), the petitioner being under the impression that this fishery was vested absolutely in the co-heiresses at law of Mr. Edward Joshua Cooper, and being ignorant of his own claims, has taken a lease of a portion of his own property, and has by a mere mistake purchased a part of his own estate from a person who had no title to it whatsoever. This was the case put forward by the cause petition; but to this certain amendments have been made which relate in the first place to the original title to this fishery in order to shew that it was considered as appurtenant to the lands comprised in the Markree estate. There had been in former times an ancient monastery or abbey at Ballysadere, and it was stated that by patents this fishery was held as an appurtenance to the monastery lands. The scope of the amendments is also to the effect that in the lifetime of Mr. Joshua Edward Cooper, the lunatic, proceedings were taken in this Court in the lunacy matter for the purpose of enquiring whether it would be for the benefit of the lunatic's estate that steps should be taken for the establishment of the Ballysadere fishery. These proceedings were in the first instance begun by Mr. Edward Synge Cooper, but on his death they were continued by Mr. Edward Joshua Cooper, who had been appointed the Committee of the lunatic's estate. The object of introducing these facts into the petition appears to be for the purpose of shewing that there was something in this transaction which would attach a trust on Mr. Edward Joshua Cooper, although it is not so put forward in the petition or amendments; and that he was properly only acting throughout as trustee for the settlement of the 13th of February, 1827, by which he had covenanted to settle in the manner therein provided such of the lunatic's property as should descend to him. A reference having been made to the Master in the proceedings I have already noticed, the Master reported that it would be for the benefit of the lunatic's estate that certain monies should be expended on the Ballysadere Fishery, and that an Act of Parliament should be procured to give powers for the improvement and establishment of the

fishery. Accordingly an application was made to Parliament for the purpose of getting this Act; but while these proceedings were still pending Mr Joshua Edward Cooper, the lunatic, died, and thereupon the Act of Parliament was converted into an Act to enable Mr. Edward Joshua Cooper himself to carry out these contemplated improvements in the Ballysadare fishery. The Act was then passed, and the proceedings subsequent to that have been already sufficiently referred to. Now, the object of this cause petition is to relieve Mr. Edward Henry Cooper, the petitioner, from the consequences of an act done by him while in ignorance of his true position, as it is alleged, with respect to this fishery, done by him in derogation of his rights while acting under the influence of a mistake. It is important then, before the relief prayed for be granted, to consider what was the nature of that mistake, which, according to the statement of the petition caused him to become a party to the agreement with Mr. Phibbs. No doubt, a mistake in point of law may be corrected both in this court and in a court of law. This is now, perhaps, sufficiently established, although it was for some time a subject of controversy in courts of law. I apprehend it is now settled that when money has been paid or a conveyance executed in ignorance of a point of law, relief may be granted; but it appears also to be well settled that neither in a court of law nor in this court will relief be given when it is against good conscience that the party who made the mistake should be freed from the consequences of his error. If, on the other hand, it would be against good conscience that the party in whose favor the mistake was made should reap the benefits of it, the Court will then interpose and prevent any prejudice to the interest of the person who has committed the mistake. In other words, there must be some thing unconscientious on either one side or the other in order that the aid of this Court should be called for. This appears to be the principle on which *Brisbane v. Dacres* (5 Taunt. Rep. 143) was decided; and the same doctrine is found in the later cases on this point. The question, therefore, which must be now considered is, what is the conscientious position (so to speak) of Mr. Edward Henry Cooper, the petitioner, and what is the conscientious position of Mr. Phibbs. In order to ascertain that we must go back and examine the statements of the cause petition and the evidence in this case. There is no charge of any fraud or suppression, or of any trust; there is no charge of any mistake in any conveyance or in any act done by anybody except the petitioner himself. The case is therefore cleared of all those doctrines of equity which refer to frauds or trusts; and a great source of difficulty is thus absent. Singularly enough, from the beginning to the end of the case there is not a positive statement of the existence of these rights in reference to which it is stated that Mr. Edward Henry Cooper's mistake was made. There is nothing further than that in the cause petition Mr. Edward Henry Cooper says that the settlement of the 13th of February, 1827, included "As your petitioner is advised," the fisheries of the river of Ballysadare; and that these same fisheries were also conveyed, "as your petitioner is advised," by the settlement of the 6th of August, 1858. He does not swear in any part of

the petition that he believes this to be the facts, and I can easily understand that he could not do so; but had very good grounds for supposing that it was never intended that these fisheries should pass by either the deed of February, 1827, or August, 1858. It is not stated that at the time of the execution of the former deed anyone was ignorant of the existence of these fisheries, and yet there is a deliberate omission of that language—these words by which a fishery would be most properly conveyed. All that appears to me to be studiously omitted from the conveyance, and the petitioner is consequently obliged to endeavour to remedy this by trying to prove that the fishery passed under the general words in the deed, words which would have been wholly unnecessary if it had been intended to convey the fishery by proper technical language. But what was the state of the fishery at this time? This is important to consider. It was worth really little or nothing, and could only be made productive and valuable by the expenditure of a large sum of money. So long therefore as any person was seized in fee it might be worth while to incur this great expense and to proceed to establish and improve this fishery. Accordingly, when the parties came to consider this settlement of the 13th of February, 1827, in reference to this fishery, they appear to have thought it inadvisable that the fishery should be settled in such a manner that no one could have power to enlarge or improve it; and therefore I can perfectly understand why it should be deliberately omitted from the conveyance. These improvements could not have been made by a mere tenant for life. I do not mean to say as a matter of fact that this was so, or to maintain that the fishery might not pass under the general words of this deed; but all I say is, there are very satisfactory reasons to account for the omission of the fishery from the conveyance. It would be very hard then to consider that it was intended that the fishery should be included in this deed when the absence of any express mention of it is wholly unaccounted for by anyone. That being so, what was the position of Mr. Edward Joshua Cooper when he came to get this estate. He proceeded at once to do that which would be most beneficial for it. But it has been urged, why should he not intend to benefit his sons by this fishery? The answer to this is, as I have already stated, that it was impossible for these improvements to be made by a mere tenant for life. Mr. Edward Joshua Cooper then believing, as is admitted by all parties, that he was not bound by the covenants in the deed of February, 1827, as far as regarded this fishery, but looking on it as his own in fee, took measures to get the Act of Parliament. The title of this Act of Parliament appears to be certainly erroneous; but if he had stated the settlement and had alleged that he was but a tenant for life, the Act would never have been passed to allow these improvements to be made at the expense of the inheritance. I have no doubt therefore that Mr. Cooper acted entirely under the belief that he was the absolute owner of this fishery, and that the deliberate intention of getting this Act for his own benefit was to enable him to accomplish the projected improvements in the Ballysadare fishery. Well, then, Mr. Edward Joshua Cooper having got this private Act of Parliament did the

work—established the fishery, expended large sums of money on it, and continued in possession of it until his death. In 1858, when Mr. Edward Henry Cooper came to be married he claimed the concurrence of Mr. Edward Joshua Cooper, the protector of the settlement, for the purpose of re-settling the Markree estate. This could not have been done without Mr. Edward Joshua Cooper's concurrence. He had been all his life firmly persuaded that this Ballysadere fishery was his own absolutely. Can it be conceived then that he would have now given his concurrence if the effect of it were to vest that fishery in the petitioner in fee. It is not then on any words in the Act of Parliament that the petitioner here founds his title, but on the general words of the deed of February, 1827, whereby all that was appurtenant or usually held or enjoyed with the lands of Ballysadere is settled on the petitioner. That, however, may have been but a bungle of the conveyancer. Mr. Henry Edward Cooper, the petitioner, acknowledges that he was under the impression, until after the execution of this agreement, that the fishery was the property of the late Mr. Edward Joshua Cooper, and alleges that he never discovered his own title until he saw this Act of Parliament. He does not say anything at all about the settlement. Here then we have this property vested in Mr. Edward Joshua Cooper, and to his heirs and assigns for ever. He made purchases from everybody about him for the improvement of the fishery, and got as many as twenty-two different conveyances, and so established what is now claimed to be the property of the petitioner. Whether in point of law the fishery passed under the deed of February, 1827, and whether it was bound by the covenants of the settlement, is not a matter to be discussed at all in this suit; all I say in reference to this is, that it is my belief that it was never intended to pass. Therefore it appears to me that it would be very unconscionable to set aside this agreement, the effect of which might be to give this fishery to the petitioner free from rent and from all other obligations. If he were to get this he would be to my mind acting against the wishes and intentions of Mr. Edward Joshua Cooper, without whose consent he never would have obtained the concurrence in his marriage settlement. It would be giving the petitioner what he and his family never dreamed of getting—what was contrary to the belief of both Mr. Edward Joshua Cooper and himself. This suit accordingly appears to me to be a suit against conscience, and I must therefore dismiss this petition with costs, without any prejudice, however, as between the parties to their ultimate rights to this fishery.

### Court of Common Pleas.

[reported by J. Field Johnston, Esq., Barrister-at-Law.]

RUSHFORTH v. MIDLAND GREAT WESTERN RAILWAY COMPANY.—May 1865.

C. L. P. Act, 1856, sections 6, 7—"Matters of mere account."

In an action brought by the proprietor of a hotel

against a railway company to recover damages for injuries sustained by the plaintiff by the use of his furniture in aid of sufferers by an accident on the defendants' railway, and also brought to recover the price of the attendance, board, and support of the sufferers, and of the board and lodging of the relatives and friends of the sufferers, the defendants disputed their liability to compensate the plaintiff for the damages to his furniture, and disputed their liability to pay for the board and lodging of the relatives and friends of the sufferers, and disputed the amounts charged for the attendance, board, and support of the sufferers themselves, paying into Court a certain sum of money. The Court refused to grant an application by the defendants to have the matter in dispute referred to the Master of the Court, under the 6th and 7th sections of the C. L. P. Act, 1856.

THIS was an application on behalf of the defendants to have the matter in dispute referred to the Master of the Court, under the 6th and 7th sections of the C. L. P. Act, 1856. The first count of the summons and plaint complained that in consideration that plaintiff, at the request of defendants, would allow his the plaintiff's furniture, apartments, beds, bedding and other household effects to be used by defendants and by certain persons who then required medical and surgical treatment, they, the defendants, undertook and promised plaintiff that they would not only pay and compensate plaintiff for the uses of said apartments and effects, but also that they, the defendants, would indemnify and save plaintiff harmless from all loss, damage, and injury which plaintiff might sustain by such uses of his said apartments and effects; and plaintiff acting on the faith of said agreement, did so allow his said apartments and effects to be so used as aforesaid, whereby divers portions of his furniture, bedding, bed-clothes, and other effects were lost, damaged, and injured by the uses thereof and otherwise by said persons for said purposes; yet, nevertheless, the defendants, although requested so to do, had not hitherto indemnified or saved harmless the plaintiff according to their said agreement for the said loss and injury so sustained by plaintiff, but therein had wholly made default to plaintiff's damage in the amount of £100. The second count complained that the defendants were indebted to the plaintiffs in the sum of £323 18s. 5d. for money payable by defendants to the plaintiff for the defendants' use by the plaintiff's permission of rooms and part of a messuage with furniture and goods therein of plaintiff. The third count was for money payable by the defendants to the plaintiff for the defendants' use, by the plaintiff's permission, of apartments and furniture of the plaintiff, and for meat, drink, attendances, nurses, lights, fires, washing, and other necessities and goods by the plaintiff found and provided for defendants and divers other persons at defendants' request. The plaint then contained a count for goods sold and delivered, a count for goods bargained and sold, a count for work done and materials provided, a count for money paid, and a count for money due on an account stated. The endorsement of particulars referred to an account of £323 18s. 5d. already fur-

nished to the defendants. The defendants pleaded the following pleas:—1. That they did not make or enter into the contract in said first paragraph mentioned. 2. And for further defence to said first paragraph, defendants by leave of the Court say that no part of the furniture, bedding, bed-clothes, or other effects in said first paragraph mentioned was lost, damaged, or injured as in said paragraph alleged. 3. And for a defence to so much of the cause or causes of action in the second paragraph contained as is or are included in the following items of plaintiff's bill of particulars; that is to say, item nine, headed "Edward Glanville's friends;" item eleven, headed "John Dempsey's friends;" item thirteen, headed "Pat Rushe's friends;" and item sixteen, headed "John Hynes' friends;" making in all the sum of eighty-four pounds fourteen shillings and four pence, defendants say that they did not use the rooms, part of the messuage, furniture, or goods in said second paragraph mentioned, or any or either of them, or any part thereof, so far as relates to the cause or causes of action in the introductory part of this defence mentioned. 4. And for a defence to so much of the cause or causes of action in third paragraph mentioned as is or are included in the following items of plaintiff's bill of particulars; that is to say, item nine, headed "Edward Glanville's friends;" item eleven, headed "John Dempsey's friends;" item thirteen, headed "Pat Rushe's friends;" and item sixteen, headed "John Hynes' friends," amounting in the whole to the sum of eighty-four pounds, fourteen shillings, and four pence, defendants say that they did not use any of the apartments or furniture, nor was any of the meat, drink, attendances, nurses, lights, fires, washings, or other necessities or goods found and provided as in said third paragraph mentioned so found and provided at the request of the defendants so far as relates to the cause or causes of action in the introductory part of this defence mentioned. 5. And for defence to so much of the cause or causes of action in the fourth, fifth, and sixth paragraphs respectively mentioned as is or are included in the following items of plaintiff's bill of particulars; that is to say, item nine, headed "Edward Glanville's friends;" item eleven, headed "John Dempsey's friends;" item thirteen, headed "Pat Rushe's friends;" and item sixteen, head "John Hynes' friends;" amounting in the whole to the sum of eighty-four pounds, fourteen shillings, and four pence, defendants say that no goods were sold or delivered to the defendants, or bargained or sold to the defendants, and that no part of the work done and materials provided was at the request of the defendants so far as relates to the cause or causes of action in the introductory part of this defence mentioned. 6. And for defence to so much of the cause or causes of action in the seventh and eighth paragraphs respectively mentioned as is or are included in the following items of the plaintiff's bill of particulars; that is to say, item nine, headed "Edward Glanville's friends;" item eleven, headed "John Dempsey's friends;" item thirteen, headed "Pat Rushe's friends;" and item sixteen, headed "John Hynes' friends;" amounting in the whole to the sum of eighty-four pounds, fourteen shillings, and four pence, defendants say that no part of the sum so paid was paid at

the request of the defendants, nor was any account stated in respect of the same or any part thereof as in said seventh and eighth paragraphs respectively alleged so far as relates to the cause or causes of action in the introductory part of this defence mentioned. 7. And as to the residue of all and singular the cause or causes of action in said second, third, fourth, fifth, sixth, seventh, and eighth paragraphs respectively mentioned, and the plaintiff's demand in respect thereof, the defendants say that the value of the same amounts to the sum of one hundred and fifty pounds and no more; and the defendants bring into court here the said sum of one hundred and fifty pounds, which is sufficient to satisfy the plaintiff's demand in respect of all and singular the said cause and causes of action in the introductory part of this defence mentioned. The plaintiff's affidavit made to resist the application stated that the said action had been instituted to recover from the defendants the amount of a hotel bill and other charges of deponent against the defendants; and also to recover damages against the defendants for injuries and losses sustained by deponent in consequence of deponent's property being used and injured and destroyed through being used in aid of a number of persons who were serious sufferers by an accident that occurred on defendants' railway in October last, when said persons were removed to deponent's hotel, where they, together with some of their immediate friends, stayed for some time after the accident. That not only was there property of the deponent's, consisting of sheets and blankets, cut up to be used as bandages for the sufferers, but some of deponent's furniture and other property were destroyed by blood-stains and otherwise. That the hotel was in fact for some time used merely as an hospital; and even the coffee-room exclusively devoted to one of the sufferers and his friends; and deponent's legitimate hotel business was seriously interfered with; and deponent was, at defendant's request obliged in fact even to close his hotel for a time against the public and against all persons save the railway officials, the doctors, the nurses, the sufferers and their immediate friends and relatives, some of whom stayed at the hotel and were boarded there by deponent; and that deponent expected and believed he would be able to prove at the trial that defendants were liable therefor. That the defendants by their defence in this case not only disputed their liability to pay for the board and lodging of the relatives and friends of the sufferers, but likewise disputed the sums charged by deponent for providing nurses, attendance, board, and support of the sufferers themselves. That defendants also disputed having made the special contract with deponent as stated in the plaint, and, that deponent believed he would be able to prove same at the trial of the action. That when the summons and plaint was first issued in this action deponent's attorney laid the venue in Dublin, as deponent had heard and believed; but that subsequently, and before service of same on defendants, deponent was advised, in consequence of the peculiar character of the action and the number of witnesses which it might probably be necessary for deponent to examine on his behalf at the trial of this action, besides the inconvenience which the deponent would suffer in his business, that



it would be more prudent to lay the venue in the county of Galway. And that deponent had to obtain an *ex parte* order of this Court on his own application to change the venue in the plaint from Dublin to Galway. That in consequence of the nature of the defences filed in this cause it would be necessary for deponent to prove not only the reasonableness of the charges, but also the defendants' liability to pay for the friends and relatives of the sufferers, and for the injury done to plaintiff's hotel, business, and property; and in order to do so it would be necessary for deponent to examine at the trial of this action a considerable number of witnesses, including some of the sufferers who stayed at said hotel, together with some of their relatives and friends, all of whom resided either in the town or county of Galway.

*Carleton, Q.C. and Buchanan* for the defendants.

*Sidney, Q.C., Morris, Q.C., and Blake* for the plaintiffs.

**MONAHAN, C.J.**—None of the Court entertain any doubt but that this case ought not to be sent to the Master.

**CHRISTIAN, J.** was led to concur by Mr. Morris's analysis of the pleadings.

**O'HAGAN, J.**—I have gone through the whole of the items. When you have dealt with about twenty-five, you have the whole.

**MONAHAN, C.J.**—I did not think it necessary to go into details. I am of opinion there is not an item of this account properly the subject of what ought to be sent to a Master under the section; and without laying down any general rule, I do not think it is a case fit to be sent.

*Application refused.*

**SHEILS v. CANNON.**—May 11.

*Sale of seed—Implied warranty.*

*The plaintiff, a gentleman farmer, came into the shop of the defendant, a seed merchant, and said to his assistant, "Have you Dutch rape seed?" The latter replied, "We have, but of last year's importation." The plaintiff then asked, "Is it good?" The assistant replied, "I believe it to be so." The plaintiff then ordered five stone of it to be sent to him, which subsequently entirely failed to produce a crop. The defendant admitted, on cross-examination, that he knew that the seed was wanted for the purpose of growing. Held, that there was an implied warranty that the seed should be reasonably fit for the purpose for which it was bought. (Christian, J., dissentiente.)*

*And, per Monahan, C.J., and Keogh, J., that if the words, "I believe it to be so," constituted an express warranty, it was upon a different subject-matter from that upon which the plaintiff sought to raise the implied warranty, and meant not that the seed was growing seed, but seed fit for producing a good crop.*

*And, per Keogh, J., that the implied warranty was not a warranty of a good crop, or that the seed should appear above ground, but a warranty that it was reasonably fit, at the time of sale, for the purpose of being sowed.*

*And, per Christian, J., that the words, "I believe it to be so," constituted an express qualified warranty, which excluded the implied warranty, sought to be raised by the plaintiff.*

*And (supposing this express warranty out of the case) that if the qualities which make seed germinate, be not wholly the gift of nature, but partly imparted by art, evidence should have been given at the trial, and the jury directed to find their verdict according as the defect was in what nature, or in what art imparted.*

THIS was an action on a warranty. The summons and plaint contained four counts, the first two of which were in contract; the third count was on a warranty, and the fourth for false representation. The plaintiff elected to take his verdict on the second and third counts alone. The second count stated that at the time of the purchase and agreement therein-after mentioned, the plaintiff intended, and was about to sow land with rape seed for the purpose of obtaining a crop of rape out of the said land, and the plaintiff ordered and agreed to buy at a certain price of and from the defendant, then carrying on the business of a seed merchant, a quantity of rape seed, for the purpose, as the defendant then well knew, of sowing the same in the said land, and of obtaining a crop of rape therefrom, and the defendant then agreed to supply the same in the way and course of his said business for the purpose aforesaid, and then promised the plaintiff that the said seed should be good growing seed, and fit for the purpose aforesaid, and should be and be supplied in a condition and of a quality reasonably fit and proper for the said purpose, and although the defendant did supply rape seed for the purpose aforesaid, and the plaintiff paid for the same at the price aforesaid, and although all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiff to maintain the action, yet the said rape seed was not of the description and quality aforesaid, but was of a different and inferior quality and description, and was not fit and proper for the said purpose, nor supplied in a fit and proper condition, but was unsound and bad, and not fit for growing and producing a crop. The third count stated that the defendant, by warranting that certain rape seed was then reasonably good growing seed, and fit and proper to be used for the purpose of sowing the same in the plaintiff's land, and of producing a reasonably good and productive crop, sold the same to the plaintiff to be used for the purpose aforesaid, yet the said rape seed was not then reasonably good growing seed, and was not then reasonably fit and proper to be used for the sowing therewith the said land of the plaintiff, and producing a reasonably good and productive crop. The defences traversed the contract, the warranty or representation, and the breach in each of the counts alleged. The case was tried before O'Brien, J., at the last Summer Assizes for the

North Riding of the County Tipperary. Mr. John Butler, the book-keeper of the defendant, was examined on the defendant's behalf, and deposed as follows:—"The plaintiff came to the defendant's office in Deemark-street, Dublin, on the 20th August last. He asked me if we had Dutch rape seed. I said we had, but of last year's importation. He asked me if it was good. I said I believed it to be so. He desired me to send him five stone of it by railway to Kells. That was all the conversation I had with him." On cross-examination he stated, "knew the plaintiff was a gentleman farmer, and that he wanted the seed for the purpose of growing. I told him that I believed the seed to be good." The defendant's counsel asked for a postponement, in order that he might produce a witness who was alleged to have been present at the interview between Butler and the plaintiff, but at the suggestion of the judge the jury retired to consider two questions, submitted by him for their consideration, first, as to what took place on the occasion of the interview between the plaintiff and Butler, and secondly, as to the quality of the seed. The jury were of opinion that Mr. Butler's account of what took place at the interview was correct, but could not agree as to the quality of the seed. The learned judge told the jury that on the one hand mere representation by a vendor of the quality of goods on a sale, would not of itself constitute a warranty or engagement which would render the vendor responsible for such representation, unless he knew at the time that such representation was untrue; but that, on the other hand, no particular form of words was requisite to constitute such warranty or engagement; and that if the vendor, at the time the article was ordered, knew of the purpose for which the article was wanted, and that the purchaser relied upon the vendor's judgment, then the latter impliedly warranted that the thing furnished would be reasonably fit and proper for the purpose for which it was required. The judge also told the jury that even though they believed that Butler's evidence as to what took place on said interview between him and the plaintiff was true, still that they might, on the entire evidence insofar that there was such an agreement, promise, or warranty as alleged in the first three counts respectively, if they were also of opinion that Butler knew at the time of the purpose for which the seed was ordered, viz., for the purpose of producing a crop. The plaintiff's counsel objected to this direction; and required the judge to tell the jury that if they believed that the seed was, to the knowledge of the defendant, ordered for the purpose of producing a crop, they should find for the plaintiff on the issues on the traverses to the promise and warranty in the second and third counts respectively. The defendant's counsel also objected to the judge's direction; and required him to tell the jury that if they believed the account given by Butler of his interview with the plaintiff, there was no engagement, promise, or warranty, as alleged in the first, second, and third counts respectively. The judge declined to comply with either requirement, but in order to avoid the expense of a bill of exceptions, it was agreed between the parties at his suggestion that either party should be at liberty to appeal to the Court of Error

from the decision of the Court of Common Pleas on any of the objections taken to his charge. The jury found for the plaintiff on all the issues except the issues on the traverses to the fourth count, with £25 damages. The defendant obtained a conditional order to set aside the verdict, on the ground of misdirection by the learned judge, and on the ground of the verdict being against evidence and the weight of evidence (the latter of which grounds was abandoned) against which.

*Humphill, Q.C.*, (with him *Tanly*) showed cause.—The plaintiff relied on the character of the house and the skill of the vendor and his representative. In *Bigge v. Parkinson* (7 H. & N. 955), there was an express warranty which did not apply, but there was held to be an implied warranty. It was held that the express warranty did not exclude the warranty implied by law. Chief Justice Cockburn in delivering judgment says, "The principle of law is correctly stated in the passage cited from Chitty on Contracts. Where a buyer buys a specific article, the maxim "*caveat emptor*" applies; but where the buyer orders goods to be supplied, and trusts to the judgment of the seller to select goods which shall be applicable to the purpose for which they are ordered, there is an implied warranty that they shall be reasonably fit for that purpose; and I see no reason why the same warranty should not be comprehended in a contract for the sale of provisions." "If the article were bespoke to answer a particular purpose, a warranty is implied that it will answer such purpose."—*Smith's Merc. Law*, p. 517. In *Jones v. Bright* (6 Bing. 644), Chief Justice Best says, "I wish to put the case on a broad principle:—If a man sells an article, he thereby warrants that it is merchantable—that it is fit for some purpose. This was established in *Laing v. Fidgeon*. If he sells it for a particular purpose, he thereby warrants it fit for that purpose; and no case has decided otherwise, although there are, doubtless, some dicta to the contrary." The doctrine of that case was carried a step farther in *Brown v. Edgington* (2 Man. and Gr. 279). At p. 289, Chief Justice Tindal says, "It appears to me to be a distinction well founded, both in reason and on authority, that if a party purchases an article upon his own judgment, he cannot afterwards hold the vendor responsible, on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, it seems to me the transaction carries with it an implied warranty that the thing furnished shall be fit and proper for the purpose for which it was designed." Applying that to the present case, is it not more reasonable that where a party holds himself out thus to the world, and the vendee relies on the reputation a house has acquired, the vendor should be liable? He has the means of being recouped by the house in Amsterdam who grew this rape seed. In *Gray v. Cox* (4 B. & C. 108), the warranty was more extensively stated than the evidence supported, but I quote the case for the impression on Chief Justice Abbott's mind, "If a person sold a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose." The marginal note has a *quere*.

[*Christian, J.*—In *Jones v. Bright* was there not some evidence of mismanagement?] Yes, there was too much oxygen imbibed. *Shepherd v. Pybus* (3 Man. & Gr. 868) was decided in 1842, long subsequently to these other cases. [*Monahan, C. J.*—In no case has the rule been held to apply where the party exercised his own judgment.] No. If a manufactured article is bought, there is not a warranty unless there be an express warranty, and so of a specific horse or other article. Both these cases are in the defendant's favour. [*Monahan, C. J.*—Your argument is, that it makes no distinction in principle whether the thing grew out of the earth, or was manufactured by the party from whom it was bought.] Yes. In *Shepherd v. Pybus* (3 Man. & Gr. 880), *Parkinson v. Lee* is explained. Chief Justice Tindal says, "But if the reasons given by Grose, J., and Lawrence, J., be examined, their opinions will not be found to affect the question now before the Court; for they both lay great stress on the fact that the seller was not the grower of the hops, and that the purchaser by the inspection of the sample, had as full an opportunity of judging of the quality of the hops as the seller himself." *Bluett v. Osborn* (1 Starkie's Rep. 384) was the case of a purchase of a particular bowsprit, which turned out to be rotten. The value of that case is the observation of Lord Ellenborough—"A person who sells, impliedly warrants that the thing sold shall answer the purpose for which it is sold. In this case the bowsprit was apparently good and the defendants had an opportunity of inspecting it." Here the bag of seed might have been produced, and the defendant might have said, Take it or not. We ordered Dutch rape seed. There was no sack produced to be selected from. *Gardiner v. Gray* (4 Campbell, 144) was the case of an imported article, as in the present instance. Lord Ellenborough says, "Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply." *Burnley v. Bollett* (16 M. & W. 644) was the case of a sale of a dead pig. It came within the category of a specific chattel. *Black v. Elliott* (1 Fos. & Fin. 595) was an action brought against the vendor of a sheep wash, which killed the plaintiff's sheep, and the defendant was held liable. The present case comes within the intermediate class of cases spoken of by Baron Parke in *Sutton v. Temple* (12 M. & W. 64), "where goods are ordered for a specific purpose from a person in a particular department of trade." *Smith v. Marable* (11 M. & W. 5); *Morley v. Attenborough* (3 Ex. 500). In *Sims v. Marryat* (17 Q. B., 291), Lord Campbell says there are many exceptions stated in the judgment in *Morley v. Attenborough*, which well nigh eat up the rule that on a sale of personal property the maxim of *caveat emptor* applies. *Eichholz v. Bannister* (34 L. J., C. P., N. S., 108), also reported in 11 Jur. N. S. 15, decided that the vendor of goods in a shop impliedly warrants the title to them. There is no express authority on the present point.—*Roue v. Faren* (8 Ir. C. L. Rep. 46).

*Serjeant Armstrong* and *Curtis* contra.—It has never been decided that there was an implied warranty when the language used was as here, "Have you Dutch rapeseed? We have. Is it good? I believe it is." That is the whole. The words amount to an

undertaking that this was rapeseed. *Allan v. Lake* (18 Q.B. 560) illustrates the extent of the warranty. Next, this is a warranty that Butler believed the seed to be good. Even supposing the language, "I have Dutch rapeseed" amounted to an engagement that it would grow, it does not make a warranty that it was fit for sowing and would make a good crop. That is what is alleged. The plaintiff took his damages on the 2nd and 3rd counts. Why not shift on the plaintiff the obligation of saying if he wants such a warranty, "will the seed grow and produce a crop?" The plaintiff is prevented from denying that this was rapeseed, for the plaint and the whole action goes upon that. There is law for this if it be necessary to have law for it, that no one can tell whether seed will grow or not till it is tried.—*Pinder appellant, Button respondent* (11 W. R. 25); also reported in 7 Law Times, New Series, 269. Chief Justice Cockburn says—"No one can tell before seed is sown if it will grow." If there were not authority *lex non cogit ad impossibilia* applies. [*Christian, J.*—As I understand your argument, the non-production of the crop might be very good evidence of the seed not being good, but a warranty that it was good was no warranty of the crop.] There is a great difference between saying the seed would grow, and would produce a good crop. [*Monahan, C.J.*—If I expressly warranted seed to grow a crop, that would be no more than that it was a seed capable of growing; and it would be a matter for the jury to say if there was some defect in it that prevented it from growing.] Good growing seed means seed that will grow. Why is it that in the absence of fraud a man is not responsible for a horse? Because the defects are undiscoverable. So of seed. [*Monahan, C.J.*—Suppose that a horse is wanted for a carriage, and that the dealer sends a horse which turns out to be not fit for a carriage.] [*Christian, J.*—The distinction there is, that a horse can be made a manufactured article, as it were, in the way of trade. He can have new qualities added to him, but the seed is a natural article.] [*Monahan, C.J.*—It was proved by Mr Mackey and others that they never sold seed without testing it in their own garden.] This must be a latent disease in the seed, a non-germinating quality. Best, C.J. in *Jones v. Bright* (5 Bing. 544), commenting on *Bluett v. Osborn*, says—"There is a great difference between contracts for horses and a warranty of a manufactured article, and this distinction explains the case of *Bluett v. Osborn*." [*Christian, J.*—In *Bluett v. Osborn* the party would have been liable if the defect had been in the manufacture.] No doubt, he would. In *Jones v. Bright* the judges confined themselves to manufactured articles. The case is also reported in 3 Moore & Pay. 155; *Budd v. Fairmaner* (8 Bing. 48); *Parkinson v. Lee* (2 East. 314). Again, this was an undertaking that the vendor believed the seed to be good.—*Wood v. Smith* (5 Man. & Ry. 124); also reported in 4 C. & P. 45; Story on Contracts, vol. ii. s. 827; Addison on Contracts, 227, 230; Chitty on Contracts. The doctrine applies only to manufactured articles and those which, though natural productions, can be wrought upon so as to be changed in their character as a horse or dog.

*Tandy* in reply.—The case is to some extent one

of the first impression. *Pinder v. Button* is not to be found in any of the regular reports, but only in the "Weekly Reporter" and the "Law Times." The judgment is given differently in both. In the "Law Times" the arguments of counsel seem to be confounded with the judgment of the court. The language used in the "Weekly Reporter" intimates that this question is yet to be decided. My proposition is—that as between vendor and purchaser, if the latter deals with a well-known vendor, relying on the skill and character of the house, and purchases an unascertained article, he not knowing anything of it, there is raised a warranty that it be reasonably fit for the purpose for which it is sold, that purpose being known to the vendor. And though in *Jones v. Bright* that number is limited by Chief Justice Best to manufactured articles, and he says a manufactured article differs, that judgment was delivered when the law confined the implied warranty of manufactured articles as between the manufacturer and the person purchasing from him. What was the defect there? That too much oxygen was used. The manufacturer knew the process, and it was his duty to see that too much oxygen was not admitted. But the cases have since advanced. *Brown v. Edgington* has decided that the implied warranty is to be transferred from the manufacturer to the mere seller of the article. When that was done the broad distinction between natural products and manufactured articles was taken away. *Gray v. Cox* illustrates that. The seller would have been liable in that case on a count framed like the count in this case. He could not have known the defect by inspection, yet he would have been liable. There was no fraud on his part. Where is the difference in principle between that and this? *Parkinson v. Lee* was always distinguishable as being a sale with warranty. It was the sale of a specific article, and there was a warranty. *Bluett v. Osborn* was a remarkable case. The principle I am contending for is laid down there; and it must be taken as applicable to that case, else why is it there? As to the natural justice of the case, there are two parties innocent in this sense that there is no fraud in the seller. Who ought to suffer? The vendor makes his money by the sale of that article. Is it more proper that if he delivers an article unfit for the purpose he should suffer, or that the purchaser should suffer, who, relying on the character of the house, gets an article for which he pays a first-class price, and which is unfit for the purpose? *Eichholz v. Bannister* is also reported in 17 C. B., N. S., 708. It is opposed to a number of *dicta* which went before and were cited in the case. Suppose a shopkeeper here gets goods from London. How can he tell whether the party who sends them to him has title to the goods; and yet when he sells them in a shop, that is a profession on his part that there is title. [*Christian, J.*—Is it not in market overt; and if so, what need is there of a warranty?] A shop in London is market overt, but not, I think, elsewhere. [*Monahan, C.J.*—In London a shop is market overt, and every day is market-day; in other places market-day is only the day of the market.] The *dicta* in *Jones v. Bright* are the only *dicta* to be found on this, and they have not been repeated; and at the time they were uttered the manufacturer only,

and not the seller, was held liable. [*Christian, J.*—What do you say to the argument that the warranty is of belief, i. e., a qualified warranty?] The loose expression in conversation, "I believe it is," will not exclude the implied warranty.

*Cur. adv. vult.*

May 11.—O'HAGAN, J.—It will be only necessary to state a small portion of Butler's evidence. "The plaintiff came to the defendant's office. He asked me if we had Dutch rape-seed. I said we had, but of last year's importation. He asked me if it was good. I said I believed it was." On cross-examination he said he knew the plaintiff was a gentleman farmer, and that he wanted the seed for the purpose of growing. The judge, in his charge to the jury, said that on the one hand mere representation by a vendor of the quality of goods on a sale would not of itself constitute a warranty or engagement which would render the vendor responsible for such representation unless he knew at the time that such representation was untrue; but that on the other hand no particular form of words was necessary to constitute such a warranty or engagement; and that if the vendor at the time the article was ordered knew of the purpose for which the article was wanted, and that the vendee relied upon the vendor's judgment, then the latter impliedly warranted that the thing furnished would be reasonably fit and proper for the purpose for which it was required. The jury found for the plaintiff with £25 damages. I will not deal with the second ground on which the conditional order has been obtained, as it has not been considered tenable. The question involved in the first ground is—whether there being no allegation of an express warranty under these circumstances, and with respect to the subject-matter, a warranty can be implied. It was contended by Serjeant Armstrong that when the question was put if the seed was good, and the answer given by Butler was that he believed it to be so, that that constituted an express warranty. I do not think much of that. I do not say whether these words constitute a warranty so far as belief is concerned; because even if they did, it would not displace the implied warranty. A late case, *Bigge v. Parkinson* (7 H. & N. 955), decides that the existence of an express warranty does not render impossible an implied warranty. The two may co-exist. But the material question is—whether or no we can imply a warranty; and with reference to that it is contended that the sale having been made by a dealer to a customer with knowledge of the purpose it was wanted for, there was a warranty the seed should grow. On the other hand it was argued, that though that should be true of manufactures, it cannot apply to natural products. I am of opinion that there was no misdirection by the judge. It is rather a case of the first impression. I think there was a warranty that the seed was fit to grow, and to grow reasonably well—Chitty on Contracts, last ed.; *Gray v. Cox* (4 B. & C. 115). In *Brown v. Edgington* (2 Man. & Gr. 289), Chief Justice Tindal says—"If a party purchases an article upon his own judgment he cannot afterwards hold the vendor responsible on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies upon the

judgment of the seller, and informs him of the use to which the article is to be applied, it seems to me the transaction carries with it an implied warranty that the thing furnished shall be fit and proper for the purpose for which it was designed." These principles are adopted in *Jones v. Bright* (5 Bing. 633); *Shepherd v. Pybus* (4 M. & Gr. 868); *Bigge v. Parkinson* (7 H. & N. 955). These cases sustain the view the learned judge presented to the jury. The sale was made for a purpose. The purpose was known. The vendee relied on the vendor and never saw the article. The liability would be admitted if the article was a manufactured one. But in the cases I do not find any words limiting the liability in this way; and I do not find that public policy requires it. *Parkinson v. Lee* has been cited by the defendant. But it was a sale of hops by sample, and the vendee did not rely on the judgment of the vendor but on his own. Again: in the case of *Bluet v. Osborn* the purchaser had as good an opportunity of judging of the bowsprit as the vendor. *Jones v. Bright* does not establish the distinction for which it is cited by the defendant. "If a man sells an article he thereby warrants that it is merchantable," &c. "If a man sells a horse generally he warrants no more than that it is a horse," &c. says the Chief Justice; but this does not sustain the contention of the defendant. The plaintiff's contention is—that the seed should have been sowing seed; seed fit to grow and produce a crop. Wanting the germinating principle it does not satisfy the description of seed, as a dead horse would not satisfy a description of that animal. The course of decisions seems to have increased the responsibility of vendors. Suppose the vendor and purchaser to be equally innocent, who is to suffer? The vendor can indemnify himself. He can try experiments to ascertain whether the article be of a particular character or not. I think there is sound sense in the words of Chief Justice Best in *Jones v. Bright*, and I shall conclude by citing them: "It is the duty of the Court in administering the law to lay down rules calculated to prevent fraud; to protect persons who are necessarily ignorant of the qualities of a commodity they purchase; and to make it the interest of the manufacturers and those who sell to furnish the best article that can be supplied."

CHRISTIAN, J.—My opinion is, that the order should be made absolute. What are the facts? It is admitted that they are comprised in the examination and cross-examination of Butler. The defendant is a seed merchant. There are ten lines of Butler's examination and two of his cross-examination, every word of which is important. "He asked me if we had Dutch rapeseed. I said we had, but of last year's importation." I pause there. The subject is shown to be a product of nature in the merchant's possession, and the order was—"Send me five stone of it." It was a specific order. Send me five stone of any Dutch seed you have, of last year's importation. The purchaser may call for the article and exercise his own judgment, or he may have an express warranty, or he may rely on the warranty the law implies. "He asked me was it good." What is the meaning of good? The plaintiff's reliance is on the passage in Butler's cross-examination in which he said he knew it was wanted for the purpose of growing. Growing

must mean growing a crop; it could not mean mere sprouting. Therefore, the plaintiff asks in the previous question if it is good for growing a crop. And if Butler had simply said "Yes," then the question would have arisen if that was not an express warranty, but he cautiously expresses the belief of his own mind, and the plaintiff rests on that, and gives the order. First, is there an express warranty on that on which the plaintiff wants to raise an implied warranty? If there be, there can be no implication of another and a different warranty on the same subject. So elementary is this, as not to need authority, but there is authority for it. *Dickson v. Zizania* (10 C. B. 602) was this. There was an express contract between the parties, neither of whom had ever seen the cargo, that it was shipped in good and merchantable condition. Wilde, C. J., thought at the trial that the contract involved a warranty that the cargo should be shipped in such a state as to be fit to bear the voyage. The Court held that there was no implied warranty. Maule, J., says, "We should not by inference insert in a contract implied provisions with respect to a subject which the contract has expressly provided for," and then he adds an instance so strong that I confess I feel some doubt of its correctness—"If a man sell a horse, and warrant it to be sound, the vendor knowing at the time that the purchaser wants it for the purpose of carrying a lady, and the horse, though sound, proves to be unfit for that particular purpose, this would be no breach of the warranty. So with respect to any other kind of warranty; the maxim, *expressum facit cessare tacitum*, applies to such cases." In *Budd v. Fairman* (8 Bing. 52), Tindal, C. J., says, "Where there is an express warranty as to any single point, the law does not beyond that raise an implied warranty that the commodity sold shall be also merchantable." I should be disposed to qualify that also. I think the true principle is, that the law will not raise an implied warranty generally on the same subject, upon which there is an express warranty qualified. In *Pinder v. Butten* the warranty was that the seed was "of a good growing stock." The question was if there was an implied warranty to produce a crop. The reason given by Cockburn, C. J., for deciding the contrary is, "there being an express warranty, there can be no warranty implied beyond it." *Bigge v. Parkinson* (7 H. & N. 955) was totally different. The warranty there was in addition for the further protection of the purchaser; and that being an elementary principle which does not call for an authority, the case resolves itself into this—if this is an express warranty for the production of a crop. We must collect the contract where there is no writing, as here, from the considered statements made in the making of the bargain. What are they? The plaintiff deliberately asks for an express assurance on the very point; for when he asked was the seed good, he must have meant for the purpose for which he wanted it. Butler gives, instead of this assurance, an assurance of his belief. The plaintiff abstains from pressing it further. If it could be proved that Butler knew the seed was bad, he would be liable to an action not merely in tort, but in contract. *Wood v. Smith* (4 C. & P. 46) is the most express authority for that. [His Lordship stated the

facts of that case.] "She is sound as far as I know," was the expression, and that was made the ground of an action not in *tor*; but in contract. Lord Tenterden says, "I think that this declaration is sufficient; there is a count on the promise that the mare was sound to the best of the defendant's knowledge, with a breach that he knew her to be unsound." What is the difference between that and this—between saying I will not warrant absolutely, and saying I will not represent that this is good, but I will represent that I believe it is good? The express contract as made has not been broken. The jury have negatived fraud. They should have been told that the express warranty in proof excluded an implied one. As this is not the view of the majority of the Court, I will go on to assume the express warranty was wiped out of the case. Suppose the case was that the plaintiff walked into the shop and ordered five stone of seed, the merchant knowing what was his purpose. Does the law imply a warranty that the seed should be fit for producing a reasonable crop? It makes no difference whether the badness of the seed was such that it did not come up at all. The case must be taken at the moment of the contract. That was, that the seed was good for producing a crop, and it matters not whether its badness was total, or only beyond the extent contracted for. If the qualities which make it germinate were not wholly those of nature, but partly of art, evidence of that should be given on both sides, as in the case of too much oxygen in the copper, and as in *Bluet v. Osborn*, and the jury should have been told that their verdict should be according as the defect was in what nature imparted, or in what art imparted. No evidence was given. The judge laid down a proposition which is perfectly good as a general proposition. No doubt, text book after text book can be cited, and has been cited by the plaintiff. On the other hand, the defendant's counsel say that in no case has the rule been applied to latent defects in a purely natural product. This the plaintiff's counsel admit; and in *Jones v. Bright* the rule is so restricted, and no one can read the judgment, especially as reported in *Moore and Payne*, without being struck by the almost anxiety evinced to restrict it to manufactured articles. Mr. Tandy, in his reply, contended that the reasoning which is in *Jones v. Bright* has lost all its force, but I think it applies with undiminished force. Chief Justice Best takes no distinction between the maker and seller of a manufactured article. He speaks of "manufacturers and those who sell." If the manufacturer is bound, the dealer who obtained the article from him is bound, having his remedy over against the manufacturer. The difference between the manufacturer and the dealer is one of detail, but between natural and artificial products there is a distinction so vital, so broad, that the mind feels intuitively almost that it has passed from one world to another. It is right that the human creator should be held responsible for what he professes to create, but on what principle can he be held responsible for the inscrutable secrets of nature? Who can tell whether a seed will grow? If the vendee wants a life insurance on the seed, let him ask for it, and let him pay for it as no doubt he would have to do by an increased price. The case of the hops sold by sample has not been done justice to

by the counsel on either side. I test it thus—Suppose in *Parkinson v. Lee*, instead of the product of nature; suppose it was beer, and that the defect was in the brewing of the beer, will any one say there would not be an implied contract that the brewing was good? That tests the distinction as applied to the one class of articles and the other. In *Bigge v. Parkinson* (7 H. & N. 959), Chief Justice Cockburn makes it a ground that "there is no difference in this respect between goods to be manufactured and provisions to be supplied." That is not the last case, because there is *Pinder v. Button*, in which Chief Justice Cockburn says, "I am far from saying that if a man deals in seed, there may not be to some extent an implied warranty that that which he sells shall grow." I, too, am far from saying that there may not be a case where there is an implied warranty that seed will grow. If there be any case where the germinating quality is partly the act of man it may be so, and I do not know whether there is or not. As to warranties of horses, Serjeant Armstrong put a case which ought to test this—Suppose the buyer wants a stallion, and a horse is given to him externally perfect, but that from some hidden cause he is of no use. Is the loss of the germinating quality in the seed more easily discoverable than the loss of the generative quality in the horse? *Jones v. Bright* was the case of a thing partly manufactured and partly consisting of raw material. The defect consisted in a want of skill. There was judgment for the plaintiff. In *Bluet v. Osborn* the subject was half manufactured and half natural. There was evidence that the bowsprit was rotten, and judgment was for the vendor. The text-writer, Addison says, "The law does not imply from the mere seller of an article in its natural state, who has no better means of information than the purchaser, and who does not affirm that the article is fit for any particular purpose, any warranty or undertaking beyond the ordinary promise that he makes no false representation calculated to deceive his purchasers, and practises no deceit or fraudulent concealment, and that he is not cognizant of any latent defect materially affecting the marketable value of the goods." There is one other view of this case which has not been argued, and I am not prepared to give an opinion on it. In *Bigge v. Parkinson* Chief Justice Cockburn says, "Where a buyer buys a specific article, the maxim *caveat emptor* applies, but where the buyer orders goods to be supplied, and trusts to the judgment of the seller to select goods which shall be applicable to the purpose for which they are ordered, there is an implied warranty that they shall be reasonably fit for that purpose." There is here, it strikes me, strong ground for saying that one branch of that observation applies. The order was not for what was to be afterwards selected from, but a specific quantity which was there in the shop, and which the buyer knew and could have inspected if he liked. It was the purchase of an entire thing existing in specie. What I hesitate to decide is, to which of the two classes of contract this case belongs, that of the sale of a specific article, or of a general sale, upon which question *Owens v. Dunbar* (12 Ir. Law R. 304) may be referred to with advantage.

KNOX, J.—I concur with my brother O'Hagan. The question arises altogether on the second and third

counts. I think "good growing seed" in the second count may reasonably be understood to mean what is averred in the third count, viz., that it was to be "fit and proper for sowing." There is no averment, I think, in either count that there was a warranty that the seed should ever appear above ground. So far from thinking that the warranty was a warranty of a good crop, I do not think it a warranty that the seed should ever appear above ground, but that it was reasonably fit at the time of sale for the purpose of being sowed. It was contended that there was an express warranty on the very subject-matter. If there was, I agree that there could not be another on that very subject-matter. "Have you Dutch rape seed? Is it good? I believe it to be so." Is that an express warranty? The case has been mentioned where the man would not warrant the horse; he said he would not warrant himself. He says, I will not give you the warranty you ask, but another. It was held that he was liable on a contract, not that the animal was sound, but because he knew it was not. I do not think there is any express contract at all in this case, and why? The ground for holding otherwise would be that case where the party said he believed the horse to be sound. But is it like this? I will not warrant the horse to be sound. Here, "I want some Dutch rape seed; is it good. I believe it to be so." What is the fair implication from these words? That it was good not in the particular sense of being growing seed, but that it would be good seed, not only fit to be sown, but when sown to produce a good crop, and therefore, if there was an express contract, it would be that it would produce a good crop. I concur with my brother O'Hagan that the rule applying to manufactured articles may be applied to what are called natural products, because I find it difficult to ascertain what is a natural product. What is a manufactured horse? A horse may be said to be manufactured into a carriage horse. The very composition of the word is Latin; it is an article made with hands: something added by the industry of man. If I were to apply, not to Blue Books, but to the first book of the Georgics of Virgil, it would show that seed has no value till the industry of man is applied to it. It is said the germinating quality may sometimes be imparted, be the gift of man. We will then have discovered something more than all the ancients discovered when looking for the philosopher's stone. This was rape seed, not to be used to feed cattle, not to make oil, but to be put in the ground for the purpose of production. There are some things which I think the Court may take knowledge of without putting a witness into the box to prove. If a witness in Court were struck and killed in a criminal case, I have always thought it absurd that a doctor should depose that he died from the effects of that blow. The experience of man is evidence in courts of justice. If corn is kiln-dried, it loses the germinating quality which nature gives it, and which never can be given to it by man. If seed be gathered from the ground before it is ripe, and sown, every one knows it will not grow. Seed requires care, preparation, selection, &c. as much as the engine which propels the vessel upon the ocean. If it were necessary to imagine a case in which a warranty might be raised that the seed would

grow, this would be the case which Chief Justice Cockburn referred to.

MONAHAN, C. J.—I think it is a matter of vast importance for judges administering law to abide by some general rule, so that professional men may know what to advise, and if we find a general rule established, nothing is more to be deprecated than to be finding exceptions. Now the general rule I find laid down by the judges in the case Judge O'Hagan has referred to is this—"Where a buyer buys a specific article the maxim *caveat emptor* applies, but where the buyer orders goods to be supplied, and trusts to the judgment of the seller to select goods which shall be applicable to the purpose for which they are ordered, there is an implied warranty that they shall be reasonably fit for that purpose." No one can question that this comes within that general rule, and the words as there laid down. The defendant is a dealer in a particular article. The article is not produced. The purchaser merely asks, "Have you Dutch rape seed?" In the nature of the thing itself there is what will bring it within the rule, that it will be reasonably fit for the purpose for which it was bought. It is said that though it comes within the terms of the general rule, there is something in the seed which keeps it out. I do not believe there is. In almost all cases a merchant who imports seed tests it before he sells it. I deny that there must be evidence on all these points. It is said this has not been applied to the products of nature. Then it is time it should be. There is no decision that seed is not within the rule. Two cases only have been referred to. One is that where on the sale of hops there was no implied warranty. Why? What were the facts? The other case was that in which Lord Ellenborough lays down the law with perfect accuracy. It was the case of a bowsprit. The article was produced and seen; and in *Shepherd v. Pybus* (3 Man. & Gr. 880), both cases are referred to and put on their proper ground. Chief Justice Cockburn says a point has not been decided, and reserves it to be decided when it arises. In my opinion the case has arisen. It is said because there is an express warranty there is not to be an implied warranty. It is difficult to make out any express warranty, but if there be one, it is quite different. It is that this was good growing seed, and would not be sustained by showing it was growing seed, but good growing seed.

*Rule discharged.*

## Court of Appeal in Chancery.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

IN RE THE BAGNALSTOWN AND WEXFORD RAILWAY COMPANY; EX PARTE, BAGNALL—June 5.

*Judgment mortgage Act, sec. 6—Word "person"—Railway Company.*

*On appeal from an order made by the Court of Bankruptcy,—Held—affirming said order, that a judgment may be registered as a mortgage against an incorporated railway company, under the provi-*



*sions of the Judgment Mortgage Act, 13 & 14 Vic. c. 29.*

Held also that where, in the affidavit to register said judgment as a mortgage, the said company is described as a "railway company," it is unnecessary further to set forth the trade of the Company, inasmuch as the description "railway company" clearly imports that the trade of the company is that of common carriers.

Held also, that in the description of the lands in the affidavit, sought to be affected by the judgment mortgage, no minutely geographical description than the name of the townlands need be set forth.

THIS was an appeal brought by the official assignees from a decision of Judge Berwick, one of the judges of the Court of Bankruptcy and Insolvency, in Ireland, and pronounced on the 21st March last, by which His Lordship declared that a judgment obtained by John Joseph Bagnall (a railway contractor, whose claim was for making the line) against the company, and registered by him as a mortgage, under the Judgment Mortgage Act, on the 11th May, 1863, was a valid charge on the lands of the company, and further ordering Bagnall to have his costs out of the estate. The questions involved in the appeal were, whether a judgment creditor could register a judgment as a mortgage against the lands of a railway company in Ireland; and if so, whether the affidavit to register Mr. Bagnall's judgment as a mortgage complied with the requirements of the Judgment Mortgage Act. *Vide* the judgment given by Judge Berwick, sup. 156, in this case in the Court below.

The petition of appeal also stated that the affidavit was deficient in not stating the names of the lands sought to be affected, the statement being, "That, to the best of Mr. Bagnall's knowledge and belief, the company were seised, possessed of, or had a disposing power over the several lands, hereditaments, and premises hereinafter mentioned, that is to say, the lands, tenements, and hereditaments in the townland of Kilmearney, Kilree"—and several other townlands mentioned—"situate in the barony of Idrone East, and county of Carlow;" but did not specify the names of the lands, and, therefore, the affidavit was insufficient; as also that the affidavit to register the judgment as a mortgage did not contain any description of the trade or business of the company, which were merely called "the Bagnallstown and Wexford Railway Company," whereas their business—that of carriers—should have been added. The company were adjudged Bankrupts, on the 27th May, 1864, under the provisions of the Irish Bankrupt and Insolvent Act, 1857—*vid. sup. p. 21.*

*Heron, Q.C., and Martin*, in support of the appeal, contended that inasmuch as the 13 & 14 Vict., c. 29, sec. 6, merely dealt with the property of private persons; and that as that Act contained no interpretation clause, there was nothing to extend the word "person" so as to embrace a corporation or public company. The affidavit (assuming that an affidavit could affect the lands of a railway company) is defective in not mentioning the names of the parcels of lands comprised in the strip known as the railway. *In re Morrow's estate* (14 Ir. Ch. 44) unless the names of the lands are given, it will be impossible to

know what portion of the townland is affected by the mortgage. A railway cannot be mortgaged, nor has the company power to raise on a mortgage any further sum than the powers of their special Act enables them; the following cases were relied on—*Egry v. McDowell* (9 H. L. 619); *Doe v. St. Helens* (2 Ad. & El. N.S., 364); *Furness v. The Caterham Railway Company* (25 Beav. 614); *Bolckow v. Herne Bay Pier Company* (1 El. & Bl. 74); *Legg v. Matheson* (2 Gif. 71); *Shelford on Railways*, 3rd edition, 155. *R. v. The South Wales Railway Company* (14 Q. B. N.S., 903); *Hodges on Railways*, 3rd ed., 30; yet it is now sought to enable companies to do by a judgment mortgage, what they could not do by mortgage deed, namely, to raise money beyond their powers.

*Ball, Q.C., Kernan, Q.C., and Falkner* were in support of the decision of Judge Berwick, and contended that the Judgment Mortgage Act was merely one of a code of laws dealing with the same subject matter; and as the 4 & 5 Vic. c. 105 (Pigot's Act) with which it was incorporated, contained an interpretation clause declaring that the word "person" should extend to and include corporations, public companies, &c., a railway company was clearly within its provisions. They also insisted that the affidavit was sufficient, inasmuch as the Judgment Mortgage Act did not require the name of the lands to be specified, further than the name of the townland, barony, and county in which they were situated, which was done in the present case. Mr. Bagnall was the contractor by whom the line was made; a debt was due to him as such contractor, to the amount of £5,327 11s. 6d., for which he had recovered judgment and costs; and he was not to be deprived of the fruits of his judgment, if he came sufficiently within the terms of the Act of Parliament. Now, as to the registry, the names of the townlands through which the railway passed, and which were taken under the mortgage, have been sufficiently given; the townland, or the name thereof, is the smallest geographical name known in the Judgment Mortgage Act; it is the small parcel of land required to be named in the Judgment Mortgage Act. If there were forty owners of one townland, in the county of Dublin, and if each of those owners had a judgment against him, each must have the name of the same townland specified, and no name of any smaller village or denomination need be noticed.

THE LORD CHANCELLOR—I am of opinion that the order of the Court below should be affirmed. All that that order decided was that the judgment obtained by Mr. Bagnall became a charge on the lands of the company by virtue of the registration. The judgment was not a void judgment, and there was no equity against it, and the party having it, if he could not register it as a mortgage, should let it lie until there were goods or chattels which he might seize, but which perhaps, might never be available. A judgment creditor was powerless unless he could register his judgment as a mortgage against the railway company; and it would be an injustice to take away any of his rights which he might legally exercise. There was nothing in any of the Acts of Parliament to which they had been referred to preclude a judgment from being made a charge against the lands. What the effect of such a mortgage might be the Court did not at present inquire, and would

not say; but here the company were stated to be seised of the lands, and were persons against whose lands a judgment might be registered as a mortgage within the meaning of those Acts. It has been argued that the affidavit was defective in not stating that the railway company were carriers. That objection was made and disposed of in the Court below. The words "railway company" sufficiently import their trade or business, and it would be straining the Act of Parliament to hold otherwise, or to say that they should be described as carriers, when they were carriers *ex termini*. There was also an objection taken to the affidavit which, for a time, struck him very forcibly—that was the vague description of the lands sought to be charged; and, no doubt, it was a very vague way of describing them, but at the same time, if the form was consistent with the Act of Parliament, it was enough. According to the language of the affidavit, the description would comprise all the lands in all the townlands mentioned, which would manifestly be more than the company would be possessed of; but any matter of that kind would be corrected by the subsequent section of the Judgment Mortgage Act, which only gave the charge an operation over such lands as the company actually had; and when the Act of Parliament only required the townland, barony, and county in which the lands were situate to be mentioned, and did not require more; it would be rather strong then for the Court to require more. He would, therefore, hold the affidavit to be perfectly good *valent quantum* as to the particular lands to be affected—namely, all the lands that the company had. Mr. Bagnall must have the costs of the appeal from the assignees, who would recover same, with their own costs, out of the estate.

THE LORD JUSTICE OF APPEAL concurred. The only difficulty he had was as to the vague terms of the description, but the subsequent section of the Act clearly showed what lands would be affected by the mortgage. The word "person," in the 6th section of the Judgment Mortgage Act clearly includes railway companies.

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

IN RE HAWKSWORTH'S ESTATE.

*Costs—Priorities—Lis pendens.*

*Unpaid costs have the same priorities as the demand, in establishing which the costs were incurred.*

THIS was an appeal brought by Benjamin Lystre Farmley, from an order made by Judge Dobbs on the 25th of February, 1865, refusing to allow as a charge on the estate of the owner the costs of a suit in Chancery in the same priority with the decree in that suit. The following is a summary of the facts of the case. In 1846 John Leake obtained a judgment in her Majesty's Court of Exchequer in Ireland, against William Hawksworth for the sum of £600, to secure the principal sum of £300 besides interest and costs. On the 29th of May, 1849, John Leake filed a bill in Chancery against said Hawksworth, praying for an

account of the sum due on foot of said judgment, and for sale of certain lands and hereditaments in the city of Kilkenny and town of Rathdowney the property of the said William Hawksworth, being the very hereditaments the subject afterwards of petition to the Landed Estates Court. There was then found by Master Henn to be due to the plaintiff for principal a sum of £300 with interest and costs; and in 1851 the final decree was made up and pronounced on 23rd of Jan. 1851, whereby it was ordered that William Hawksworth the defendant should within six months thereof, pay to the said John Leake the sum of £375 10s 11d. with further interest on the principal sum until payment, and the plaintiff's costs in said cause, and directing the lands to be sold for payment of the amount due, and interest and costs. A consent was subsequently entered into, whereby a sum of £200 was paid, the remainder to be paid by annual instalments of £40. The instalments were paid until the principal amount, and interest, were paid, but leaving the Chancery costs unpaid. The judgment, &c. was assigned to the appellant, and the owner having presented a petition for sale of his estate in the Landed Estates Court, the appellant filed an objection to the schedule, which stated that principal, interest, and costs had been paid, and he claimed a sum of about £400 for the unpaid Chancery costs. Judge Dobbs, by order bearing date the 13th March, 1865, decided that as the decree of the Court of Chancery had not been registered as a *lis pendens*, it was a mere money order, and not a charge on the lands in the same priority as the judgment, and from that decision Mr. Farmley now appealed.

Warren, Q.C., and Charles Henry Woodroffe were in support of the appeal.—By the terms of the final decree in the Chancery cause, the costs decreed to the plaintiff in the said cause were made a charge on the estate of William Hawksworth in the lands ordered to be sold in this matter, in the same priority as the judgment. By the consent in the cause of *Leake v. Hawksworth* the rights of the plaintiff under the final decree are all reserved to him, and if a sale of the lands had taken place in the Court of Chancery in pursuance of the said final decree, the plaintiff, or we who are the plaintiff's assignees, would have been entitled out of the proceeds of the sale to the repayment of the costs when taxed, otherwise the plaintiff would be left without any remedy for the payment of his costs, for the decree was for the sale of the lands in default of the plaintiff's demand and costs, and was not personal as against William Hawksworth. *Lynch v. Skerrett* (5 Ir. Eq. 494); *Mandeno v. Mandeno* (1 Kay App. iii.); *Duke of Beaufort v. Phillips* (1 De Gex. & Sm. 321). The appellant is entitled to have the order of the 13th of March, 1865, varied or set aside, and is entitled to the costs of the plaintiff in the Chancery cause when taxed.

Lloyd, Q.C., with John F. Walker, contra.—The order of Judge Dobbs ought to be affirmed, inasmuch as the decree of the 23rd of January, 1851, was obtained after the passing of the 13 and 14 Vict., ch. 29 (the Judgment Mortgage Act) and the decree of January, 1851, not having been registered in the office of registry deeds as a *lis pendens*, it cannot be contended that this would have been a charge on the lands of Hawksworth. Now the petitioner is bound by the

order, and if the petitioner makes any claim for costs, he can only do so under the terms of the order which provided that the claim of the petitioner should be discharged by yearly payments of £40 a-year.

THE LORD CHANCELLOR.—I have no doubt on my mind that the unpaid costs have the same priorities as the demands which the costs were incurred in establishing. That being so I think the order of the Court below was erroneous, and must be reversed.

THE LORD JUSTICE OF APPEAL concurred.

## Court of Queen's Bench.

[Reported by William Woodcock, Esq., Barrister-at-Law.]

[BEFORE O'BRIEN, HAYES, AND FITZGERALD, JJ.]

MOORE v. LONG.—May 13.

*Stamps—Lease—Statutes 5 & 6 Vict. c. 82; 13 & 14 Vict. c. 97; 16 & 17 Vict. c. 59, and 17 & 18 Vict. c. 83.*

*A lease executed in 1849 must, in order to be admissible in evidence, be stamped with the duty imposed by st. 5 & 6 Vict. c. 83; and it is not sufficient that when produced it bears a stamp sufficient to cover the duty now in force.*

THIS was a motion on behalf of the plaintiff to discharge a conditional order obtained by the defendant for a new trial, or to have a non-suit entered for him. The action was one of ejectment on the title to recover possession of a house at Kingstown. The defence and issue were in the usual statutable form. The case was tried before Mr. Justice Fitzgerald at the sittings after Hilary Term. The plaintiff's case was, that he derived a sub-interest by virtue of a lease executed to the plaintiff, William Moore, on the 1st December, 1849. That lease was for a term of fifty-one years, at a yearly rent of £14, and was made between Richard Foster as lessor, and William Moore, the plaintiff, as lessee. The present ejectment was brought by Moore against John Long, Robert Foster, and others who were in possession. Robert Foster alone took defence. The present possession of Foster was derived through Long, the defendant, who did not take defence, and who derived from the plaintiff; and if the plaintiff's own lease was a valid one his claim could not be resisted. The lease of 1849 from Foster to Moore was produced by the plaintiff on the trial. It bore on the face of it a ten shilling stamp. The lease was objected to by the defendant as not being sufficiently stamped; and the plaintiff having declined to pay any penalty, the judge decided to allow it to be received in evidence subject to the defendant's objection, and thereupon a verdict was given for the plaintiff; but leave was, by consent of both parties, reserved to the defendant to move to have a non-suit entered for him. A conditional order having been obtained accordingly, cause was now shown against it by the plaintiff.

*Keogh for the plaintiff.*—My proposition is—that though the lease was insufficiently stamped at the time of its execution, yet it was sufficiently stamped at the time of the trial. It is decided that it is the stamp of the present day that ought to be affixed and not the old stamp. At the date of the lease the requisite stamp was a thirty shilling one. If at the time the case came on a one pound stamp would have been sufficient, what should be paid would be the difference between the stamp actually affixed and the stamp at present necessary. The ten shilling stamp on this lease is sufficient according to the present law. The first Irish Stamp Act to which I shall refer is the 56 G. 3, c. 56. Under the schedule to that Act the duty payable on this lease would be £1. The st. 5 & 6 Vict. c. 82 changed the duty only so far as it enacted that in lieu of the duties payable under the Act of 56 G. 3, there should be paid the duties which were payable under the English Act, 55 G. 3, c. 184. The duty payable on this lease, which was dated in 1849, was that payable under the English Act, and under it as continued by subsequent statutes a one pound stamp was necessary. Then came the statute 13 & 14 Vict. c. 97, under which the ten shilling stamp is sufficient. Under the schedule to that Act the duty payable on such a lease as this is one shilling and sixpence. St. 17 & 18 Vict. c. 83 increased that duty to nine shillings. I do not argue that I have escaped all difficulties with the Commissioners of Excise, but I say that for the purposes of evidence in a case it is sufficient if the judge at Nisi Prius have a document produced to him which is sufficiently stamped at the time to allow it to be produced in evidence.—*Deakin v. Pennell* (17 L. J. Exch. 217); *Buckworth v. Simpson* (1 Cr. M. & Ros. 834); *The King v. The Inhabitants of Preston* (5 B. & Ad. 1028). Under the authority of that last case I say that the court is not to inquire as to the time the stamp was affixed. *Non constat* but that the stamp was affixed in 1850 when it was sufficient. All that the court has to see is that the stamp now affixed is sufficient. [Fitzgerald, J.—We will not enter into an inquiry as to when the stamp was affixed, but we must presume that the deed was executed at the time it bears date, and then the Commissioners of Excise should affix the stamp of 1849.]

*S. Walker contra for the defendant.*—The first section of st. 13 & 14 Vict. c. 97 contains a proviso "that nothing herein contained shall extend to repeal or alter any of the said duties now payable in relation to any deed or instrument which shall have been signed or executed by any party thereto, or which shall bear date before or upon the said 10th day of October, 1850." That proviso answers the argument on the other side. Section 4 of the same Act alters the duty expressly—"So far as the same respectively relate to any such lease, &c. as aforesaid which shall bear date after the said 10th day of October, 1850." St. 5 & 6 Vict. c. 82 was finally renewed by st. 16 & 17 Vic. c. 59, s. 20. Section 1 of the 17 & 18 Vic. c. 83 contains words similar to those of 13 & 14 Vic. c. 97. It is admitted that when this lease was executed it was insufficiently stamped. If the argument on the other side was correct it would only go to this,—that they would be permitted

to stamp the lease by the duties payable now according to law. But the sections just adverted to show that the stamp duty payable is that payable under 5 & 6 Vic. c. 83. There is no stamp duty applicable to this instrument but that given by that statute. In the cases cited on the other side the penalty had been paid, and the only question was—what duty along with the penalty the commissioners were to receive. What the cases decided was, that the sections of the Acts in question there authorised the Commissioners to receive the duty payable when the instruments were presented to them. That was upon the express words of the Act.

*Keogh* in reply argued that the judge had no right, since the Common Law Procedure Act, to reserve a point upon the Stamp Act once he had admitted the document in evidence—Archbold's Practice, 407.

*Walker* upon this point referred to *Emes v. Smith* (1st Jur. N.S., 1025), where it was held that where the point was reserved for the Court with the consent of the parties the Common Law Procedure Act did not apply, and to *Herbert v. Beyhan* (8 Ir. C. L. Rep. App. 1v).

*O'Brien, J.*—It appears to us that the sections of the Acts which have been referred to by Mr. Walker are decisive in this case. In 1849 a duty of £1 was payable on this lease; but later, under the two Acts which were referred to, the 10s. stamp would have been sufficient. But the first section both of st. 13 & 14 Vic. c. 97, and of st. 17 & 18 Vic. c. 83, which reduce the duties, expressly provide that they shall not extend to any lease either dated or executed by any party before the 10th October, 1850, in one of the acts, and the 10th October, 1854, in the other. It is almost impossible to have clearer words. The case on which the plaintiff relies of *Deakin v. Penniall*, is founded on an Act of Parliament which contains no such words, but other words, which the Court there held did not prevent the Act from being retrospective, because they said that the duty was not payable to her Majesty within the terms of the Act. They therefore do not hold that if there were such retrospective and forcible words as we find in this Act of Parliament, the Act would not be retrospective.

The other judges concurred.

*Cause shown disallowed.*

## Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

*DONOHUE v. THOMPSON.*—May 31, June 8, 1865.

*Interrogatories—C. L. P. Act, 1856, s. 56.*

*The jurisdiction conferred upon the Court by the 56th section of the C. L. P. Act, 1856, to permit interrogatories to be delivered to the opposite party in a cause, embraces all classes of actions.*

*The objection to interrogatories, that they tend to expose the party interrogated to a criminal prosecution, is premature if made on an application for leave to*

*deliver them, and must be made by the party himself as a reason for declining to answer a particular interrogatory.*

THIS was an application to the Court for leave to deliver written interrogatories to the defendant under the C. L. P. Act, 1856, s. 56. The 1st count of the summons and plaint complained that the defendant, being one of her Majesty's justices of the peace for the county of Longford, on the 21st day of June, 1864, assaulted the plaintiff, and also then and there caused the said plaintiff to be apprehended and seized, and laid hold of and handcuffed, and to be forced and compelled to go into, through, and along divers public highways, streets, and places, to a certain lock-up or prison in the town of Granard, in the county of Longford, and to be unlawfully imprisoned, and kept and detained in prison, in the town of Granard, in the county aforesaid, in a certain prison or place for a long space of time, to wit, for the space of one day and a night; and for that afterwards, on to wit, the 22nd day of June, 1864, the said defendant caused the said plaintiff to be again assaulted and to be laid hold of, and to be forced and compelled to go into a certain other house in the said town of Granard, in the county of Longford; to wit, a certain house called the court-house of Granard, in the said county aforesaid, and caused the said plaintiff to be unlawfully committed to a certain gaol or prison called the gaol or prison of the county of Longford aforesaid, and then directed and ordered the said plaintiff to be imprisoned, and kept and detained in prison, for a long space of time, to wit, for the space of three months then next following, together with hard labour during the said imprisonment, whereby the plaintiff was then not only greatly hurt and injured, but was also thereby greatly exposed and injured in his credit, character, and circumstances, and was prevented from attending to his lawful business and occupation, and also from collecting certain poor rates of which he was a collector for the union of Granard, in said county, whereby he was deprived of great profit and gains, to wit, the sum of £100, in consequence of said imprisonment; and was put to divers expenses, to wit, to the sum of £100, in order to quash the said conviction, and in order to obtain his liberation from said imprisonment, and other wrongs to the plaintiff, to the damage of the plaintiff of £500. The second count complained that the defendant on the 21st day of June, 1864, as one of the magistrates of the county of Longford aforesaid, maliciously and without any reasonable or probable cause caused the said plaintiff to be assaulted, beaten, and ill treated; and also then and there maliciously, and without reasonable and probable cause, caused the said plaintiff to be apprehended and seized, and laid hold of and handcuffed, and forced and compelled to go into, through, and along divers public highways, streets, and places to a certain lock-up or prison in the town of Granard, in the county of Longford, and then and there maliciously, and without any reasonable or probable cause, caused the said plaintiff to be unlawfully imprisoned in the town of Granard, in the county of Longford, in a certain prison or place for a long space of time, to wit, for one day and a

night; and for that afterwards, to wit, on the 22nd day of June, 1864, the said defendant maliciously, and without reasonable or probable cause, caused the said plaintiff to be brought before the said defendant and Henry Dopping, William Webb, and John Henry Keogh, being four of her Majesty's justices of the peace as aforesaid, to answer to a charge "that plaintiff, in the month of June, 1864, threatened and used intimidating language towards complainant, deterring him working in Mr. Thompson's employment in Clonfin," falsely alleged to be used and made by the plaintiff towards and against one Michael Dolan; and the defendant afterwards caused the said plaintiff to be assaulted and laid hold of, and to be forced and compelled to go into a certain other house in the said town of Granard, in the said county of Longford, to wit, a certain house called the court-house of Granard, in said town and county aforesaid, and then and there maliciously, and without reasonable or probable cause, procured the said plaintiff to be brought before the said defendant, Henry Dopping, William Webb, and John Henry Keogh, Esq., four of her Majesty's justices of the peace as aforesaid, to be examined touching said charge; and the said defendant maliciously, and without reasonable or probable cause, did cause and order the said plaintiff to be unlawfully convicted of the said charge as aforesaid, and to be committed to a certain gaol or prison of the county of Longford aforesaid, and there imprisoned, and kept and detained in prison, for a long space of time, to wit, for the space of three months then next following, together with hard labour during the said imprisonment, whereby the said plaintiff was then and there not only greatly hurt and injured, but was also thereby put to considerable and great expense, to wit, the sum of £100, in order to quash the said conviction and in order to obtain his liberation, and was deprived of great profits in consequence of his not being able to attend to his business as a poor-rate collector as aforesaid, to wit, the sum of £50, and greatly exposed and injured in his credit, character, and circumstances, and other wrongs to the said plaintiff, to the damage of the said plaintiff of £500. The 3rd count complained that the defendant assaulted the plaintiff and caused him to be imprisoned in a certain police office at Granard, in the county of Longford, and also caused him to be imprisoned in a certain gaol at Longford, in the county of Longford, for, to wit, three months, with hard labour, whereby the plaintiff suffered the special damage in the two former paragraphs mentioned, and was otherwise injured to the amount of £500. To each of the three counts the defendant pleaded traversing the committing of the grievances alleged. The following were the interrogatories:—1. Did you on the 21st day of June, 1864, or at any other and what time, see the plaintiff at, or near, or about Clonfin House, your residence, in the county of Longford, in the custody of certain policemen, or while any policeman or policeman was in or about said house; and if yes, state the names of said policemen or any one of them whom you can identify and know? 2. Do you know, or for any and what reason believe, that the plaintiff was at or about said house on said day in the custody of any policeman or policemen, and of whom by name, and were you, before plaintiff was in or about said

house on said day, apprised or aware that he was coming or to be brought there? 3. Was it by your order or direction, directly or indirectly, the said plaintiff was brought to Clonfin House on the day before mentioned; and if yes, state whether said order or direction was in writing or otherwise; and if not by your order and direction, do you know, or for any, and what reason believe, who it was that gave such order or direction, and state the name of the person who gave said order as you know or believe? 4. Was it by your order or direction that said plaintiff was sent to the town of Granard, in the county of Longford, on the 21st day of June, 1864, from your said house of Clonfin, or elsewhere, or at all, in custody of policemen; and if so, state whether said order was in writing or otherwise; and if in writing, set forth the contents and substance thereof, and also the names or name of the policemen or policeman who took said plaintiff in charge and brought him to the said town of Granard. 5. Had you any conversation with any police officer, or police constables or constable, or any of the constabulary force, or any justice of the peace or other person, at, or in, or about your said house on said 21st day of June, in reference to said plaintiff, or in which his name was mentioned by you or any other person in course of such conversation; and if so, set out fully and at large about such conversation, and what was said about the plaintiff by yourself or any other person on such occasion. 6. Did you on or about the 22nd day of June, 1864, attend at the investigation of the charge made against the plaintiff in the town of Granard, in the court-house of said town; and if so, state whether you took any and what part in said investigation, or in ordering and permitting same to be held with closed doors, and in a court from which the public were excluded; and whether you took any and what part in making any order consequent on said investigation, and what said order was. The following affidavit was made by the plaintiff and his attorney:—"We, Patrick Donohoe, of Garvagh, in the county of Longford, the plaintiff in this action, and Christopher Reynolds, of No. 48 Mountjoy-street, in the county of the city of Dublin, attorney for the said Patrick Donohoe, jointly and severally make oath and say that this action is brought for an assault and false imprisonment, and also for malicious prosecution; and defences have been filed. And deponents, to avoid prolixity, crave leave to refer to the pleadings, which they pray may be incorporated herewith; and they believe the plaintiff will derive material benefit in this cause from the discovery which he seeks by the interrogatories which he requires to be delivered herein, and on a copy of which deponents have endorsed their names at the time of swearing this affidavit; and that plaintiff has a good cause of action upon the merits in the present action. The said Patrick Donohoe for himself saith that he was brought to the house of the defendant on the evening of the 21st day of June, 1864, by a policeman, and shortly after his arrival there he was brought by the said policeman to the town of Granard, and there detained in gaol for some considerable time; that on his departure from the house of the defendant he saw the said defendant near the said house. Deponents further state it will be important for the

plaintiff to prove at the trial in this cause that he, the plaintiff, was arrested and confined in prison by the direction and order of the defendant; and that it is to the aforesaid matter and circumstance the disclosure on the oath of the defendant is sought by said interrogatories which are advised by counsel who directed proofs for the plaintiff.

*Serjeant Armstrong* (with him *Harkan*) in support of the application.—There is no affidavit made to resist this motion. *Osborn v. London Dock Co.* (10 Ex. 698) was an application under the corresponding section of the English Act. There were 159 interrogatories. The motion was opposed by an affidavit made by the plaintiff's attorney, which stated that he believed the questions would tend to criminate his client. Baron Parke says, "The weight of the authorities seems to be in favour of the rule which requires the witness to satisfy the court that such will be the effect of the question." Baron Alderson says, "We have lately decided that the witness must be sworn to entitle him to make the objection." In *Chester v. Wordley* (17 C. B. 410) the marginal note states that "the objection must be made to the particular questions after the party has been sworn." The tendency of all the cases is to give a remedial and liberal construction to this statute. *Whateley v. Crowder* (5 El. & Bl. 709) does not shake the authority of *Osborn v. London Dock Co.*, which decides that the party must make the objection himself after he is sworn. In *Edwards v. Wakefield* (6 El. & Bl. 462) the application was refused because it was for a disclosure of evidence. [*Christian, J.*—The value of that case is that it still follows the standard of a discovery in equity.] *Tupling v. Ward* (6 H. & N. 749) was a peculiar case; and Taylor on Evidence in a note says it is not to be considered law. It was an action for libel. Baron Martin says, "Without laying down any general rule on the subject we think that in cases of this kind it would be unfair to submit questions which a party is clearly not bound to answer, the object being either to compel him to answer when not bound, or to refuse and so create a prejudice against him." *Zychlinski v. Malby* (10 C. B., N. S., 838) was an action for malicious prosecution as the present is. Erle, C. J. says, "I see no objection to any of these interrogatories except those which relate to the box of plate." In *Bartlett v. Lewis* (12 C. B., N. S., 249) the object of the interrogatories was to show that the defendant had been guilty of one of the offences specified in section 251 of the Bankruptcy Act, 1849, and that his certificate was void. Byles, J. in chamber had declined to allow them to be delivered. Willes, J. winds up his judgment by saying *Tupling v. Ward* was a very peculiar case. It was said in the argument in that case, "it is idle to allow interrogatories which the Court must know will not be answered." How can the Court know here that the questions will not be answered? [*Christian, J.*—I should wish to know what made *Tupling v. Ward* peculiar; the only peculiarity seems to have been that the interrogatories would not be answered because they would have exposed to a criminal prosecution.] *Tupling v. Ward* is not law. Baron Martin says he will not lay down any general rule, but he goes on to lay

down one. Erle, C. J. says in *Bartlett v. Lewis*, "but I think they did not intend to overrule it," i.e. *Osborn v. The London Dock Co.* Willes, J., says, "The framers of the Act evidently did not intend that we should be fettered by the rules of equity."—*Stern v. Sevastopulo* (14 C. B., N. S., 787) was an action for slander. The interrogatories were fishing interrogatories. One of them was, "Did you speak and publish the words laid in the declaration, or any and which of them; and what other words conveying the same or similar imputations against the plaintiff?" [*Monahan, C.J.*—How is it a more fishing interrogatory?] If the defendant answered, I never said that; but what I did say was as follows,—the plaintiff might discontinue his action and bring a new one, and fix him with his own admission. In *Goodman v. Holroyd* (15 C. B., N. S., 839) Willes, J. says, "I retain the opinion I expressed in *Bartlett v. Lewis*. We are not to be hampered in administering the law under the Common Law Procedure Act by the rules which regulate the practice of the Court of Chancery in the case of discovery."—*Attorney-General v. Corporation of London* (2 M. & G. 247); *Wright v. Goodlake* (6 New Rep. 123). *Tupling v. Ward* has been practically overruled. One judge calls it exceptional, another says that he did not know what limitation it intended to put on *Osborn v. The London Dock Co.* *Stern v. Sevastopulo* was so bad a case that the Court probably wished to discourage it. Let the defendant put in an answer on oath that he objects to answer.

*Purcell, Q.C.*, contra.—In the cases referred to, the Courts of law have not laid down the rule that they would not be governed by the practice of the Courts of Equity. *Tupling v. Ward* is good law, and consistent with the other cases. There is no case in the books where the Court has decided that it will allow interrogatories to be exhibited on principles different from those on which the Court of Equity allows discovery. In the 56th section of the Common Law Procedure Act, 1856, which is identical in terms with section 51 of the English Act, the words are "interrogatories in writing upon any matter as to which discovery may be sought." Where it is not intended to confine the power to the analogous jurisdiction of equity, the Legislature says, "for the purpose of discovery or otherwise," as in section 55. [*Christian, J.*—In the 64th section of the Common Law Procedure Act, 1853, the Legislature expresses it in the clearest manner where it did intend to limit it to equity jurisdiction, but according to Erle, C. J., and Willes, J., the words "discovery may be sought" do not mean discovery only in Courts of Equity.] The 64th section is in aid to give a meaning to the section of the Common Law Procedure Act, 1856. The Act refers to something in existence, but there was no power then to obtain discovery by bill in equity. This section introduces machinery to enable the Court to do what could be done in another way, viz., by bill of discovery. [*Christian, J.*—Why does the section add, "provided such party would be liable to be called and examined as a witness?" Is not that like throwing over the analogy of the Court of Equity?] Discovery might have been sought against a person who was no party, and this shows it is to be

confined to those who might be witnesses. [*O'Hagan, J.*—It does not seem to be the object to put Courts of Law on the same footing with Courts of Equity, but to enable each Court to administer entire justice within the scope of its jurisdiction.] There is no doubt but that complete justice could have been attained by a bill of discovery, and by then coming back to the Court of Law, and the object is to enable that to be done in the Court of Law itself. *Martin v. Hemming* (10 Ex. 478) was almost immediately after the passing of the Act in England. *Osborn v. London Dock Co.* has been considered in subsequent decisions as laying down the principle too widely; and until *Bartlett v. Lewis* was considered as practically overruled. But *Osborn v. London Docks Co.* is only an authority on the practice of the Court as to the time of objecting. It does not decide the other point. In *Whateley v. Crowter* (5 Ell. & Bl. 712), Lord Campbell says, "The object of the enactment was to obviate what was a scandal to the law, viz., the necessity of commencing a fresh suit in a Court of Equity for the purpose of obtaining discovery in aid of an action at law." That is the first case in which a judicial interpretation was put on the section. The inference from *Flücroft v. Fletcher* (11 Ex. 643), is that the discovery in equity is the true standard. In *Edwards v. Wakefield* (6 Ell. & Bl. 462) there is in the marginal note a *semble* "that the power to interrogate under the Common Law Procedure Act, 1854, is confined to such discovery as might be obtained in equity on evidence." In *Horton v. Bott* (2 H. & N. 253), Bramwell, B., in giving judgment, says, "The authority is given by the 51st section of the Common Law Procedure Act, 1854, which enacts that interrogatories may be required to be answered upon any matter as to which discovery may be sought. Of course this must mean according to the rules existing in Courts of Equity," and the Court coming to the conclusion that the matter was not such as could be the subject of discovery in equity, made the rule absolute to set aside the order requiring the interrogatories to be answered. In *Adams v. Lloyd* (3 H. & N. 361), Pollock, C. B., says—"I have always thought that the law was correctly stated by Maule, J., in the case of *Fisher v. Ronalds*. He there said in the course of the argument, 'It is the witness who is to exercise his discretion, not the judge.'" Bramwell, B., says, "I have always thought that the right to administer interrogatories was confined to those matters in respect of which the party might have a discovery." Watson, B., says, "The authorities are clear that a person is not entitled in equity to a discovery of title deeds unless they contain evidence of his own title. Neither is he otherwise entitled under the recent statute."—*Blyth v. L'Estrange* (3 Fes. & Fin. 154). In *Bartlett v. Lewis* there was not an interrogatory which asks, "Have you been guilty of fraud?" nor one which necessarily involved fraud? They were such as these—Did you open an account in such a year? Did you purchase an estate for £80,000? &c. It was argued in that case that a bill would not lie in a Court of Equity which had a tendency to criminate; the answer of the judges in that case amounts to no more than this—we will not be bound by the practice of a Court of Equity, and we

will not assume that these questions necessarily do point to fraud, and we will not decide at this stage that they shall not be put. The Court of Equity, without putting the party to his oath, allows him to demur. The Courts seem inclined to put *Bartlett v. Lewis* in the category of peculiar cases, as in *Stern v. Sevastopulo*; *Baker v. Lane* (11 Jur. N. S. 117). The defendant here is exempted not only because the questions are expressly asked which involve a criminal result, but because it is a case in which no bill of discovery would lie. *Glynn v. Houston* (1 Keen. 329) was a bill of discovery. The argument was—This is the first case in which discovery has been sought in aid of an action to recover damages for a personal tort. The Master of the Rolls says, "I asked in the course of the argument whether any instance could be cited of a bill of discovery in aid of an action brought to recover damages for a mere personal tort, and the answer which was given to me confirmed me in the impression that such a bill could not be sustained." At the next sitting of the Court he said, "I have looked into the authorities which tend very much to confirm my opinion that a bill of discovery cannot be sustained in aid of an action for a mere personal tort. If it were necessary expressly to decide this point, I think it is clear what the course of my duty would be." A distinction has been taken between actions for personal tort, and matters which merely sound in tort.—*East India Co. v. Evans* (1 Vernon, 307). These interrogatories ought not to be allowed at all, and therefore the question which arises in those other cases does not apply. But if the Court think they are not bound by the rule in equity, then this is a case in which, according to *Baker v. Lane*, they ought not to be allowed, because they impute a criminal offence. The summons and plaint states that the order was quashed as illegal. Therefore to ask the defendant as to what the Court of Queen's Bench has decided was wrong, is to ask what partakes of a criminal nature. If the defendant declines to answer the questions, it will prejudice him.

*Harkan* in reply.—It is said the opposition here is tantamount to a demurrer to a bill of discovery. But this is after defence filed, which defence is, that the defendant committed none of the grievances alleged. Taking these to be the true facts which he intends to make at the trial, is there then any of these interrogatories which would subject him to a criminal result? The Court are first to hear the ground the defendant has for not answering these interrogatories. The Legislature used the words "just cause" to make the party come forward and show what cause he had. There is a difference between the sections of the Act of 1853 and the Act of 1856. The Legislature intended a wide difference between "bill of discovery" and production of what the party is entitled to for the purpose of discovery or otherwise. Otherwise the Act of 1856 would be only giving what was already given by the Act of 1853.—*Osborn v. London Docks Co.* (10 Ex. 698). In *Bayley v. Griffiths* (1 H. & Colt. 433), Bramwell, B., says, "I doubt whether you may not search a man's conscience as to his own case." We do not mean to ask in what manner will the defendant conduct his case at the trial. *Glynn v. Houston*, which has been



relied on, was decided twenty years before the Common Law Procedure Act was passed. The Court will compel the defendant who has not come into Court with an affidavit to abide by his own defence.—*McMullen v. The Guardians of the Poor of the Lurgan Union* (10 Ir. Jur. N. S. 175).

*Sergeant Armstrong* referred to *Smith v. Great Western Railway Company* (6 El. & Bl. 405) to show that if the Court did not make an order for costs, neither party would get them, owing to the peculiarity of this Act.

*Cur. ado. vult.*

June 8.—MONAHAN, C. J., delivered the judgment of the Court, having stated the nature of the action and the defences.—The plaintiff wants to exhibit interrogatories, not having done so with the summons and plaint. This is resisted by the defendant. Mr. Parcell's grounds are, that we are confined to those cases in which the Courts of Equity would give discovery in aid of the action or defence, as the case may be. And further he says the Court should not lend its aid to discovery which would tend to criminate a party in case of an indictment. As to the first objection, he has referred us to *Glyn v. Houston* (1 Keen. 329), in which an action was brought in the nature of trespass, substantially trespass. The bill was filed to obtain discovery in aid of that action. There was a general demurrer to that bill. Lord Langdale's impression during the argument was, that there was a rule that the Court of Chancery would not give discovery in aid of an action for a personal tort. The next day he did not decide the case on that ground precisely, but he says the whole object of the bill was to obtain a discovery of a fact which would subject the defendant to penal consequences. And in that case he allows the demurrer. It is not necessary for us to consider whether the rule is there correctly laid down by Lord Langdale as to equity, for he did not decide the case on that. No case has been since decided on it. In the view we take of the objection, it is not necessary to consider if Lord Langdale be right, because that is a rule which would apply generally to all actions of that description. Without presuming to offer an opinion on that abstruse point of equity practice, we think, on the construction of section 56 of the Common Law Procedure Act, we have jurisdiction, and are at liberty to exercise it in all cases. [His Lordship read the sec.] Therefore, without considering the propriety of Lord Langdale's opinion, we think according to the express words of the Act of Parliament, we cannot exclude a class of cases, the jurisdiction being given to us in all cases. But we are not deciding how far we will abide by that rule in every particular case. Then the other objection arises whether these interrogatories may subject the defendant to a criminal prosecution. As to that, we are of opinion this is not the time to raise that objection. It must be made by the party himself as a reason for not answering any particular question when put to him. If there was any reason to suppose that these interrogatories were in aid of a criminal prosecution, or that the party had a fear that he would be exposed to one, we are not deciding that we would not refuse to allow them to be exhibited. But

the party himself must make the objection, and then, and not till then, the Court will be in a position to deal with it. We must allow the present interrogatories to be filed, and direct the party to answer them within the usual time. We have been referred to a case showing that we ought now to dispose of the costs of the motion. We are of opinion that the costs of the interrogatories, and the motion and proceedings under it, should be costs in the cause.

*Harkan* applied that a less time than ten days might be named, as the Term would be at an end in a week.

MONAHAN, C. J.—You have no right to that; you might have come sooner. You can serve notice of trial in the meantime, and if you like, withdraw it.

*Application granted.*

COLVILLE v. HALL.—June 10, 1865.

*Ejectment—Compromise—Lien—Defendant's attorney.*

*The plaintiff and defendant having compromised an action of ejectment, and the former having paid a sum of money to the latter, in consideration of which the latter assigned the premises in dispute to the former, the defendant's attorney five days afterwards served a cautionary notice on the plaintiff and his attorney, warning them against compromising without providing for his costs. It appeared that the town agent of the defendant's attorney was made aware that the compromise was pending before it was completed. The Court refused an application by the attorney that the plaintiff should be required to pay him the amount of his costs.*

THIS was a motion to make absolute the conditional order made in this case on the 23rd May by Keogh, J., in chamber, that James Chaigneau Colville, the administrator with the will annexed of William C. Colville, the late plaintiff, be at liberty to suggest the death of the said Wm. C. Colville, and that he be at liberty to proceed with the action. The action was an ejectment brought upon a forfeiture incurred by breach of covenant in an indenture of assignment, the particulars of which will be found reported in 8 Ir. Jur. N. S. 303, and 10 Ir. Jur. N. S., 109. The plaintiff having obtained judgment in this Court, the defendant appealed to the Court of Exchequer Chamber, the judges of which were equally divided in opinion. A compromise having been entered into between J. C. Colville and the defendant, Hall, a deed bearing date the 8th May, 1865, was executed by the defendant, by which in consideration of £300 paid to him by J. C. Colville, he released and conveyed to him the lands and premises, the subject of the ejectment. There was also a motion on behalf of the attorney for the defendant in accordance with the terms of a cross notice, which had been served, that his costs incurred in this cause might be ordered to be paid by James Chaigneau Colville when

taxed and ascertained, or that the sum of £168 1s. 11d. be paid into Court to the credit of this cause to abide the result of the taxation of said costs, and that the amount of the defendant's costs when taxed and ascertained be paid to him out of said sum, or that he might be at liberty to proceed with the pending appeal to the House of Lords, and if necessary, that the deed of release of the 8th day of May, 1865, and made between the said James Chaigneau Colville and the said Joseph H. Hall, might be ordered to be delivered up to be set aside or cancelled; that the attorney's said costs be declared a charge on the lands and premises in the pleadings mentioned, on the grounds that the said release was executed collusively between the parties and the plaintiff's attorney for the purpose of depriving him of his said costs, and all security therefor in the lands and tenements by said deed released. The following cautionary notice had been served on the plaintiff and his attorney on the 13th May:—

"Sir,—Take notice that it has been intimated to me for the first time that you are effecting a compromise of this case behind my back, and without my sanction or knowledge. I beg to apprise you that I have engaged the services of a Parliamentary agent, and I have also retained counsel for the due prosecution of this appeal before the House of Lords. Take notice that I hereby caution you on behalf of your client against entering into any compromise of this appeal to my prejudice, and in the event of your doing so, I will apply to the Court to hold you and your client personally liable, or take such other steps against you as counsel may advise, and this notice will be made use of.

"13th May.

"E. H. REARDON.

"W. J. Bradley, Esq.

Attorney for J. C. Colville,  
and J. C. Colville.

The attorney, Reardon, in an affidavit made by him, charged that although defendant had signed the receipt to said deed the whole or greater part of said sum of £300 remained unpaid, and that neither said W. J. Bradley, J. C. Colville, or said J. H. Hall, ever gave him any notice of said compromise, and that he had up to the present conducted said proceedings at his own cost, and without any pecuniary assistance from Hall, and was entirely depending on Hall's interest in the premises. In a joint affidavit made by James C. Colville and Wm. James Bradley, his attorney, William J. Bradley stated that said Hall subsequently informed him that he, Hall, had shown such proposition to Carey, the town agent of Reardon, who, if so, must have been aware of the pending arrangement, and they both stated that the said sum of £300 was paid to said Hall on the said 8th May, 1865, and was so paid contemporaneously with the execution of said deed, and previous to the delivery of said deed, and that it was not until the 13th May, 1865, five days after the arrangement was carried out and the money paid, that the cautionary notice was served. Bradley further stated that in the interviews he had with the said Hall in regard to the arrangement of this matter, he

referred to the costs Mr. Carey might have against him Hall, when Hall stated that he, as auctioneer and valuator, had a set-off against any claim Mr. Carey might have for costs, that as to Reardon, he, Hall, had never seen him, or had any communication with him.

*Darley, Q.C.*, (with him *Palles, Q.C.*) in support of the motion to make absolute the conditional order.

*Burke, Q.C.*, (with him *MacMahon*) in support of the cross-motion.—Where there is a compromise, the attorney's lien attaches as much on that compromise as on a judgment obtained in his client's favour.—*Davies v. Lowndes* (3 C. B. 823); *Grace v. Lewis* (4 Ir. C. L. R. 491). In *Harbison v. Wilcox* (11 Ir. Law Rep. 500) the amount of money was not fixed, and Perrin, J. confines the right to compromise to any time before judgment.—*Welsh v. Hole* (1 Douglas, 238). [*Monahan, C. J.*—All these are cases in which the suit was instituted by the plaintiff to recover something. Does the same rule apply in the case of a defendant's attorney defending an action?] I have not found any case which comes up to this. [*Christian, J.*—If an unsuccessful defendant has a sum of money given to him to buy off further litigation, is there any authority that his attorney has a right to prevent that. Your argument might be that if this were prosecuted to the House of Lords, and Hall's right established, the attorney would have a lien on that property, and that so if a sum of money be thus given to him as a substitute for that, that his lien is on that.] *Read v. Dapper* (6 T. R. 361). The affidavit charges that the compromise was entered into behind the back of the attorney for the purpose of depriving him of his costs. [*Monahan, C. J.*—Suppose the compromise was still *in esse*, and that Hall said he would not compromise the case unless the money were paid to him.] Then the case would be as it was; it would go on.

*Darley, Q.C.*, and *Palles, Q.C.*, contra.—In all the cases the notice was served before the money was paid. In *Davies v. Lowndes* a verdict was taken for the tenant by consent on the terms that £5000 was to be paid over. What is asked for cannot be done in the case of a defendant's attorney—*Quester v. Callis* (10 M. & W. 18); *Brumeson v. Allard* (2 Ellis & Ellis, 19); *Greene v. Fitzpatrick* (8 Ir. C. L. Rep. app. xxxi); *Scott v. Whiteford* (3 Ir. Law Rec. N.S. 273); *Barker v. St. Quintin* (12 M. & W. 441); *Mulligan v. Gilligan* (3 Ir. L. Rep. 323); *Shaw v. Neale* (6 Ho. of Lor. 581). The attorney has a lien on his client's papers, not on his property. We entered into the compromise not by collusion, but because we knew if we went to the House of Lords we would never get anything from Hall. There is a statement in our affidavit that Hall substantially informed Bradley that he had shown the proposition to Carey. It makes no matter whether Reardon was attorney for Hall or not. It is charged that Carey the town agent had notice of this arrangement, and it is not denied by him. He must have known the compromise never would have been made unless with his co-operation, so as not to have to pay the money twice. This case differs from all the cases. 1st, it is an ejectment; 2nd, it is the case of a defendant's attorney. Though there cannot be a compromise for

liquidated damages after notice of the attorney's lien, it is not so with unliquidated damages—*Ex parte Hart* in the matter of *Tovey v. Payne* (1 B. & Ad. 660). If the attorney has not a right to force the party to go on, he has not a right to adopt the compromise in part and obstruct it in part. Where the plaintiff's claim is for unliquidated damages, or where it is the case of a defendant's attorney, there is no such thing as lien. The ground on which the Court interferes equitably is solely the ground of fraud; and therefore before granting this application the Court must come to the conclusion that there was a conspiracy to deprive the attorney of his costs, and to ascertain that they must look at the object of this compromise not at the result. Both were doing the best for themselves, the plaintiff, and the defendant. The defendant was insolvent. The plaintiff did not care whether the defendant or his attorney got the £300, but he did not wish to litigate the case in the House of Lords with a pauper. The notice should have been such as would have entitled the party to go into the Court of Chancery and get an interpleader order. We would have been liable to an action if we did not carry out the compromise.

*M'Mahon* in reply cited *Swain v. Senate* (2 Bos. & Pul. N. R. 99).

MONAHAN, C.J.—Right or wrong Colville obtained a judgment of this court under which he was entitled to issue a *habere*, and was entitled to execution for costs against Hall. Hall appealed. The Court of Exchequer Chamber were equally divided in opinion; and being so, the judgment of this court was affirmed, the result of which was that Colville had the judgment of this court under which he had the right to recover the property and to have an execution for costs. That was the state of things when the compromise was entered into. At that moment there was no subject-matter on which Reardon had a lien except the chance of Hall being able to reverse the proceedings of this court; the result of which, if the attempt had proved successful, would have been that Mr. Reardon, whom I assume to have been the attorney, would have had a lien on the judgment for his costs. But that would have been the extent of what the lien would have been, so that the only subject-matter on which the lien could exist then was the chance of going to the House of Lords and reversing the judgment, not on the property at all. In that state of things a compromise was entered into. There is no doubt of the general rule, that a plaintiff and defendant may compromise without communication with their attorneys if it be *bona fide* and done for their own benefit; but it is certain a defendant cannot collusively enter into a compromise to deprive the attorney of the costs he would have got if he had gone on and got a judgment. I do not raise a question whether in the progress of the suit if the defendant's opposition is bought off, the same rule as to lien may apply; but be that as it may, the Court must come to the conclusion that the object of the compromise was not *bona fide*, but was to deprive the attorney of his costs. What are the facts here? We must take them on the affidavits. I do not doubt but that what money was advanced was previously advanced by Reardon. But Bradley says that in the whole of these proceedings Carey's was the name made use of; and that the

proposition having been made by Hall to Colville, he asked Hall in reference to Carey's costs, and that Hall then informed him of the compromise which was being made; and that Hall informed him it was true Carey had a claim, but that he (Hall) had a counter claim in the way of trade or business. It is impossible that we can come to the conclusion that the object was to deprive the attorney of his costs. There is no allegation on the part of Hall or Carey that Carey was not aware of what was going on. But the circumstances convince me that neither Colville nor Bradley cared at all whether the attorney got his costs or not, but that Colville's object was to buy off Hall's opposition. We would be going far beyond any case if we were to grant this application. Against that affidavit we cannot come to the conclusion that this was fraudulently entered into to defraud the attorney, even though the effect may have been that the attorney would lose his lien. Hall had been put in funds to the amount of £300. Carey lies by, having notice; and no notice is served cautioning Colville against paying the money over. We cannot make Colville pay this sum in addition to what he has already paid.

*Application refused.*

## Court of Exchequer.

Reported by William Albert Sargent, Esq., Barrister-at-Law.

[BEFORE THE FULL COURT.]

DUNBAR V. O'BRIEN.

*Motion to set aside defences for embarrassment—  
Common Law Procedure Act, 1853.*

*In an action to recover £105 10s. the summons and plaint contained the usual counts for money had and received, and on an account stated; defendant traversed these and pleaded set off, accord and satisfaction, and that there was an award; plaintiff replied to these pleas and at the same time applied to have them set aside on the grounds of embarrassment, and that they consisted partly of pleas in bar and partly of pleas against the further maintenance of the action. Held, that there be no rule on the motion, defendant consenting that plaintiff shall be at liberty to confess said defences against the further maintenance, defendant paying the costs hitherto incurred; and that the action should be stayed notwithstanding the pleas in bar.*

THE summons and plaint was issued to recover £105 10s. as money payable by the defendant to the plaintiff, for money had and received by the defendant for the use of the plaintiff, and for money found to be due from the defendant to the plaintiff, upon an account stated. To these counts defendant pleaded a traverse of the money had and received, and a traverse of the money found to be due. And for further pleas—set off, accord and satisfaction; and that this action was brought by plaintiff against defendant for the recovery of the said sum of £105 10s. as a trustee for one Margaret O'Brien, and for her sole use and benefit, and not otherwise, and at the time of the commencement of this suit, there were matters in dispute between the defendant and said Margaret O'Brien, relating to certain other alleged causes of

action of the said Margaret O'Brien, against the defendant, irrespective of the subject matter of the present action, and that after the commencement of this suit, it was mutually agreed between defendant and one Robert O'Brien, duly authorized in that behalf by plaintiff and said Margaret O'Brien, to refer all the said matters in dispute, including this action, to the arbitrament of one John Grattan, who having taken on himself the said arbitration, and considered said matters, duly made and published his award respecting the said matters so referred to him, and he thereby awarded that the defendant in respect of said matters, should pay to the said Margaret O'Brien, the sum of £120 15s 10d. in full satisfaction and discharge of said several matters aforesaid, and defendant paid said sum so awarded to the said Margaret O'Brien, by the delivery to the said Robert O'Brien, duly authorized in that behalf by the said Margaret O'Brien, and the plaintiff, of the defendant's cheque or order directed to the Manager of the National Bank of Ireland, Longford, for the payment to the said Robert O'Brien, or order, of the said sum of £120 15s 10d.; and said Robert O'Brien, by the authority of the plaintiff and the said Margaret O'Brien, accepted the said banker's cheque for said sum in full payment and discharge of the said sum so awarded as aforesaid, and in performance of the said award. Plaintiff replied to this defence as follows—"The said John Dunbar, the plaintiff, by way of replication to the defendant's defences of set off, says as to the first defence of set off, that the work and materials therein mentioned were respectively done and provided under a special contract, and not otherwise, whereby it was agreed between plaintiff and defendant, that defendant should act as agent for plaintiff in receipt of the rents, on the terms of being allowed a commission on the sums received by him as such agent, and the plaintiff says that all sums claimed by defendant and payable for such commission were allowed by plaintiff to defendant, on the settlement of accounts between them prior to the commencement of this action, and that the sum claimed by the plaintiff is independent of said commission. And as to the second defence of set off, plaintiff says that the only monies paid by him as agent as in the last replication mentioned all such monies were allowed by plaintiff to defendant, in the settlement of accounts between them prior to the commencement of this suit. And as to the 3rd defence of set off, the plaintiff says that no money was found to be due, upon accounts stated, as alleged."

*S. Walker* (with him *Sidney Q.C.*) for plaintiff, applied to have the pleas set aside on the ground of embarrassment, and that they consisted partly of defences pleaded in bar, to the entire cause of action, and partly of defences pleaded to the further maintenance thereof, and because same were inconsistent and contrary to the provisions of the Common Law Procedure Act, and also as regards the defences pleaded to the further maintenance of the action, because same were pleaded only to the claim of the plaintiff, and not to the costs and damages. Counsel relied on *Kelly v. Slater* (7 Ir. C. L. 55) *Gates v. Lord Holland* (7 C. & B. 336); *O'Brien v. Clement* (15 M. & W. 435); *Thompson v. Jackson* (1 M. & G. 242); *Suckling v. Wilson* (4 Dow. & Low 167); 22nd General Rule (Eng); Trin. Term,

1853; *Cook v. Hopewell*, (11 Exch. 555); *Kemp v. Balls* (10 Exch. 607.) In point of fact there was no award. [*Fitzgerald, B.*—Why not traverse the plea of award then?] I fall back on the English rule.

*M. Mahon* (with him *Morris Q.C.*) for defendant, in support of the pleas, relied on the Common Law Procedure Act, 1853, ss. 40, 57, 72; Russell on Awards, 324.

*Morris Q.C.* on same side—They have replied, and this puts them out of court, even though it was with notice that the replication was to be without prejudice to this motion. It is an unheard of proceeding, to reply to pleas, and then move to set them aside; you cannot blow hot and cold. The replication and notice of motion, actually bear the same date.

*Sidney, Q.C.* in reply—The pleas are inconsistent each is good by itself, but they cannot stand together. *Gabardi v. Harmer* (6 Dowl. & Low. 481); the Common Law Procedure Act, s. 72, only recognized the statutory right existing before the Act, but does not allow defendant to plead inconsistent pleas. Defendant must elect as to which pleas he will go on.

Ordered per Curiam—

That there be no rule on the motion, defendant consenting that plaintiff shall be at liberty, if he so desire, to confess the said defences pleaded to the further maintenance of the action, defendant paying the costs of this suit hitherto incurred, and thereupon that this action be stayed notwithstanding defendant's said pleas in bar.

N.B.—There was a cross motion by defendant, that plaintiff's replication to defendant's 1st and 2nd defences of set off, be set aside upon the grounds that same were so framed as to prejudice, embarrass and delay the fair trial of this action, and because it did not appear by plaintiff's replication to defendant's 1st defence of set off, what was the amount of commission payable by plaintiff to defendant as therein mentioned, nor did it appear thereby that the settlement of accounts therein mentioned related to the subject matter of said 1st plea of set off, or that plaintiff paid or satisfied defendant's claim in respect of said work and labour, or that on said settlement of accounts the amount of said set off, was not found due to defendant, or that defendant was not entitled to plead said work and labour, as a set off against plaintiff's demand in this action, and because the replication to defendant's 2nd defence of set off, did not show what monies were paid by defendant for plaintiff's use, or how they were so paid or how said monies were allowed by plaintiff to defendant on the settlement of said accounts, or that such settlement comprised said claim for money paid by defendant for plaintiff, or that the monies so paid by defendant for plaintiff, were paid, or how, or that in said settlement the amount of said set off was not found due to defendant, or that defendant is not entitled to set off same against plaintiff's claim.

The court after hearing the same counsel for both parties, ordered—

That plaintiff be at liberty to amend said replications, by traversing said pleas, and replying payment thereto without prejudice to the notice of trial already given, and that the issues served on defendant's attorney be amended, by adding issues on said replications, and that plaintiff pay defendant £5 for his costs of this motion.

**Court of Appeal in Chancery.**

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR, THE LORD JUSTICE OF APPEAL, AND FITZGERALD, B.]

BREDIN v. HEWITT.—June 20.

*Will—Construction of—Bequest of “whatever money I shall die possessed of”—What the word “money” comprehends.**The decision of the Lord Chancellor in Hewitt v. Bredin (ante, p. 85) affirmed.*

THIS was an appeal from a decretal order made by the Lord Chancellor in the case of *Hewitt v. Bredin*, reported supra page 85. The appellants were William Bredin, and his wife Eliza Selinda Maria O'Grady (now Bredin) the administratrix and widow of Hugh Hamon Massy O'Grady, who was the residuary legatee named in the will of the late Archdeacon O'Grady, whereby the said Archdeacon willed and bequeathed “whatever money I shall die possessed of to my brother the Hon. John O'Grady,” and after making several bequests, testator thus concluded—“I will and bequeath all the rest and residue of my property not heretofore disposed of to my brother Hugh Hannion Massy O'Grady, whom I appoint my residuary legatee.” The Lord Chancellor decided, firstly, that the sums of money secured to the testator by mortgage, as also the arrears of rent and rent-charge, interest, and dividends on consols and upon stock passed under the expression “money” to the Hon. John O'Grady; secondly, that the sums of money which the testator had invested in consols and new three per cent stock, went to the residuary legatee; and it was from the first portion of the Lord Chancellor's decision that the present appeal was brought. The arguments now addressed to the Court were mere repetitions of those in the Court of Chancery, supra p. 8.

THE LORD CHANCELLOR.—I have heard the case now fully reargued, and I adhere to the opinion I formed at the hearing in the Court below.

THE LORD JUSTICE OF APPEAL.—I agree with the Lord Chancellor in the conclusion he has arrived at.

FITZGERALD, B.—The question we have to consider here is what is the construction to be put on a bequest of “whatever money I shall die possessed of?” The deceased was possessed of two sums of £800 and £500 secured by mortgage, and also other moneys invested in government consols, and in government new three per cent stock. I entirely concur with the two other members of this Court that those two sums did not pass to the residuary legatee whose personal representative Mrs. Bredin is, but went to Mr. John O'Grady under the bequest of “whatever money I shall die possessed of.”—*Shelmer's case* (Gilbert's cases in Equity, 202) has long since decided what the law is on this point. I also agree with my Lord Chancellor and Lord Justice of Appeal that the cash, arrears of rent, and rent charge, interest and dividends on consols, and upon stock, due to the testator at the time of his decease, pass likewise under the term money to the Hon. John O'Grady.

*Order of the Lord Chancellor affirmed.*

**Court of Chancery.**

Reported by Oliver J. Burke, Esq., Barrister-at-Law

M'CAUSLAND v. WATERS.—June 28.

*Will—Construction of—Bequest of “Money”—Demonstrative Legacies.*

*Testatrix by her will, bearing date 26th December, 1859, desired “that my dear brother M.W., will get the sum of £1000 of my money, which is lodged in the Bank of Ireland. I also wish my dear sister C.W., will get the sum of £500 of the money I have lodged in the Bank of Ireland. Now my dear sister S., I wish you to get the remainder for yourself and daughters, after my death; I mean the money that remains in the Bank of Ireland.” Testatrix never had any cash account whatever with the Bank of Ireland, nor money lodged on deposit receipts therein. She was however possessed of a sum of £6,179 3s. 3d., Government New three per cent stock, standing in her name in the books of the Governor and Company of said Bank. Held—that said stock passed under the bequest of “money”—and also that the said legacies of £1000 and £500 were to be paid in money and not in stock, and that same were not liable to the debts and funeral expenses of testatrix.*

THIS was a cause petition filed by Sarah Jane M'Causland, the personal representative of Mary Barber, deceased, to take the opinion of the Court upon the construction to be put on the will of said Mary Barber, which will was in the form of a letter addressed to her sister, Susan M'Causland, and was as follows:—“26th December, 1859. My dear sister Susan,—I wish you to understand my wish, should it please God to call me out of this world before you. I would like to be interred with my dear father and mother in St. James's churchyard in Dublin. Now my worldly affairs. My wish is this: that my dear brother Marcus General Waters will get the sum of £1000 of my money which is lodged in the Bank of Ireland. I also wish my dear sister, Charlotte Waters, will get the sum of £500 of the money I have lodged in the Bank of Ireland. Now, my dear sister Susan I wish you to get the remainder for yourself and daughters after my death, I mean the money that remains in the Bank of Ireland; and I also leave you and the girls my wardrobe to dispose of as you please, for I feel grateful to you for all your kind attention to me at all times. My dear sister, I hope you will approve of all I have written and see my wishes executed at my death. Your affectionate sister,—Mary Barber. Witness, Elizabeth Semple, Joseph Semple.” The petition stated that said Susan M'Causland, to whom said letter was addressed, died in the lifetime of Mary Barber, the testatrix, whose death occurred on the 25th December, 1864; that Marcus Waters and Charlotte Waters were the surviving brother and sister and next of kin of deceased Mary Barber; the petitioner, Sarah Jane M'Causland, and her sisters, Elizabeth, Catherine, Susan, and Charlotte, who were the daughters of said Susan M'Causland, and nieces of the testatrix, were the legatees mentioned in the said

will, living at the death of testatrix. That on the 4th of April, 1865, letters of administration with the will annexed of the personal estate and effects of the said Mary Barber were granted forth of her Majesty's Court of Probate to petitioner. The petition then stated that Mary Barber, at the time of making her will and at the time of her death, was possessed of a sum of £6,179 3s. 3d. Government New three per cent. stock, standing in the books of the Governor and Company of the Bank of Ireland in the name of the said Mary Barber; but neither at the time of her making her said will, nor at the time of her death, nor at any other time, had the said Mary Barber any cash account with the said bank, or any sum of money on deposit receipt or otherwise, as distinguished from the said stock lodged therein. That Mary Barber purchased the whole of said stock by investments of her own money made at various dates ranging from the 19th of October, 1845, to the month of August, 1859. That with the exception of her wardrobe and a few trifling articles, the said stock constituted the whole property of said Mary Barber at the time of her decease. The petition then stated that from a memorandum in Mary Barber's handwriting, of 18th April, 1855, it appeared that a sum of £3489, portion of said moneys, up to that date, which had been invested by Mary Barber, in the purchase of £3677 portion of said stock, was described as "Cash in the funds;" and that deceased was in the habit of describing her stock as "Cash in the funds," and as her "money in the Bank of Ireland;" that the assets of Mary Barber, independently of said stock, were insufficient to pay the debts and funeral and testamentary expenses. The petition then prayed that it might be declared that on the true construction of the will of said Mary Barber deceased the said sum of £6,179 3s. 3d. Government New three per cent. stock, standing in the name of said Mary Barber in the books of the governor and company of the Bank of Ireland, passed under the said will by the said bequests of money of the said Mary Barber in the Bank of Ireland, and that the Court might give such directions as in that event might be required, and that it might be declared that the said bequest of £1000 and £500 were bequests of so much stock, and that the said bequests were liable to contribute towards the payments of the debts and funeral and testamentary expenses of the said Mary Barber, along with the said residuary bequest; and that the estate of Mary Barber might be administered, &c.

Ball, Q.C. (with him Webb) submitted on behalf of petitioners that upon the true construction of the will the stock passed under the bequests of "money." It was sworn in the cause petition that Mary Barber had no property whatever to answer the description of money in the Bank of Ireland excepting the stock, and that that stock was purchased by her money.

That "stock" passes under the bequest of "money" is a question now set at rest by the decision arrived at in the case of *Hewitt v. Bredin* (supra 10. Ir. Jur. N.S., 86); where a long judgment was pronounced by the Lord Chancellor, and that very case was affirmed on appeal within this last term before the Court of Appeal in Chancery (*vid. supra*, 265); *Day's case* (1 P. Wms. 286); *Chapman v. Reynolds* (28 Beav. 222); now there was nothing else for the bequest to

operate upon; *Knight v. Knight* (2 Giff. 261) was an authority for admitting the memorandum of Mary Barber in evidence. Upon the next point, as to whether all the legatees should contribute equally to the payment of the debts and funeral expenses, it is submitted that the Court must substitute in the will, "stock" for "money;" then also will the Court hold that the bequests of sums of stock, as distinguished from sums out of stock, were specific bequests. *Kisby v. Potter* (4 Ves. 748); followed by *Hosking v. Nichols* (1 Young & Coll. C.C., 478); and if there were specific bequests, then *Page v. Leapingwell* (18 Ves. 463) shews that the residuary bequest was specific also, and consequently that all the legatees should contribute equally to the debts and funeral expenses.

Brewster, Q.C., and Ryan were for the respondents, Major-Gen. Waters and Charlotte Waters, next-of-kin. —The statement as to the purchase of the stock and the statement of the nature of Mary Barber's property are not evidence upon the construction of the will of Mary Barber. You must read the will in its four corners, and that will has left the Government stock undisposed of; and therefore the money to be realized by the sale of said stock is now distributable between the next of kin of Mary Barber, that is to say, one-third to her brother, the respondent, Marcus Antonius Waters; one third to her sister, Charlotte Waters; and one-third to the representatives of Susan McCausland. The memorandum of the 18th of April, 1855, cannot be looked at for the purpose of construing the said will; and neither can the conversation of Mary Barber, nor what she was in the habit of calling stock she was possessed of be admissible in evidence; but supposing that the stock passed under the bequest of "money" we then at all events strongly contend for this point, namely, that the bequests to the respondents, of £1000 and £500, were not specific, but were demonstrative. The authority of *Kisby v. Potter* relied upon on the other side has been doubted; besides the wording of the will, of Mary Barber, was very peculiar—the words were "the sum of £1000 of my money which is lodged in the Bank of Ireland;" and again "the sum of £500 of the money I have lodged," &c.; this shews that the testatrix contemplated bequests of sums of money and not of stock. *Lambert v. Lambert* (11 Yes. 607); a demonstrative legacy is not liable to abatement with the general legacies. *Acton v. Acton* (1 Meriv. 178); *Livesay v. Redfern* (2 Y. & Col. 90).

THE LORD CHANCELLOR.—I am clearly of opinion that the sum of £6,179 3s. 3d. Government new three per cent. stock, standing in the books of the Bank of Ireland in the name of Mary Barber, passed under the bequest of money; and the legacies of £1000 and £500 bequeathed by the will are bequests of so much cash to be paid out of the new three per cent. stock. That being so, the bequests of £1000 and of £500 are demonstrative legacies, and not liable to contribute to the payment of the debts and general legacies.

## Court of Queen's Bench.

[Reported by William Woodlock, Esq., Barrister-at-Law.]

IN RE MOYLAN.—May 25.

*Habeas Corpus—Civil side of Court.*

*A writ of habeas corpus granted to issue on the civil side of the Court.*

Michael O'Loghlen moved for a writ of *habeas corpus ad subjiciendum* to bring up the body of Laurence Moylan, a prisoner in the Four Courts Marshalsea. The circumstances under which the application was made appear below. The Court granted the motion, and counsel then applied that the writ should issue on the civil, and not on the Crown, side of the Court, this being wholly a civil transaction, and it being a matter of some importance that on account of the serious nature of the fees on the Crown side the prisoner should not be compelled to take his writ on that side.

After some consultation the Court allowed the writ to issue on the civil side of the Court.

IN RE MOYLAN.—May 31, June 3.

*Habeas Corpus—Sheriff—Marshal—Actual and legal custody—St. 5 & 6 Vict., c. 95.*

*L. M. being a prisoner in the Four Courts Marshalsea, an order was made by one of the judges of the Court of Bankruptcy and Insolvency for his attendance in Court in order that he might be examined in an insolvent matter then pending. He attended twice in custody in pursuance of the order. On the first day he was not examined, and was sent back to the Marshalsea. The next day he was examined, and when his examination was over he was again sent back to the Marshalsea. He protested against being sent back, on the ground that after what had occurred, his further imprisonment was illegal. A writ of habeas corpus having been obtained, and the discharge of L. M. having been moved for, it was held that the custody was legal, and that he could not be discharged.—(O'Brien, J. dubitante). Notwithstanding the st. 5 & 6 Vict., c. 95, a prisoner committed to the Four Courts Marshalsea, remains in the legal custody of the sheriff, though in the actual custody of the marshal.*

THE writ of *habeas corpus* having issued in this case the prisoner was now brought under it before the Court, and the sheriff of the city of Dublin and the marshal of the Four Courts Marshalsea both made returns to the writ. The returns were very voluminous, but the facts of the case may be stated shortly as follows:—Laurence Moylan, the prisoner, was on the 27th of February last arrested by the sheriff of the city of Dublin under a writ of *capias ad satisfaciendum*, marked for £74, and issued out of the Court of Exchequer. He was lodged in the Four Courts Marshalsea, where he still remained. There being a matter of *Doyle an insolvent* pending in the Court of Bankruptcy and Insolvency, Judge Berwick on the 27th March made an order that Moylan should be brought up to be examined in that matter. He

was accordingly brought up in custody under that order on the 29th March, but he was not examined upon that day and was taken back to the Marshalsea. Next day he again attended under the order, in custody as before, and was examined. After his examination he was again taken back to the Marshalsea, but he remonstrated against it, and he returned under the influence of *vis major*. Subsequently he made an application to the Court of Exchequer for his discharge upon the ground that his being brought back into custody was, under the circumstances, illegal, but that court refused to grant the application, Fitzgerald, B. however, dissenting.\* The prisoner being now before this court under the writ of *habeas corpus*, and the returns having been read it was moved that he should be discharged from custody.

Jellett, Q.C., and Michael O'Loghlen, for the prisoner.—There was a voluntary escape in this case, and the custody is now illegal. The prisoner was in the sole custody of the marshal—st. 5 & 6 Vic. c. 95. *Ex parte Higgins* (9 Ir. L. Rep. 414) will be cited to show that the prisoner was in the legal custody of the sheriff, though in the actual custody of the marshal. The notion is fanciful, but at all events *Ex parte Higgins* does not decide any such proposition. All that it decides is, that it is not necessary that there should be a written committal by the sheriff with the marshal—*Lamphier v. —* (2 Ir. Jur. 291); *Ex parte Staunton* (5 Ir. L. Rep. 581). There never could be an escape if the prisoner was still held to be in the custody of the sheriff. If such an alteration was intended to be made in the law, it would not have been done by such an Act of Parliament as the 5 & 6 Vic. c. 95.

Sidney, Q.C., contra.—The custody is still legal. Notwithstanding the Act 5 & 6 Vic. c. 95 the prisoner continues in the legal custody of the sheriff, though in the actual custody of the marshal—*Ex parte Higgins*. Test the matter in this way: the sheriff is bound to obey every writ of *ca. sa.*; he arrests a man and lodges him with the marshal, then a fresh writ comes in against the person of the same debtor. Would it be a good return to say that prior to the second writ he had handed the prisoner over to the marshal, and that he was still in the marshalsea? Such a return would be bad; it would not be a return of performance of the writ—*Brown v. Copley* (8 Sc., N. S., 350).

*Cur. adv. vult.*

June 3.—LEFROY, C.J.—In this case we are of opinion that the prisoner has not shown a title to be discharged. I am of that opinion first on the authority of *In re Higgins*, in which this point was adjudged upon, and upon the Act of Parliament transferring the custody, which under the old system the sheriff had in his own gaol, to the marshal,—the Act 5 & 6 Vic. c. 95, which abolishes that protection which the sheriff had for himself, by having a gaol which he could consider as exclusively his own. I

\* The case in the Court of Exchequer is not yet published, but a report of it was in Court and was handed up to the judges.



have already said that the construction of that Act and the effect of it were well and correctly stated in *In re Higgins* by the judges who decided that case, which case has received the sanction of the Court of Exchequer; and the very reason of the thing does so coincide with the principle—with the provisions of the Act itself, as to leave no doubt on my mind, not only from the cloud of authority of former decisions, but upon the just and reasonable ground of construction to be put upon statutes and upon that great principle of the law that *lex nemini injuriam facit*. When a change is made in the law the presumption is that that law, that legislation which goes to affect the common law rights of the parties is not to be construed in such a way as to injure the common law rights of any party unless the terms of it absolutely require such a construction, and that construction is not unnecessarily and for no object of the Legislature to be collected from the Act. I shall again have occasion to refer to the statute, but there is another ground on which I am against the discharge of this party. The principle of the law when a party is arrested by due process is, that there are reciprocal duties and obligations arising from that. When a party is arrested, as here, under a *capias*, directed to the sheriff, and the sheriff makes his arrest, there are reciprocal duties and obligations thrown by the law both on the sheriff and the party whom he has taken into custody. The sheriff is answerable from the moment he makes the arrest for the safe keeping of the party till he is produced before the court for the object for which he is confined; but there is a reciprocal duty thrown on the other party to remain the prisoner of the sheriff until he is duly discharged. Unless that officer, who is made liable for his safe custody, concurs in letting him go, it is an escape; and though the doors were open, it is a violation for him of his duty to walk out, and it is an escape for him to do so unless he has the consent of the officer. That I consider to be a true and sound principle of the law imposing an obligation and a duty in point of law upon the party so arrested to remain prisoner until he be lawfully discharged. That is the principle of the law. Well, what was the case of the sheriff before the change in the law? He had a gaol to himself in which he could lock up his prisoner; but if the doors of the prison were left open in such a way as not to implicate the sheriff in a concurrence, the prisoner had no right to go out; he had no right to make for himself an exemption by committing that which was a violation of the law—namely, escaping from legal custody. The Act of Parliament, however, which changed the law by depriving the sheriff of his protection, could not give to the prisoner a benefit by implication; but I need not even raise the question, because the provisions of the Act are express that he shall remain in the custody of the marshal until duly discharged. I admit he may be discharged from that custody by what is called a voluntary concurrence in what would otherwise be an illegal escape; but there must have been that concurrence, for the principle is not now to be disputed that a mere negligent escape will not suffice; and is it to be argued that on the construction of this Act the effect of the legislation has been to vary the legal rights and obli-

gations of the parties? The Court of Common Pleas, consisting of very able and learned men, of whose talents I may be permitted to express my opinion, as well as of their perfect competence to decide any question of law, and to give to an Act of Parliament the soundest construction, that Court decided that the construction to be put on the new Prisons Act was that which should secure to both parties the *status* in which they stood antecedently with respect to the consequences that might accrue from an escape. They decided that a prisoner was from henceforth to be considered as in the actual custody of the marshal and in the legal custody of the sheriff. That is stated to be a fancy. Why what was the case under the law as it stood when the sheriff had a gaol to himself? Did he live in the gaol? No; he entrusted to another the actual custody of his prisoners; but did anyone imagine for a moment that that took from the sheriff his responsibility? He stood in the same light not merely as to his responsibility, but he was the person through whom only, if there was any other process to be served for the purpose of operating as a detainer, it could be served, and therefore the construction given to the law, which cannot be intended unnecessarily to affect the rights and obligations of the parties as to collateral matters, is no fanciful construction. It is applying to the new state of things the principle which was applicable to the old one. The prisoner was in the actual custody of another, but still he was in the legal custody of the sheriff under the old law. So he is now. And he being in the actual custody of the sheriff, and not having escaped by any voluntary act of the sheriff, the sheriff had him in the state in which he was entitled to have him—in his own legal custody, and in the custody of the person to whom the law entrusted his actual keeping. The Legislature could not be intended to make such a monstrous enactment, so mischievous to the sheriff and the public, as to alter the responsibility which every man is acquainted with; and on the other hand they cannot be supposed to have intended what never was presumed by anyone, and that was—that the prisoner could make for himself a legal escape even if the door of the prison was left open. He was still in the legal custody of the sheriff, and therefore it at any time before action the sheriff could seize him he is entitled to have him before the court to give an account of how he has acted. In this case there is a question I shall not enter further into at present; that was, whether the judge of the Insolvent Court had not a perfect right to issue a *habeas corpus*. Has he lost that right because it was given to the court instead of the commissioners? Now the same law and same jurisdiction is administered by judges which formerly was administered by commissioners. But is there anything in the terms in which that provision is made to alter the law upon this collateral subject? This therefore is my opinion; but I feel so much support in following the case in the Common Pleas followed by that of the Exchequer, that I think that a more solid ground to decide upon than whether the judges of the Court of Insolvency have lost the jurisdiction which the Court had when it consisted of commissioners. Upon these grounds I am clearly of opinion that this party has not shown

any right to be discharged from the custody under which he was brought before the Court.

O'BRIEN, J.—I have some doubt in concurring with the decision at which the Court has arrived, but that doubt is not sufficiently strong to make me dissent from the judgment of the Court. My difficulty is upon the ground which was relied upon by Fitzgerald, B. St. 5 & 6 Vic. c. 95 especially provides that all debtors shall be committed to the Four Courts Marshalsea, and then "that the persons imprisoned in the Four Courts Marshalsea shall be there in the custody of the marshal, from whatever court or by whatever legal process they shall severally have been committed." It is clear from that that the sheriff ceases to be responsible for the escape of the prisoner when once committed to the Marshalsea; whether that escape arises from the negligence or the deliberate consent of the marshal, the sheriff is no longer responsible. Before that Act the gaoler was an officer of the sheriff, appointed by him and removable by him; and on plain principles of law the sheriff was responsible for his negligence or misfeasance. The prisoner, being in the actual custody of the sheriff's deputy, was for all purposes in the custody of the sheriff himself. But under the Act of 5 & 6 Vic. c. 95 the state of things was altered. The sheriff is obliged to lodge the prisoner in the Marshalsea. The governor of the Marshalsea was not appointed by the sheriff, who had no control over him; besides, the Act says that the prisoner shall be in the custody of the marshal. I think it clear on that that the sheriff, when once he lodges the prisoner in the Marshalsea, is exempt from all responsibility. That being so, the question is, whether the escape with the consent of the marshal is to be considered a voluntary escape within the class of cases deciding that where there is a voluntary escape he could not afterwards retake the prisoner. That is a question on which I confess I feel considerable doubt. In the case of *Ex parte Higgins* there were some expressions used by members of the court bearing out Mr. Sidney's construction of the Act. But, on the other hand, there were also expressions used which are in favour of the construction contended for by Mr. Jellet and Mr. O'Loughlen. The actual decision in *Ex parte Higgins* does not bind the present case, that decision being that where the Act directed the sheriff to lodge the prisoner in the Marshalsea it was not necessary for the sheriff to give a written order of committal to the marshal when so doing. Well, certainly the judgment of the members of the Court of Exchequer is well worth considering on account of the learning of the judges and the care they have shown; but I must say that the difficulty raised by Fitzgerald, B. is strong with me—namely, does not the principle apply to the case of a voluntary escape with the consent of the marshal? Upon that I confess I am unable to come to the conclusion that the other members of the Court have arrived at; but I do not think the doubt which I entertain sufficient to make me dissent from the rest of the Court. It was not contended that the order of the judge of the Insolvent Court was right.

HATTA, J.—I concur with my Lord Chief Justice in holding that the prisoner cannot be discharged. As I have come, however, to that conclusion upon

different grounds, I may be allowed shortly to express them. The facts of the case are few and simple. The party, Laurence Moylan, who has sued out this writ, was arrested by the sheriff of the city of Dublin under a writ of *capias ad satisfaciendum* issued out of the Court of Exchequer for £74. In execution of the sheriff's duty Moylan was lodged in the Marshalsea, and while he remained a prisoner in the Marshalsea a transaction occurred in another place to which I shall now refer. Judge Berwick sitting in the Court of Bankruptcy and Insolvency had before him the petition of a person named Doyle. In the course of the inquiry in Doyle's case it was suggested that evidence could be given by Moylan, and the judge, anxious to avail himself of every means of information made an order for his attendance, and he attended on the 29th March. He was not examined on that day, but was present to be examined, and on the case not coming on, he was desired to attend the following day. He did so, and was examined. He attended in the custody, as before, of the marshal, and now, being informed of his legal rights, he presses them, and says that this was an escape, and that he was entitled to take advantage of it, and to be discharged. The question is, whether under the circumstances he is so entitled to be discharged. In the argument of this case it seems to be taken for granted that the order of Judge Berwick was illegal. Counsel on neither side thought it worth while to expend a sentence on it. It was hinted that the law which authorised Judge Berwick to make the order was repealed—that he had the authority by law before that, but that by the new law of 1857, his power was not renewed. It seems to me, however, that that is not quite a correct statement of the whole of the judge's power, and that looking at the 19 & 20 Vict. c. 68, it may be argued that the judge's power in this respect was not taken away. That was the New Prisons Act, and that after enacting that the jurisdiction of the Queen's Bench should be transferred to the Lord Lieutenant, provides in section 3 that "the judges of her Majesty's Courts of Queen's Bench, Common Pleas, and Exchequer, or of her Majesty's High Court of Chancery or Admiralty, and the commissioners of the Court of Bankruptcy, and the commissioners of the Court for the Relief of Insolvent Debtors in Ireland, shall have and exercise the same powers with respect to ordering the marshal of the Four Courts Marshalsea to take into custody any person committed by them respectively, or to bring before them respectively any prisoner in his custody, which the said judges now have with respect to the marshal of the said Four Courts Marshalsea." Now, before that, undoubtedly, any judge of this Court could have issued his *habeas corpus ad testificandum* to bring up any party, and as it is said here now, as long as these persons were satisfied with their title of commissioners, they could have done so, but that it happened that there was a change of the law the year after this Act, which gave them more dignity, but less power; but however, nevertheless these persons, while commissioners, could under this make the order, and I take that is a plain statutory announcement that for the discharge of the duty of the old commissioners it was deemed necessary to invest them

with a power to call before them persons in the marshalsea. I am satisfied that the new court is analogous to the old commissioners, and therefore that this bringing up of a party for the occasion in question may be still within their necessary powers, which they continue to retain. But be that as it may, it is not necessary for us to decide the question, but supposing that it was an illegal, strictly an illegal act, let us see how the case stood independently of that. By the stat. 5 & 6 Vict., c. 95, the Sheriff's Prison was taken from the sheriff, and it was enacted that the Four Courts Marshalsea should be the only prison, and that the persons imprisoned in the Four Courts Marshalsea should be in the custody of the marshal from whatever Court or by whatever legal process they should severally have been committed. Now, I may say here I do not mean to enter into a discussion which I do not quite comprehend—namely, the discussion in *Ex parte Higgins* as to legal and actual custody, nor do I think it necessary to do so, for I intend to base my judgment on the ground that the Act has placed the prisoner in the actual custody, and sole custody, of the marshal. It goes on to say, “that all securities taken by any officer of the Four Courts Marshalsea for the performance of his duty respecting prisoners now confined in the said Four Courts Marshalsea shall enure for securing the performance of the like duty respecting the prisoners who shall be confined in the same prison under this Act; and all rules, orders, and enactments now in force respecting the prisoners now in the same prison . . . shall be taken to apply in all respects to all the prisoners who shall be confined therein under this Act.” So that after the passing of this Act, every person who was lodged in gaol, as this man was, by writ of *habeas corpus ad satisfaciendum*, was, to all intents and purposes, a prisoner of the Four Courts Marshalsea, and all enactments as to prisoners of the marshalsea apply to prisoners under the new Act. That refers us to the question were there any enactments to be considered here that formerly applied to the Four Courts Marshalsea, and to the old Marshalsea prisoners, and therefore to these new ones? I find the Act of 8th Anne, c. 7, which is entitled “An Act for the better preventing Escapes out of the Prison of the Marshalsea of the Four Courts.” It recites that “whereas divers persons legally committed by her Majesty’s several Courts of Record at Dublin to the custody of the marshal of the Marshalsea of the said Court upon actions for the recovery of debt or damages, or for contempts in not performing orders or decrees made in her Majesty’s Court of Equity, and likewise persons committed in execution have by corrupt and illegal practices obtained liberty to escape and go at large,” it enacts that if any such person shall “make any escape from the custody of the marshal of the said Courts for the time being, or from the prison of the said marshalsea, or shall go at large at any time,” it shall be lawful for any judge of the Court in which the action under which the party was imprisoned arose to give a warrant authorising the arrest of the party at large, and that it shall be lawful for the sheriff of any county in which the party is at large, to arrest him and commit him to gaol under that warrant. Now, that Act first of all seems to say this,

that whether an escape is voluntary or by prison breach, or how it is, no person may have an escape, and therefore it seems to be that if a person goes out without lawful authority, he is liable to this warrant and may be lodged in gaol. We have had a good deal of argument as to escape, but I have observed that no case was cited in which on such a constructive voluntary escape as here, the person was allowed to seek a remedy, and the Act here does not speak of a person who escapes in the legal sense of the word, but a person who has got out and been at large—a person against whom a warrant may be directed, and it would be to the last degree absurd if when the judge asked the sheriff where was his prisoner, he was to say he wanted a warrant for a voluntary escape, and take him out of the Marshalsea, and take him to Richmond Bridewell. The only way of getting out of that is to hold that the Act of Parliament only contemplated actual escapes, and gave a remedy to the creditors: it speaks merely of escape and going at large. Therefore, it appears to me that what we are to deal with now, is not at all a case within the meaning of this. This person never for a moment was at large. It may be there was a voluntary escape in one sense of the word. The creditor may not have had all the duress of the prisoner which he was entitled to, but we have nothing to do with that. Now, it appears to me that this person here never for a moment being at large, has never, so far as he himself is concerned, escaped at all. He has not for a moment been at large, and if the officer of the Four Courts Marshalsea has done what was illegal, he may seek his remedy by action, but has no right to any remedy under the *Habeas Corpus Act*, which only speaks of persons restrained of liberty to which they were entitled. Assuming, therefore, that this writ of *habeas corpus* was rightly granted, this person has not entitled himself to any discharge by this Court; he was always in the actual and legal custody of the marshal of the Four Courts, and if he complains of any abuse of the marshal, he has his remedy by action. Let me also, before parting with this case, say that this was not a case in which the writ of *habeas corpus* should ever have been granted, for the stat. 56 Geo. 3 specially excepts the Court from interfering in any case where the person was imprisoned for debt, which was the case here, for the writ which was issued from the Court of Exchequer was perfectly regular. If there was any irregularity, the Court out of which it issued could redress it, but I think this Court should not have issued the writ of *habeas corpus*, and at all events that the prisoner has no remedy under it.

FITZGERALD, B.—When the order for the *habeas corpus* was made in this case, we entertained considerable doubt as to granting it, but we issued it when pressed to do so, in deference to what took place in the Court of Exchequer. That Court was divided in opinion, and we could not say, therefore, that it was not a proper case to issue the writ. With respect to the order of the Court of Bankruptcy and Insolvency, that Court exists entirely by statute, and I confess my impression would be that there was no legal foundation for that order. The present Court of Bankruptcy does not possess the powers of the old Court. The

case was, therefore, argued on that basis, and it was considered that if this gentleman was in the lawful custody of the sheriff, though in the actual custody of the marshal, according to the decision in *Ex parte Higgins*, there was no escape such as to prevent the sheriff from confining him again, and it was argued principally on the point whether he was or not in the custody of the sheriff. That question turned on the 5 & 6 of the Queen, and we were referred to *Ex parte Higgins*. For twenty-three years since the passing of the Act there has been an interpretation put on it that the effect of the Act was to place the prisoner in the actual custody of the marshal, but that he remained in the lawful custody of the sheriff also. That has been acted on in this way, that when a party is in custody, a detainer goes to the sheriff. It was further acted on in *Page v. Williams* (1 Ir. C. L. R. 527), for the writ of *habeas corpus* in that case went to both sheriff and marshal; and further, the Court of Exchequer in this case has determined that the principles of *Ex parte Higgins* contained the true interpretation of the 5 & 6 Vict. I confess that on this motion I am not inclined to overrule what has been going on for twenty-three years. On this motion there is no appeal from our decision. We would be overruling the decision of a co-ordinate Court, and we would be doing that on a motion where there is no possibility of appeal. I am not inclined to do that, and therefore I think we should not discharge the prisoner on motion, but leave him to decide the lawfulness of his custody by his action, which will give him an ample remedy. If I were now called upon to express an opinion on *Ex parte Higgins*, and the interpretation to be put upon the 5 & 6 Vict., my opinion would be that I could not follow either the rule in *Ex parte Higgins* or the interpretation of the Act, for I find that the marshal of the Four Courts has his prison, but his name is the marshal of the Four Courts; he is the officer to receive prisoners. We find in this Act, one abolishing the sheriff's prison, that it directs not alone the transfer of the prisoners in the custody of the sheriff, but it further directs that prisoners of this Court shall be placed in that gaol to be in the custody of the marshal. The inclination of my opinion, if I were to express it, would be, that when placed in the prison of this Court, they were taken out of the hand of the sheriff; that he had performed his duty, and that they were from that moment in the custody of the Court itself, and a simple interpretation of that kind would free us from all the difficulties which would flow from the notion that he is in the actual custody of one man, and the legal custody of another. I think, however, that is a question which should be determined in some proceeding where there is an appeal. It is to be regretted that so many matters which should have been brought before us were not brought before us. There is the important topic for which we are indebted to our brother Hayes, the statute of the 8th Anne, which has a most important bearing on the proposition which I put to Mr. O'Loughlen when he moved for the writ, if he had any authority shewing that on a constructive escape the Court had, on the application of the prisoner, granted a writ of *habeas corpus* to the detriment of the execution creditor, the result being that

the creditor was left to his action against the marshal. How much more strongly does that affect the case, when we come to look at the statute of Anne, which with reference to this prison enacts that there shall be no escape, because a party does not, by escaping, relieve himself from custody, and any person may come and ask for a warrant against him. That affords an answer to Mr. Jellett's argument that upon the construction which we give to the Act there could no longer be an escape. I think that statute is an answer to that. As long as we are to have arrest for debt, the law ought to be as the Chief Justice has stated it, that there is an obligation on the prisoner to remain in prison till payment of the debt or discharge by due course of law. Without expressing any opinion on *Ex parte Higgins*, I think we ought not, on motion in the present case, to reverse what has been done by the Court of Exchequer, and we therefore must remand the prisoner to custody.

An application was made that the marshal should have his costs of appearing on the motion, but the Court held that they had no jurisdiction to give costs in cases of *habeas corpus*.

## Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

TOMLINSON v. HEWITT.—June 14, 1865.

*Principal and agent—Privity of contract.*

In an action brought to recover an amount due by defendant to the plaintiff for commission, factorage, and agency business, it was proved that at a meeting of masters of vessels in the Whitehaven coal trade held in Dublin in 1858, certain rules were agreed to, and amongst them the following—that an agent should be appointed for the Dublin and Kingstown markets, to be named by the masters and approved of by the owners; that the agency should be under the control of a Whitehaven committee of seven managing owners; and that the agent should receive one penny per ton, register tonnage, from each vessel per voyage. These rules were forwarded to Whitehaven, and a memorandum recommending the plaintiff as a fit person to be appointed agent was there signed by a considerable number of owners. The defendant, who was part owner of certain vessels in the trade, for the tonnage of which, since April, 1860, he was sued in this action, attended the meeting in Dublin and signed the memorandum in Whitehaven. The plaintiff deposed that at a subsequent meeting in Whitehaven, at which he alleged the defendant was also present, he was appointed agent. The judge, with the consent of both parties, left to the jury certain questions, to which they returned for answer that in 1858 the plaintiff was employed as agent with the defendant's sanction, in pursuance of the resolutions; that the committee were still in existence and had not discontinued the plaintiff's services; and that early in 1860, previously to the arrival of any of the vessels, the subject of the action, the defen-

*dant repudiated the plaintiff. The judge directed a verdict for the defendant. Upon motion to turn this verdict into a verdict for the plaintiff, Held, either that there was no contract entitling the plaintiff to sue the defendant, or that it was terminated when the defendant gave the plaintiff notice.*

THIS was an action brought to recover £30 13s. 8d. due by the defendant to the plaintiff for commission, factorage, and reward for agency business done by the plaintiff for the defendant at his request. The summons and plaint also contained a count for work and labour, and a count for money found to be due on an account stated. The defendant's first defence denied that any commission, factorage, or agency business was done by the plaintiff as in the first count alleged; and the second and third defences traversed the second and third counts respectively. The issues were in the terms of the defences. It appeared at the trial before Monahan, C.J. at the Hilary assittings, that in 1858 the Whitehaven coal-trade being in a depressed condition, a meeting of the masters of vessels and others interested in the trade was held in Dublin, at which certain rules and regulations were agreed to, and amongst them one that an agent be appointed for the Dublin and Kingstown markets, to be named by the masters and approved of by the owners at a general meeting; and another, that the agency should be under the control of a Whitehaven committee consisting of seven managing owners; and another, that the agent was to receive one penny per ton, register tonnage, from each vessel per voyage. The defendant attended this meeting. The rules were subsequently forwarded to Whitehaven; and a memorandum recommending the plaintiff as a proper person to be appointed agent was there signed by a very considerable number of owners and masters of vessels, and amongst them the defendant, who in this action was sued for commission at the rate of one penny per ton of coal due by the "Jane," the "Traveller," and the "William," of which he was the part owner and ship's husband. The plaintiff deposed that at a subsequent meeting in Whitehaven at which the defendant was also present, he was unanimously appointed agent. The defendant's case was—that from 1858 to 1860 he employed the plaintiff as his agent and regularly paid him the penny per ton; that in April, 1860, he informed the plaintiff he would not further require his services, and since then had had no communication with him, that the committee appointed in 1858 had long since ceased to exist as such, and that defendant had not heard of them for several years. At the close of the case on both sides the Chief Justice, with the consent of both parties, left to the jury two questions, to which they returned the following answers:—1. That in the year 1858 the plaintiff was employed as agent with the defendant's sanction and in pursuance of the general resolutions, and that the committee then appointed are still in existence and have not discontinued the plaintiff's services, who has acted as such agent up to the present time. 2. That early in 1860, previously to the arrival of either of the vessels, the subject of the present action, the defendant repudiated the plaintiff and his services, of which at the time the plaintiff had

notice, and has not since in any way recognized him or his services. Upon these findings the Chief Justice directed a verdict for the defendant, reserving liberty to the plaintiff to have the verdict entered for him for the one penny per ton for the "Jane," of which the defendant was owner when the resolutions of 1858 were entered into, or for all three vessels, should the Court be of opinion that he was so entitled. A conditional order was accordingly obtained, against which

*Morris, Q.C. (with him Dowse, Q.C. and Seeds), showed cause.*—The plaintiff has not proved that he ever did anything for the defendant after being cautioned beyond the benefit which he alleges the defendant derived from his general exertions, such as looking after the Whitehaven coal and seeing that it did not get a bad name on account of spurious coal.

*Semple and Macdonogh, Q.C., contra.*—There is no disputed fact in the case. The question is, if the defendant had a right to discontinue the plaintiff. The first count is for agency fees, not for work and labour. The question is not whether work was done for an individual, but who was the principal? The committee at Whitehaven alone had the power to dismiss the plaintiff. He was not appointed by the defendant. This is not an interminable contract, for the defendant might have gone to the others and signified his withdrawal. The agreement was a tripartite transaction between the defendant, the plaintiff, and the ship-owners. No one owner could repudiate it without separating himself from the others. If a committee of a club appoint a servant, no one member of that committee can dismiss him. [*O'Hagan, J.*—Suppose the defendant ceased to have a vessel.] Then he would be no longer liable. [*Christian, J.*—If by dissociating himself from the body he would have put an end to his liability, then the action should be against the committee on a special contract, and they might reimburse themselves over against the member who had departed from the regulations.] By the 23rd rule the agent is to receive for his services one penny per ton, register tonnage, from each vessel per voyage. [*Christian, J.*—Does that bring the agent into privity of contract with every member?] It does as to remuneration with that owner who brings his vessel in. The money was never to be paid by them. [*Christian, J.*—Suppose a servant of a club appointed, his wages to be paid out of a subscription by the members, would that entitle him to bring an action against each member for his salary?] It would. [*Monahan, C.J.*—It occurs to me that if the plaintiff be the servant of the defendant he could recover for work and labour, but the defendant could dismiss him; but if he be the servant of the committee, then the privity of contract is between the plaintiff and them.]

*Dowse, Q.C. in reply.*—The plaintiff must satisfy the court what the contract was which the defendant entered into with him. It is said this action is not brought for work and labour, but for commission; but that is only another name for work and labour. Our defence is, that the plaintiff never did any work at all, and that we never employed him whether he did it or not. The memorandum signed by the owners is a recommendation. The documents would in them-

selves constitute no contract between the plaintiff and the defendant, but an implied contract, that if the defendant availed himself of the plaintiff's services he was to pay him for them. The defendant says to the plaintiff, I will have nothing more to do with you. The plaintiff is either our agent or the agent of the committee. If he is our agent we can dismiss him; if he is the agent of the committee, in what better way can we tell the committee than by telling the agent of the committee? It is said the defendant might give notice of leaving. He was not a member of the committee. It is said that until the committee dismiss the plaintiff the defendant is not free. There is no evidence that we ever entered into such a contract as that. If we did, a serious question will arise if that is not what should have been declared on. Could the plaintiff get rid of the contract? Could he refuse to have anything further with the defendant? If he could, the contract would be tripartite in one case and unilateral in another.

MONAHAN, C.J.—This case has occupied a good deal of time. We have given it as much consideration as possible, and if we thought that any further consideration would induce us to alter our opinion we would allow it to stand for judgment, but we concur in thinking the plaintiff fails. His case is this: a permanent irrevocable contract has been entered into between himself and this committee and Hewitt, which, so far as Hewitt is concerned, he is to be unable to get rid of. We do not think that is the fair construction, that the defendant is to be liable, so long as the others choose, to continue this man to do what was rather business for the public or for a great many whom this committee represented. We do not think it possible to import such permanency, and that the persons who so employ the plaintiff are not to have the power to discontinue him. Unless we adopted Mr. Macdonogh's argument, that so long as vessels traded between Whitehaven and Dublin they were bound to pay a penny per ton, we think either that there was no contract, or that it was terminated so far as it could be by this man giving the plaintiff notice.

*Rule discharged.*

[CORAM KEOGH, CHRISTIAN, AND O'HAGAN, J.J.]

LATOUCHE v. PENNINCK AND SLOANE.—June 23, 24.

*Ejectment—Transfer of possession—Statute of Limitations—Acts of ownership.*

*The plaintiff in an ejectment claimed the premises in dispute under a conveyance of 20th May, 1861, from one W. G. and a lease subsequently made by himself, the lives in which had expired. The case made by the defendant at the trial was, that in 1831 possession of the same premises by sod and twig was given to her father by W. G. on the occasion of his marriage with the daughter of the said W. G. It did not appear that in 1831 W. G. had any greater interest in the premises than a tenancy at will. Evidence of the continuance in possession by W. G. and of possession by the fa-*

*ther of the defendant and his family having been given on both sides respectively, the judge put to the jury the following question—Did W. G. transfer to J. S. the actual possession of the premises, and did J. S. retain such possession? and the jury answering the question in the affirmative, he directed a verdict for the defendant. Held, that this was a misdirection.*

*A defendant in ejectment who does not at the trial set up a title under the Statute of Limitations, cannot rely on the Statute upon the argument of a new trial motion.*

*A policy of insurance against fire effected by one of the parties in an ejectment is not admissible in evidence to show an act of ownership over the premises in dispute.*

THIS was an ejectment on the title brought to recover part of the lands of Kindlestown, formerly called Hosey's Garden. No defence was taken by Pennick, but defence was taken by the defendant, Miss Sloane. The action was tried before Mr. Justice Fitzgerald at the Wicklow Spring Assizes. The plaintiff claimed under a deed of conveyance of the 20th of May, 1861, executed to himself by William Goode and others for valuable consideration, which was given in evidence, and also a lease of the 21st May, 1861, from the plaintiff to the defendant Pennick for the lives of William Goode and his wife, and the life of the survivor, upon which a memorandum was endorsed that the lease was in trust for Goode and his wife. The premises in question were known as Goodesbrook, and the plaintiff alleged that they were included in the conveyance of the 20th May, 1861. It was proved that William Goode died in 1862, and that his wife died on the 1st September, 1864. The following evidence was given for the plaintiff. Charles Doyle deposed that he knew William Goode; that he went to Goodesbrooke 27 years ago; that there was then but a small house and cabin there belonging to a person named Hosey; that Goode built a dwelling-house there about 27 years since, and lived there until his death, and his widow lived there until her death, and that Sloane (the son-in-law of Goode and father of the defendant) never lived there save as a visitor. John Grundy, who was a mason, deposed that he knew Goode for 40 years, that he recollected when he got the whole farm. Goodesbrook then consisted of Hosey's farm and cabin; that it was from 40 to 50 years since Goode got possession; that deponent's father, who was a mason, worked for Goode at the premises, as did also deponent, and that he was paid by Goode. On cross-examination he stated that Goode had more than Goodesbrooke, that he had different takes; that he got Goodesbrook first, and the 29 acres the last; that some of the place, i.e., the barn, was built before Sloane's marriage; that it was after Sloane's marriage deponent worked and was paid by Goode. Ellen Neale, a nurse-tender, deposed that she attended Mrs. Goode, and also Miss Sarah Goode, at Goodesbrook; that Mrs. Sloane, the grand-daughter of Mrs. Goode, came there three times and stayed; that about three weeks before Mrs. Goode died, Miss Goode and deponent went away; that Miss Sloane had not come to live there permanently before depo-

nent left; that two days after deponent left, she returned to see Mrs. Goode, and found Miss Sloane there, but not apparently living there; that about a week after, deponent came again, and Miss Sloane was then staying in the house.

The defendant's case was, that Goode originally took under a lease of April, 1822, from a person named Bunn 29a. Or. 24p., which did not include Hosey's garden now known as Goodesbrook; that Goode afterwards got possession of Hosey's garden; that he afterwards gave it over to Sloane, the defendant's father, at the time of his marriage, and that the latter retained that possession, and in fact built Goodesbrook, and that Goode had nothing in the plot in question to convey to plaintiff.

James Sloane, the father of the defendant, deposed that he got actual possession on his marriage from W. Goode of the lands the subject of this action; that the present dwelling-house called Goodesbrook was built after deponent got possession; that it was built in 1835 or 1836, and finished about 1841; that it was built with deponent's money, and that he sent from his own place the chimney-pieces, grates, &c.; that deponent effected a policy of insurance against fire in 1843; that it was long after deponent's marriage that the place was named Goodesbrook; that after the death of deponent's wife his children and their aunt who took charge of them for him occupied Goodesbrook; that deponent continued to do so from 1842 to 1849; that he went out on Saturday nights, and supplied the house with everything; that in 1851 deponent insisted that the lands should be let, and Goode wrote to him this letter dated 1st August, which was to the following effect—"As it would appear that Granny's fostering care is no longer wanting, by your giving me verbal notice to give up, so that the ground should be let, the present is to request you will explicitly let me know your intention that I may provide some place to fall back on, and not to be left without a home." Deponent further proved that he took no notice and that Goode remained there; that about 1843 the new avenue to the house was commenced, and made at deponent's expense; that deponent paid no rent for the premises the subject of the ejectment, unless they formed portion of the 29 acres in the settlement, and that deponent never gave up to anyone the possession of Goodesbrook which he got in 1831. On cross-examination this witness stated that Goode conveyed nothing to him but by the settlement, and he claimed only what was in that settlement; that he got possession of what was conveyed by it; that there was a sale in the Incumbered Estates Court to pay incumbrances recited in the settlement, and that he endeavoured to get Goodesbrook sold by the Court as included in the settlement; that Goode resisted this, and the order of the 29th of February, 1856, was made making "no rule" on the application; that Goode and his wife lived at Goodesbrook to the period of their respective deaths; that he claimed Goodesbrook as part of the 29 acres, and as demised under the lease of the 29 acres; that he was informed and thought it was so, and that he paid rent for it as such; that the rent of the 29 acres was £94 10s. late currency, that he did not pay rent for Goodesbrook unless it was included in the £94 10s.; that the dispute he

had with Mr. Goode in 1861 was about the management of the lands; that Goode lived on the farm at the time, that is, at Goodesbrook, and deponent considered it to be part of the farm. Deponent further stated that he did not go to the place from 1851 until after Mrs. Goode's death; that his daughter went out to attend her during her illness, and remained there after her death; that Goode and his wife had no other house to live in; that when deponent's family lived at Goodesbrook, Goode and his wife also lived there; that she took care of deponent's children, and deponent went out on Saturday nights, and paid for the whole of the necessaries of the household; that Goode had furniture in the house; that deponent had one servant there, and Goode another, whom he paid; that deponent brought down provisions for the whole household, and paid all the expenses; that in the summer of 1850 deponent's family went there again, but never after that; that they went there every summer during the life of deponent's wife, but not as visitors; that deponent went not as a visitor, but as a person going to his own house; that Goode never alleged that deponent was there as a visitor, and on the contrary said he had not as much land as he could put his two feet on. On re-examination deponent stated that Goode told him he claimed Goodesbrook as a "mending" or make up for the rocky land included in the 29 acres. On cross examination deponent stated that he paid all the costs of building Goodesbrook House, altogether about £400; that after his marriage Goode took him to the gate-house which leads up to Goodesbrook, and gave him possession of all by cutting a twig, &c.; that he gave him actual possession of all, including the premises the subject of this action; that when deponent left in 1850 there was a receiver over the lands in respect of prior incumbrances, but not over Goodesbrook; that deponent was a bankrupt, and that in two or three days after old Mrs. Goode's death, he went to the place and found his daughter there. W. J. Goode, the nephew of W. Goode, deposed that on the marriage of Mr. Sloane, he heard Goode say that the whole of his property save his personal property went to Sloane; that after the disagreement of 1851 he told deponent that if he got his live and dead stock he would retire from the place, and that that statement referred to all the lands. On cross-examination this witness stated that he assisted in the survey of the lands before W. Goode got the lease of 1822; that it was originally intended to include Hosey's Garden in the lease, but it was then in possession of Hosey, and was omitted; that the lease of 1822 included about two acres of stony ground, for which W. Goode was charged rent; that this was a mistake, and that W. Goode objected to it, and also objected to the expenses of making out new leases, and it was finally arranged that Bunn was to give him a writing of Hosey's Garden as amends for the two acres of stony ground, for which he was to pay the high rent by the lease; that there was a writing which was witnessed, and deponent copied it, and W. Goode came to terms with Hosey.

W. G. Sloane, the brother of the defendant, deposed that he frequently heard W. Goode say he was there only as the agent of Sloane; that he did not



own the land or anything connected with it, and that Sloane supplied money every Saturday night to pay all the labourers about the place including those who worked at Goodesbrook. At the close of the defendant's case the plaintiff offered in evidence the lease of 1822, but it was admitted that the premises the subject of the action were not included in it. The plaintiff's counsel called upon the judge to direct a verdict for the plaintiff, which he declined to do. Before giving any direction to the jury, he submitted the following question to them, viz.—Did the late Mr. William Goode transfer to James Sloane the actual possession of the premises now known as Goodesbrook, and did Mr. Sloane retain such possession? The jury answered in the affirmative, and the judge, considering that on the evidence Goode had acquired no legal right to the premises save possession, was of opinion that as he had in 1831 transferred that possession to Sloane, who from that time had retained it, he had nothing in Goodesbrook to convey to the plaintiff, and that the plaintiff was not entitled to recover, and he accordingly directed a verdict for the defendant. The judge in his report stated that he was not dissatisfied with the finding of the jury. The plaintiff obtained a conditional order for a new trial on the ground of misdirection, and the improper reception of evidence, and on the further ground of the verdict being against the weight of evidence if the finding of the jury should be relied on as establishing title under the Statute of Limitations, against which

*Hemphill*, Q.C. (with him *Devitt*) showed cause.—There was no evidence of more than a mere estate at will in Goode prior to 1831, in which year Goode, having a bare possession by sod and twig transferred that possession to Sloane. The policy of insurance which we put in evidence proved an act of ownership. The deed conveying to the plaintiff does not recite the title of W. Goode, and that is evidence that the parties knew at the time that Goode had no title. Where the judge is not dissatisfied with the verdict, the Court will not set it aside. In *Irwin v. Callwell* (12 Ir. C. L. R. 147), Fitzgerald, B. says, "The practice in England, where there is a conflict of evidence, and the judge reports that he is not dissatisfied, is not to disturb the verdict. It strikes me that it would be very desirable that the same practice should prevail in this country, and that the exceptions to the rule should be of rare occurrence," and Lefroy, C.J., concurs in that. In *Hayes v. Dexter* (13 Ir. C. L. R., 22), and other cases that has been acted on. It is now clear that there is nothing in the new Landlord and Tenant Act to prevent the plaintiff from bringing a new ejectment. Coming to the other question, I will therefore assume that the finding of the jury was right, and that possession was transferred to us in 1831, and has been retained since. "A tenant at will has nothing that can be granted by him to a third person."—Cruise's Dig., vol. I., p. 244. "Any act of ownership exercised by the landlord which is inconsistent with the nature of the estate, will also operate as a determination of it."—Id. p. 245. [*Christian*, J.—Sloane got possession from Goode. If Goode had re-demanded the possession, could Sloane have set up this *jus tertii*? *Andrews v. Hailes* (2 El. & Bl. 349). [*Christian*, J.—That case went

upon the presumption that the encroachment was part of the demise—here the two acres were granted subsequently.] When possession was given by sod and twig, Sloane became at all events tenant at will. *Andrews v. Hailes* is followed in *Doe v. Tidbury* (14 C. B. 304). Goode had no estate in 1861. If he had been in exclusive possession prior to 1861, he might have had a title under the Statute of Limitations, but no question on that was asked to be left to the jury. One tenant at will transfers to another tenant at will. If the evidence were that Goode was in possession in 1831, and that not accounted for, he must then have been taken to have been seised in fee; he could not transfer under the Statute of Frauds without a writing, and therefore as there was none, he could afterwards have come upon Sloane. Under the circumstances of Goode's title, it was the same as if Goode had conveyed the fee-simple. Though the Statute of Limitations was not mentioned to the jury in terms, yet the very question that would arise upon it was put. A third view of the case is this. A tenant at will, if he parts with the possession, is *felo de se*, and so Goode had no title on which the premises could be recovered in the ejectment. We might rely on the conveyance were it not that the deed cannot under the word "appurtenances" include land.

*J. E. Walsh*, Q.C. *Harris*, Q.C. and *Harris*, in support of the rule.—The ruling made in this case is not short of a repeal of the Statute of Frauds. 1. There was no ground for leaving the question of possession to the jury. 2. Even if there was possession, against a purchaser it was simply valueless. Although there is no recital, there are stringent covenants as to Goode's title in the deed of 1861. In the case of a person who shows no title except by seisin of sod and twig, the plaintiff having got his deed from a person in possession, whether joint or not, any part possession is simply void.—Statute of Frauds, sec. 1. The utmost Sloane became was tenant at will to Goode, which tenancy Goode might put an end to whenever he pleased, and which was put an end to by the conveyance to Latouche. Where both parties have nothing but possession, the prior possession prevails.—*Allen v. Rivington* (2 Saunders, 111); *Hughes v. Dyball* (3 C. & P. 610); also reported in Moo. & Mal. 346; referred to in *Doe d. Carter v. Barnard* (13 Q. B. 953); *Doe d. Smith and Payne v. Webb* (1 A. & E. 119); Bythewood's Conveyancing, vol. 4, title Feoffment; *Jayne v. Price* (5 Taunt. 326); Co Litt. Remitter, s. 666. The fact of having got these two acres as a mending will not make any difference. Sloane claims through Goode, whose title he denies. This parol delivery of possession would not be as strong as an unregistered deed, and if Latouche registered his deed it would override the marriage settlement. [*Christian*, J.—If the landlord had been brought into privacy, and accepted Sloane as a tenant, it might be said that Goode's title had wholly ceased.] The judge ought to have told the jury that the delivery by sod and twig referred back to the settlement. But even if not, there was no evidence of retainer of possession, nothing but this one expression of Sloane, "I never gave up the possession." It is the case of valid con-

veyance to one, and invalid conveyance to another. [*Christian, J.*—Suppose there was evidence of possession, and of retainer of possession, how will the Statute of Limitations operate on the joint possession?] The joint possession does not affect it. We objected to the evidence of the policy of insurance. The total amount insured in this policy is £2,000, and the insurance is on many other premises, and among them a dwelling-house called Goodebrook, £100. It is not proved that Sloane ever put a plough into the ground, or placed an animal on it, and how can effecting a policy of insurance be an act of possession, which means something which somebody else could interfere with? If it be said that it was a declaration by Sloane that the property was his, it is not a declaration against his interest. *Doe d. Rowlandson v. Wainwright* (8 A. & E. 691). In his evidence Sloane stated that he claimed only what was in the settlement.

*Devitt* in reply.—There are two modes in which this case may be presented to the Court—either that the inception of Goode's title was a tenancy at will to Bunn, and on the occasion of the marriage, and the subsequent events, payment of rent, &c. Sloane was substituted for Goode. Or, secondly, even upon the showing of the plaintiff's counsel the transaction of 1831 made Sloane tenant at will to Goode, and he has title under the Statute of Limitations. We are not precluded from relying on the Statute of Limitations. If the plaintiff's counsel mean to rely on joint tenancy, they should have asked the judge to put a question upon that to the jury. As to the covenants in the deed of 1861, we had no opportunity of seeing them. We served a notice to produce the deed. The contract of assurance is one which a stranger cannot enter into. It is an unequivocal act of ownership.—*Cole on Eject.* 231; *Doe d. Manton v. Austin* (9 Bingh. 41). At the time of the settlement, Goode had not an adverse possession as against his landlord. The acceptance of rent by Bunn from Sloane is an acknowledgment by Bunn. Upon the sale in the Incumbered Estates Court in 1856, Goode first disputed our right. The effect of that repudiation was, if he was our bailiff, to make him a trespasser, but if our tenant, to make him tenant at sufferance. The question of how we got into possession originally is out of the case. Upon the second view, assuming that Goode was tenant in fee in 1831, he then creates a tenancy at will. He has no adverse possession because of the writing in 1861, which would prevent him from relying on the statute. Tenancy at sufferance is not assignable.—*Thunder v. Belcher* (3 East. 449). We are entitled to maintain the verdict, but if the Court set it aside, it ought to be on the terms of permitting us to file an equitable defence setting out the merits of the case. It is a fallacy to say that we are estopped.—*Doe d. Groves v. Groves* (10 Q. B. 486). Any question as to the nature of the tenancy lay with the jury. The Court are asked to send the case back to the jury to inquire if by possession they meant exclusive possession; the plaintiff's counsel should have done that at the time. As to the observation that Sloane said he only claimed what was in the settlement, the answer to that is, that such were his legal views. The view he took ought not to bind him to his prejudice.

*KEOGH, J.*—The questions are very short, and lie in a narrow compass. The question left to the jury was, whether in 1831 W. Goode transferred the possession of the premises, and did Sloane retain such possession. That appears to have been the only question submitted, and though the Statute of Limitations now has been relied on by the defendant's counsel, a question upon it was not left. The question was left without any reference to the Statute of Limitations. It was left to the jury to say whether Goode, who was tenant to Mr. Bunn, and had a possessory title, transferred whatever he had to Sloane, and whether Sloane had remained in possession down to the present time. With reference to that, we are of opinion that there was no evidence of the retainer of possession to go to the jury, because in the first place nothing took place in 1831 which could amount to a surrender by operation of law. It was not alleged that the landlord was taken into counsel, and agreed to substitute Sloane for Goode; that the tenancy at will was then and there determined, and that with his consent he took up with Sloane as his tenant at will. If that were the case, a very different state of things might exist. Where is the evidence of retention? We are clearly of opinion that there was no such evidence. Now, as to the Statute of Limitations, we are of opinion if it was a matter of pleading, it would be the business of the party to plead the statute. It is the duty of the party who relies on the statute to have any question on it submitted to the jury. No such demand was made. We are not saying that the defendant would have a good case on the statute. From 1831 to the decease of Goode, he never was for a moment out of possession, and the letter expressly shows he was in the possession. If the statute makes the defendant's title, he should have called on the judge to leave a question on it to the jury, and not having done so, he cannot rely on it. As to the policy of insurance, we are of opinion there was no possible ground for admitting it, and on that ground, too, the plaintiff would be entitled to have the verdict set aside.

Leave to appeal was given.

*Rule absolute.*

## Court of Probate.

Reported by W. R. Miller, Esq., LL.D., Barrister at Law.

*M'CARTHY v. MATHEWS*—July 10.

*Receiver—Practice—Interest.*

*A party in the cause having no interest, in any event, in the real estate, cannot get a receiver; but, on his motion, a nominee of a party who is interested may be appointed.*

*G. Fitzgibbon*, for the defendant, moved for a receiver. The defendant was opposing a will which left the plaintiff most of the personal and real estate, the heir-at-law being in Australia, and it was necessary to cite him to see proceedings. The defendant was next of kin, and had pleaded undue influence on the part of the plaintiff and others, and also forgery.

*Dames*, for the plaintiff—The defendant has no in-

terest in the real estate, and therefore the court will not make an order appointing her nominee; but as the plaintiff is devisee of the real estate, I desire his nominee to be appointed.

KEATINGE, J.—I cannot, on the motion of the defendant, who has no interest, appoint her nominee as receiver; but the plaintiff's counsel so desiring, I can appoint his nominee such receiver, and I accordingly appoint him.

#### GOODS OF BURROWES.—July 6.

*Semble*—A gift of residue by a will to A. to be by him disposed of in such public or private charities as he should think fit, is void, and could not be carried out either in Chancery or by the Crown, and therefore administration, with the will annexed, was given to the next of kin, as beneficially entitled to the residue, on the renunciation of the executors and of A.

Dr. Ball, Q.C. for Peter Burrowes, the brother and the next of kin of Miss Burrowes deceased, applied for administration with her will annexed. She had by her will given the residue of her estate to the Bishop of Tuam, to be disposed of by him in such public and private charities as he should think fit. That was a trust that could not be carried out, either by the Court of Chancery or by the Crown—*Omniney v. Butcher* (1 T. & R. 260); *Kendall v. Grainger* (5 Beav. 303, and Tud. Ch. 15); consequently the bishop was a trustee for the next of kin, and he and the executors had renounced.

Mills, for the Attorney-General, contended that a gift to private charity was valid; and if not valid *per se*, yet it was saved by association with a public charity; that it was not invalidated by generality, and that when the general purpose was for charity, the gift was not allowed to fail. Charity is defined by Sir W. Grant in *Merrice v. Bishop of Durham* (9 Ves. 399), as a purpose within the statute of 43 Elizabeth, c. 4, or its spirit or intentment—*Attorney-General v. Pierce* (2 Atk. 87); *Nash v. Morley* (5 Beav. 177). A bequest to such poor, pious, male or female old or infirm persons as my executor shall see fit, not omitting large and sick families of good character, was held a valid charitable bequest. In support of his positions he cited *Kendall v. Grainger* (Ib. 303); *Thompson v. Thompson* (1 Coll. 395) *Luscombe v. Wintringham* (13 Beav. 87); *Attorney-General v. Mathews* (2 Lev. 167); *A. G. v. Clark* (1 Amb. 422) *Horde v. Lord Suffolk* (2 M. & K. 59); *Chapman v. Brown* (6 Ves. 404); *Powerscourt v. Powerscourt* (1 Moll. 616); *Re Barnett* (29 L.J. Ch. 871); *University of London v. Yourall* (1 De G. & J. 72); *A. G. v. Todd* (1 K. 803).

KEATINGE, J.—This is a motion for administration with the will annexed of Miss Burrowes. Notice was given to the Attorney-General, who appeared by counsel, but did not give any notice of applying for a grant to his nominee. The residuary legatees and executors have renounced; and then, according to the ordinary course, the next of kin are entitled, and Mr Peter Burrowes applies for a grant. He contends

that the residuary gift is void, and that the object cannot be accomplished; that the Court of Chancery has no power to carry out those trusts. The counsel for the Attorney-General contended that the charity can be exercised by the Court of Chancery. I am not called on to say what jurisdiction the Court of Chancery may possess to enable the Crown to accomplish the purposes intended as to charity; and it would be improper for me to do so, as my judgment on the point would not bind any of the parties. If the right to administration were disputed here, the Court would be bound to come to a decision on it, but that would be decided for ever; but that is not the case here. However, I should say that it is tolerably clear that the object or purposes mentioned in this will cannot be carried out; but that is, however, for the Court of Chancery; but that Court cannot look at the will until administration is granted. Under these circumstances I grant administration to Mr. Burrowes, he giving security.

Order accordingly.

#### HANKS v. TOTTENHAM—June 9, 10, and 12.

##### Evidence—Lost will—Declarations.

*The production by a testator of his will after its execution to another person, and the declarations of the testator then to such person of the contents of such will, are admissible evidence to prove the contents.*

*Sed semble*—Such declarations would not be evidence if the will had not been at the same time produced and shown to such person.

THIS cause came on for trial before the Court and a special jury. The defendant, the widow of the deceased, the Rev. R. Tottenham, late of Rathangan, had alleged the contents of a missing will which had been made by the deceased in his own handwriting, and had not been revoked by him or by his directions, the contents being a general gift to the defendant of all the property of the deceased. The plaintiff, who was the heiress-at-law and sole next of kin of the deceased, had pleaded, traversing the making of any will of the tenor or effect alleged, and also that if any such will had been made it had been revoked by the testator. The defendant was examined on her own behalf as a witness, and she stated that the deceased, about a fortnight before he died, produced on several occasions from a writing-desk (which was always unlocked and lying in his study) a letter with a black seal, and told her that it was his will, and that when it was required she would find it in that writing-desk; and that by it he had left her all his property.

Sergeant Armstrong, Q.C. (Dr. Walsh, Q.C., and Woodroffe with him), for the plaintiff, objected to that evidence. It had been settled by Sir C. Cresswell, and since his death by his successor, Sir J. P. Wilde, that declarations made by a testator after the making and execution of his will were not evidence to prove the contents.—*Goods of Ripley* (1 S. & T. 68); *Staines v. Stewart* (2 ib. 320); *Wherram v. Wherram* (3 ib. 300); *Quick v. Quick* (ib. 442).

*Butt, Q.C. (Dr. Ball, Q.C. and F. Johnston with him), for the defendant.*—Those cases are not sound decisions; they are all based on *Doe d. Shallcross v. Palmer* (16 Q. B. 747). But there is no such decision in that case. The only point really decided there was, that declarations made by a testator before the making of the will were evidence to rebut the presumption that alterations were made after the execution. But Lord Campbell in his judgment uses a dictum merely, to the effect that declarations made after the execution would be admissible; but no objection had been taken to any such evidence, nor had any such evidence been in fact offered—*Goods of Brown* (1 S. & T. 32).

KEATINGE, J.—If I had formed any decided opinion myself on the point, still I should feel it my duty to follow the judgments of Sir C. Cresswell and Sir J. P. Wilde on the same point, they being judges with co-ordinate jurisdiction with myself; but it appears that in one of the cases decided by the latter judge a case was cited which is not reported as to this point—namely, *Glen v. Burgess*. That was cited by Dr. Spinks, an advocate of great experience and learning; and I do not see that it was in any way questioned by the Court or the opposite counsel; on the contrary, I infer that it was acquiesced in. That case then makes the case before me an exception from *Quick v. Quick* and the other cases referred to; for there the production by the testator of his will to another person after the execution and his statements then, were let in as evidence of his acts. I shall therefore follow that case and shall admit the evidence subject to the objection.

The case proceeded, and a verdict was found in favor of the will as alleged in the declaration, and that it had not been revoked.

[His Lordship on a subsequent day mentioned that he had communicated with the learned reporter, Dr. Tristram, as to *Glen v. Burgess*, but he had not been able to give him any further information though he had enquired from Dr. Spinks; but his Lordship had found a report of the case in the current number of the *Times*, and the evidence, it appears, was given and acted on.]

## Court of Appeal in Chancery.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

IN RE THE BANBRIDGE EXTENSION RAILWAY.—June 21.

*Railway—Bankruptcy of company whose line was not as yet opened for traffic—20 & 21 Vict. c. 60, s. 4.*

*An incorporated railway company, whose unfinished line is not as yet opened, in any portion thereof, for the carriage of goods or passengers, is nevertheless liable to be declared bankrupt.*

THIS case came before the Court on appeal brought by the Banbridge Extension Railway Company, from

a decision made by Judge Berwick, one of the judges of the Court of Bankruptcy and Insolvency. By that decision his Lordship held that where a railway company is incorporated under an Act of Parliament enabling said company to enter into traffic agreements with other companies, and to enter into agreements for working the traffic, and where the said Act of Incorporation clearly shews that the said company was formed for trading and commercial purposes, and where it appeared that the line was never opened for traffic, nor the rails even laid, yet nevertheless the company may be adjudicated bankrupt as one established for trading and commercial purposes. The judgment delivered in this case in the Court below is reported at page 196 *supra* of the present volume. The appellants now insisted that said decision of the Court below was erroneous for the following reasons:—First—Because appellants being a railway company incorporated by Act of Parliament, having regard to the statutory enactments affecting railway companies, are not subject to be made bankrupt under the provisions of the Irish Bankrupt and Insolvent Act, 1857. Second—Because the railway of appellants has never been completed or opened in any part for traffic, or used for the carriage of passengers or goods: and as appellants have never elected to become carriers, they are not subject to be made bankrupt under the provisions of said Act. Third—Because the object of making the said railway of appellants, for which alone they were incorporated, is not a commercial or trading purpose within the provisions of said Act, and appellants are not a joint stock company within the meaning of said Act, and cannot therefore be made bankrupt under its provisions. Fourth—Because, assuming (which is not admitted) that appellants are subject to be made bankrupt under the provisions of the said Act, no trading by appellants has been proved.—Of the foregoing reasons the second and fourth were those relied upon, and pressed on the Court, the first and third being already set at rest by the decision of the Court of Appeal in Chancery in Ireland in the case of the Bagnalstown and Wexford Railway Company, reported *sup.* page 21, which decided that a railway company incorporated by Act of Parliament is liable to be made bankrupt within the meaning of the Irish Bankruptcy and Insolvency Act, 1857, 20 & 21 Vic. c. 60, sec. 4.

The respondents' case was, that although the said company never did complete the said railway, or open the same for traffic, and although the said railway has not been used for the carriage of passengers or goods, yet the respondents did not admit that the said company have never become carriers, or elected to become carriers, for respondents submitted that, in point of law, the said company by being constituted under their special Act as a railway company, in which Act the several other statutes in the petition mentioned are incorporated, that the said company, by force of the said special Act, and the other statutes incorporated therewith, have not only elected to become carriers, but have become carriers, and therefore said respondents submitted that the order of adjudication of bankruptcy of Judge Berwick made on the 15th May, 1866, should not be reversed, but should be affirmed for the following reasons:—First—That the said company

being incorporated for the making and maintaining a railway were, at the time the said order of the 15th May, 1865, was made, a joint stock company, within the meaning of the Irish Bankrupt and Insolvent Act, 1857. Second—That the said company being incorporated for the purpose of making and maintaining a railway were a company associated for a commercial or trading purpose incorporated by statute within the meaning of the said Irish Bankrupt and Insolvent Act, 1857, and were therefore a joint stock company within the meaning of the said Act. Third—That having regard to the statutable enactments affecting the company in their special Act, and the statutes incorporated therewith, the said company was a commercial or trading company, the capital or profits of which was or were divided into shares, and transferable without the express consent of all the partners, and, therefore, a joint stock company within the meaning of the Irish Bankrupt and Insolvent Act, 1857. Fourth—That the said company being a joint stock company within the meaning of the Irish Bankrupt and Insolvent Act, 1857, it was not necessary to prove any act of trading by the said company. Fifth—That having regard to the statutable enactments respecting railways, which enactments were incorporated with the special Act of the company, the said company had elected to become, and had, in fact, become carriers.

*John E. Walsh, Q.C., Harrison, Q.C. and Jackson*, were in support of the appeal.—This case is entirely different from the *The Bagnalstown and Wexford Railway* case (10 Ir. Jur. N. S. 21). The distinction between the cases is, that the Bagnalstown and Wexford Company had elected themselves to become traders as common carriers, and were therefore held liable under the fourth section of the Irish Bankruptcy and Insolvency Act to be made bankrupt. We have never elected, and may never do so, and if we do so elect we may let our line to traders as common carriers without becoming traders ourselves. [*The Lord Chancellor.*—I think that railway companies are carriers if they set their line to a third company.] No, not more than the proprietors of turnpike roads are carriers. The case of *Ex parte Barber* (1 M.N. & Gord. 176), which is the leading case against us, is entitled to little respect. We are not aware that that case was ever decided on appeal. We submit that a railway company, though liable to be made bankrupt, if they be common carriers, that is, if they elect to be carriers, yet where that election is not made, and where they never trafficked so far as running one carriage, or making one farthing, they cannot be made bankrupt.

*Ball, Q.C., Kernan, Q.C., and Falkiner*, were heard in support of the judgment of the Court below.—All the arguments on this side are collected by Judge Berwick in his Lordship's judgment, already reported, *supra*, pp. 196, 197.

THE LORD CHANCELLOR.—I consider that the conclusion arrived at by the Court of Bankruptcy is correct. The very object of the incorporation of the company was for trading and commercial purposes; that being so, whether they had actually opened their line for traffic or not, does not in the least alter their position. From the moment of the incorporation of

this company they were traders, and the trade they followed was that of common carriers, a trading or commercial pursuit that makes them liable to be made bankrupts under the 4th section of the Irish Bankruptcy and Insolvency Act. I think then that the order made by Judge Berwick is correct.

THE LORD JUSTICE OF APPEAL.—I entirely concur with the Lord Chancellor. I am clearly of opinion that this order is the right one, I think that the 4th section of the Bankrupt Act has reference to future trading. I do not, however, at all concur in the principle laid down by Judge Berwick that it is compulsory on every railway company to conduct the carrying trade in connection with their line, that, however, is beside the question we have to consider here.\*

*Order of Judge Berwick affirmed.*

## Court of Queen's Bench.

[Reported by William Woodcock, Esq., Barrister-at-Law.]

*MOYLAN v. NOLAN.*—Nov. 23, 24, 25, 1864;  
JAN. 13, 1865.

*Husband and wife—Authority of wife—Agency.*

*The question whether a wife, living with her husband, has authority to bind him by her contract for necessities, is a question of agency. She is presumed to have the authority, but the presumption may be rebutted by circumstances showing that her agency is at an end.*

*A. allowed his wife £5 a week for the supply of necessities for the family, and forbade her to contract any debts for those necessities. The wife, for a series of years, obtained goods on credit from the plaintiff. The goods were entirely consumed in A.'s family, and partly by A. himself; but for all that appeared, A. had no reason to suppose that the goods had been obtained otherwise than for cash. The plaintiff never, until just before action, sent in any account to A., and on two occasions he took bills from the wife, payable at his (the plaintiff's) residence, and he admitted that this was done in order to conceal the extent of the wife's dealings from A. The learned judge before whom the case was tried, told the jury that the question for them to consider was, whether the goods were obtained on the credit of the husband or on that of the wife. The jury found for the plaintiff. Held (Fitzgerald, J. dissentiente) that the verdict should be set aside, and that there should be a new trial.*

In this case the action was brought to recover the sum of £118 15s. for goods alleged to have been sold by plaintiff to the defendant. The defence was a traverse of such sale and delivery. The action was tried before Deasy, B. and a common jury at the Summer Assizes, 1864, for the county of Galway. The plain-

\* Vid. 28 & 29 Vict. ch. 21, which Act came into operation since the adjudication of bankruptcy in the above case.

tiff was examined, and deposed that he was a grocer, residing in Summer-hill, Dublin. That in June, 1860, he opened an account with defendant through his wife, Mrs. Nolan, which continued on to June, 1864; that the goods supplied were groceries; that a pass-book was kept; that defendant's sister-in-law, who lived with him, on many occasions ordered goods, and that she and defendant's wife made various payments from time to time on account of the goods; that a pass-book was kept by defendant's wife, in which the entries of all goods bought and the payments made appeared; that the defendant's son John paid him £1 on one occasion. In March, 1863, witness pressed Mrs. Nolan for money, and she excused herself saying that her daughter's getting married prevented her paying witness. In March, 1863, he, witness, drew a bill on Mrs. Nolan for £99 13s. 3d. on account of goods supplied; the bill was retired by witness. Mrs. Nolan never denied that she got all the goods entered in the pass-book. Witness never furnished any account to Mr. Nolan until lately; he never communicated with witness, nor witness with him, about the account and dealings until lately, in June, 1864. Witness also deposed that there was now due to him £118 5s. 3d. On cross-examination this witness deposed that he knew Mrs. Nolan prior to the opening of the account in 1860. On referring to his ledger or book, he deposed that his first entry therein was a loan of £5 by him to Mrs. Nolan per John Hunter. That when witness pressed her for a settlement he proposed to draw on her the bill for £99 13s. 3d.; that Mrs. Nolan told witness that if her husband knew she was so much in debt he would turn her out of his house; that there was another bill before this in December, 1863, for £80. Mrs. Nolan paid him £20 as against this bill. Witness made both bills payable at No. 6 Lower Summer-hill, where he (witness) lived. Witness made them payable at his own house so as to conceal the bills from Mrs. Nolan's husband. Witness retired the bills himself. About the time the first bill became due he (witness) saw the defendant's son, John; he paid witness £1, and ordered the goods to go down as usual to the house. Defendant's son told witness the affair would ruin his mother. Witness recollected defendant's son John coming to him about the £80 bill in March last; witness may have said to him to say nothing of the bill to his father. The plaintiff also called a witness, Edward Darnmor, who proved that he was a porter in plaintiff's employment, and that on many occasions he brought goods to defendant's house. On those occasions he either saw Mrs. Nolan, Miss Bell (the sister-in-law of the defendant), or the servant; and he (witness) often got back from them empty bottles. The defendant was examined, and deposed that he never had a dealing with the plaintiff; that until June, 1864, he never knew that plaintiff had any claim against him; that for many years past, and prior to the commencement of plaintiff's account, witness on all occasions invariably paid cash on delivery for all goods supplied to his family or sent to his house; that on all occasions witness prohibited his wife or any member of his family from contracting any debts or buying any goods on credit; that witness allowed his wife 15 per week for household expenditure over

and above other matters which he (witness) paid himself—namely, servants' wages, rent, taxes, gas-light, doctors' and apothecaries' bills, clothing of family, schooling and education of children, milk, butter, for the providing of which witness kept a cow, hams and bacon bought by witness. That the £5 so allowed by witness was always regularly paid by witness to his wife; and on a few occasions when she saw her expenditure exceeded the £5, she would get from the defendant the balance, which was only a few shillings. Witness deposed that the allowance he made for his wife was ample to cover all the domestic expenses in addition to the items paid by defendant himself. Witness also deposed that he never even knew the plaintiff till the latter called on him in June, 1864; that he never knew there was any account opened by his wife or family with plaintiff or with anyone else; that he never knew she got goods from plaintiff or anyone on credit; that until he received a letter on the 1st of May, 1864, from the holders of the bill for £99 13s. 3d., announcing that same would be due on the 4th of June, 1864, witness never knew that his wife had ever accepted a bill; that she had no power or authority so to do, and in no way acted for defendant in his business; that immediately on being applied to by plaintiff for payment, witness repudiated his liability. This witness, on cross-examination, deposed that he had two houses in Dublin, one in Amiens-street, where his family lived, and the other in Meredyth-place. That he had nine children living with him, and three servants, besides himself and his wife and Miss Bell, to support; that he took a tumbler of grog at his dinner, and sometimes another before going to bed; that he may have observed plaintiff's name upon some bottles, but if he did he thought the goods were bought for cash; that in no instance and for no purpose did he allow his wife to buy goods on credit; that they both occupied the one bedroom. The defendant also produced his son, John Nolan, as a witness. He deposed that early in March last a bank runner called at defendant's office in Meredyth-place for payment of an £80 bill of defendant's. Witness knew that defendant had no bill due that day. Immediately after the bank clerk left, witness spoke to his mother about the bill. She gave a message to witness to go down to Moylan's with £1, which she gave witness to give to Moylan, the plaintiff, and desired witness to tell Moylan to send up the goods as usual. This was on a Saturday. Witness went down to Moylan, and just as witness arrived there the same bank clerk came into Moylan's shop and presented the bill for payment. Moylan took the money out of a drawer or desk in the shop and at once handed it to the bank clerk, who left the bill with Moylan. On the clerk leaving Moylan said, "This is for your mother, Master Nolan (handing him at the same time the bill). Give it to her and say it is all right." Also that he (the plaintiff) had been looking for the bill for the last two days but could not find where it was, and that he had put "payable at 6 Summer-hill" on the bill as he did not wish it to be seen below, and that he would be sorry it caused his mother any trouble. Witness gave the bill to his mother and got it back from her a few days since. A Doctor O'Reilly was called as a witness,

and he deposed that Mrs. Nolan was too ill to attend the trial as a witness. His Lordship told the jury that when husband and wife are living together, the wife was presumed by law to have authority to order goods suitable to the establishment for the supply of it, and that the husband was liable for goods so supplied on the wife's order; that that presumption was capable of being rebutted, but that a mere private arrangement between husband and wife, not communicated or known to the party supplying the goods, would not of itself be sufficient to rebut it. With such directions as to the general rule of law in such cases, his Lordship left to the jury whether the goods supplied by the plaintiff or any of them were so supplied upon the credit of the husband, or whether they were supplied upon the credit of the wife solely, with the knowledge or belief that she was acting without authority, and in the hope that, either to avoid exposure or through the wife's influence, the husband might unwillingly be prevailed upon to pay for them, telling them that in the latter state of things the husband would not be liable, and they should find for the defendant as to all goods which they might think were so supplied on the credit of the wife solely; and he called their attention to the transaction about the bills of exchange as affording evidence that the plaintiff then at least knew that the wife was getting goods without her husband's authority; and telling them that if they thought so, the plaintiff was not entitled to recover for the goods subsequently supplied, and that he was bound to give credit for the £20 paid by the wife as against any goods previously supplied which they might think were supplied on the husband's credit; and that even as to the goods previously supplied, those transactions coupled with the absence of any communication with the defendant afforded evidence, which was for their consideration, that the plaintiff believed that the wife was acting without her husband's authority, and trusted her solely.

*Sidney, Q.C.*, for the defendant, called upon his Lordship to tell the jury that if they believed the evidence of the defendant and that the money given to the wife was sufficient for the supply of the establishment, that rebutted the presumption. He also asked his Lordship to tell the jury that if they believed that the defendant authorised the goods to be purchased for ready money, and that the money supplied was sufficient for the purpose, they should find for the defendant irrespective of the plaintiff's knowledge. His Lordship declined to give those directions, and the jury found for the plaintiff the amount of the goods supplied up to December, 1863, viz. £80, and gave credit as against that amount for the £20 paid by the wife afterwards. In his report his Lordship stated that he thought that, if his direction to the jury was right in point of law, their verdict was a right conclusion from the evidence. On the 3rd November, 1864, on motion of the defendant, a conditional order was made setting aside the verdict and granting a new trial on the ground that said verdict was against evidence and the weight of evidence, and for misdirection of the learned judge. Cause was now shown against this conditional order.

*Bourke, Q.C., Blake, Q.C., and Monahan*, for the

plaintiff, to shew cause.—The cases show, first, that the wife is the general agent of the husband, having authority to order necessaries for the supply of the family; and, secondly, that the public are not to be bound by any private understanding between the principal and the agent. The arrangement made by the defendant with his wife was never communicated to the tradesman.—*Manby v. Scott* (2 Sm. L. C., 375); *Fitzherbert, N. B.* 120, G.; *Freestone v. Butcher* (9 C. & P. 643); *Chitty on Contracts*, p. 322. A husband is liable for necessaries supplied to the wife during the period of his lunacy. *Read v. Legard* (6 Exch. 636). The wife then having authority to bind her husband for all articles which come within her general management, the question is what is to supersede that general authority.—*Sir Robert Wayland's case* (3 Salk. 234); *Nickson v. Brohan* (10 Mod. 109). It cannot be by any private arrangement between the principal and the agent.—*Smethurst v. Taylor* (12 M. & W. 545); *Johnston v. Sumner* (3 H. & N. 261). As between the husband and the wife, the husband's giving money to the wife amounts to no more than this, that he does not intend her to run in debt. *Ruddock v. Marsh* (1 H. & N. 601) shows that there is a presumption of authority in the wife during co-habitation. *Reneaux v. Teakle* (8 Exch. 680) and *Jolly v. Rees* (15 C. B., N. S. 628) will be strongly relied upon on the other side, but there were in both circumstances to distinguish them from the present case. Here the goods supplied were for the use of the family, and were partly consumed by the husband himself. Here, too, the defendant saw the plaintiff's boy coming to the house with the goods. It was then as incumbent on him to make inquiries as to what his wife was doing, as it was upon the plaintiff to make inquiry as to whether the wife had authority. *Holt v. Brien* (4 B. & A. 252) is a decisive authority upon the present case.

*Sidney, Q.C.*, and *Morris, Q.C.*, for the defendant, to sustain the conditional order.—The whole of the evidence shows that credit was given exclusively to the wife; the transaction with respect to the bills is especially strong to show this. It was plainly an attempt to keep the defendant in the dark as to what was going on. The verdict was not satisfactory upon the evidence. The plaintiff acted fraudulently with the wife against the husband. He is almost estopped by the bills which he took, from saying that the credit was not given to the wife. Then as to the legal question, *Reneaux v. Teakle* (8 Exch. 680) is a strong authority for the defendant. So also is the third resolution in *Manby v. Scott* (2 Sm. L. C., 395). So also the cases of *Montague v. Benedict* (2 Sm. L. C. 409), and *Seaton v. Benedict* (2 Sm. L. C. 415). They show that the husband supplying his wife with necessaries is not liable for her debts unless he has authorised her to contract them.—*Metcalf v. Shaw* (3 Campb. 22). But the case of *Jolly v. Rees* (15 C. B., N. S., 628) is decisive for the defendant. It is a judgment of the Court of Common Pleas upon a case even less strong than the present. *Etherington v. Parrott* (Lord Raym. 1006) shows that *Jolly v. Rees* is only declaratory of the old law.

*Cur. adv. vult.*



Jan. 13.—FRIZZKRALD, J.—After referring to the facts of the case, and to the judgment of Pollock, C. B., in *Johnson v. Sumner* (3 Hurst. & Norm. 261) proceeded to mention the case of *Jolly v. Rees* (15 Q. B., N. S., 628). The latter case is a formidable obstacle in the way of the plaintiff, and was distinguished by Mr. Blake, who insisted that *Jolly v. Rees* may stand, and not govern the present case. I shall have occasion to refer to it again. The effect of the wife's contract in imposing liability on the husband depends on her authority. There was no express authority in the present case. Was there any implied? On this subject there has been some discrepancy in the cases. But the fair result of the authorities seem to be that where, as in the case before us, a wife living with her husband in his house, and managing his household, gives orders for necessaries, which are supplied at the defendant's house, and used there, it will be presumed that she had authority to order them, and he will be bound by the contract. I am not aware that in *Manby v. Scott*, or any of the authorities, there has been found anything conflicting with the proposition stated, which is found in the direction of the judge. The law of Scotland concurs with ours, and is perhaps stronger. In Erskine's Institute of the Law of Scotland, the law is stated at p. 126—"With regard to disbursements necessary for a family, the rule is that the wife, who is formed by nature for the management within doors, is presumed, while she remains in family with her husband, to be *proposita rebus domesticis*. In this character she hath power to purchase whatever is proper for the family; and the husband is liable for the price, even though what was purchased may have been applied to other uses, or though he may have given the wife a sum of money *aliunde* sufficient for the family expense." It is to be observed further that in the present case the goods were actually delivered at the husband's house, and that the family had the benefit of them by consuming them, and these are circumstances not to be disregarded. In *Manby v. Scott*, Foster, C. J., and other Judges, are reported to say a *feme covert* cannot make a contract to bind the husband. They did not deny that circumstances may be express or implied, so that the contract of the wife may be the contract of the husband, and they put the case even of the goods coming to the husband's use, and the 3rd resolution is—"That if the wife purchase goods, and it is found by special verdict that they were consumed in the household, yet the husband shall not be liable for them. But it shall be good evidence for the jury to find that the husband '*assumpsit*,' but not conclusive evidence." That is the proposition which Mr. Blake contended for. Assuming that from the facts of co-habitation, and the wife's management of the household there is an implication of agency, it remains to be seen whether that can be rebutted by proof of such an arrangement as in the present case, which was not communicated to the plaintiff. The presumption is of a general authority, that is of an authority to act for the husband in all matters coming within the scope of her employment acting for her husband. The distinction is one of substance, and not of form, and is based on public policy. If the husband was suffered to permit his

wife to act and appear to the public as having authority, it would lead to the grossest injustice if he was permitted to set up his private directions as relieving him from liability. The law as to the power of an agent seems to be correctly stated in Story on Agency, p. 100: "If the principal, by his declarations or conduct to persons dealing with him, has authorised the opinion that he had in fact given more extensive powers to his agent than were conferred, the principal will be bound by the acts of such agent to the extent of the authority which such declarations and conduct have fairly led them to believe to exist." And *Holt v. Brien* (4 B. & Ald. 252) supports that view, where Bayley, J. says, "If a husband makes no allowance to his wife, he gives to her a general credit, and she may contract debts for the necessary supply of herself and her family, for which he will ultimately be liable; but that proceeds on the ground that in such a case she is to be considered as his agent in contracting the debts. But if he supplies her with a sufficient allowance for the purpose of paying for these necessary supplies, and the tradesman with whom she deals has notice of it, and afterwards trusts her, he does so at his own peril, and will only be entitled to recover by proving that in fact the allowance was not regularly supplied." But he limits his peril to the case where he has notice. So also is the following dictum of Bramwell, B., in *Ruddock v. Marsh* (1 H. & Norm. 601)—"People have a right to suppose that a wife keeping her husband's house has such authority as is usually given to persons in such a situation. If the husband would limit such authority, he must give notice of the limitation. Referring again to the law of Scotland, I find it stated thus in another part of the passage which I have adverted to—"This *propositura* ceaseth..... Secondly, by the husband depriving the wife of the management of his family. This is effected by inhibition, which is a remedy competent to every husband whose wife discovers an inclination to live beyond his fortune. It is obtained upon a bill or petition preferred to the Court of Session, and prohibits all persons to contract with the wife or give her credit. As the wife's *propositura* falls by the perfecting of this diligence according to the forms prescribed in common prohibitions, the husband is not liable for any debt contracted by his wife after inhibition, except for such furnishings suitable to her quality as he cannot prove that he provided her in *aliunde*. As the wife's right of managing her husband's family is founded entirely on the presumption that he placed her in the direction, and as every one may remove his managers at pleasure without assigning any reason for it, inhibition may pass against the wife, *etiam causa non cognita*, though the husband should not offer to justify that measure by any actual proof of her bad economy or profuseness of temper," and a case is referred to, of which the note is as follows: "A husband who intimated to an innkeeper that he would not be liable for contractions by his wife after a day named by him, was held only liable for a maintenance to her suitable to his own means." Against these authorities the defendant relies on *Jolly v. Rees*. In that case the action was not for goods supplied for the keeping of the house to be consumed there. The action was for drapery and millinery supplied to the wife without

defendant's knowledge, not delivered at his house, nor had he any knowledge of the transaction till the account for them was furnished. The wife had not, as in this case, the appearance of authority to act as agent. She went to the shopkeeper after actual prohibition, to a shopkeeper who lived at a distance. The goods were sent to a railway station, not to the house, and the husband never got them. These are grounds to distinguish *Jolly v. Rees* from the present case. But even were it not distinguishable, I should not be prepared to adopt the opinion of the majority in *Jolly v. Rees*, and would abide with that of Byles, J. His opinion is in the plaintiff's favour, for even there he held that a private arrangement between husband and wife limiting her authority, is no answer in an action at suit of the tradesman against the husband. Different considerations then arise with respect to that decision. It seems to me that it does not govern the present case, and even if it were applicable, I would not be prepared to follow it. It seems to me contrary to sense and justice and the better authorities if the husband could in this way defeat the tradesman. It seems to me that the direction of the learned judge, though it may be open to verbal criticism, is right in substance, and I have still to consider whether the verdict should be set aside as against the weight of evidence. The case is now one of a conflict of evidence. There was evidence of a sale of goods on the order of the wife, an order which she was *prima facie* authorised to give, and there was evidence of delivery and consumption by the defendant's family, while on the other hand there were circumstances to warrant the jury in finding that credit was given to the wife alone, and that the plaintiff was put on his guard, and ought to have perceived that the wife exceeded her authority. There were, no doubt, various grounds to support either view, and there were very strong topics to submit to the jury for the defendant; but I have no doubt they were submitted with great force. I have no doubt they were fairly submitted by the judge to the jury, and they seem to have been carefully considered. I cannot say that the verdict was erroneous, and I consider that it was on the whole fair and correct. In such cases there are certain rules which I have heard stated in this Court, and in the Exchequer, by my Lord Chief Justice, when a member of that Court, and one rule is, that the verdict of a jury, when fairly found, ought to stand. There are exceptions, but they only prove the rule. I cannot find anything to make this case an exception. Again, there is another rule, viz., that a verdict is not to be disturbed as against the weight of evidence, unless the judge reports that he is not satisfied with the verdict. Baron Deasy reports here that if his direction to the jury was correct in point of law, their verdict was a right conclusion from the evidence. It seems to me that the direction was right, and that it would be wrong to set aside the verdict as against the weight of evidence.

HAYES, J.—If the decision in this case were to turn on the question whether the wife had authority to bind her husband, I should be disposed to think that our judgment should be for the plaintiff. The wife was not only living with her husband, but during

that period she was invested by her husband with control over that branch of the domestic affairs to which the goods purchased by her belonged. It was her authority and duty to purchase and lay in all necessary provisions for the household, and that may be clearly inferred from what was proved, that a weekly allowance was given to her. In this state of things it seems that the wife would be authorised to pledge her husband's credit for goods reasonably necessary for the family—I say reasonably necessary, for to that extent only was the plaintiff justified in giving credit. Looking to the station in life of the defendant, and applying the standard which he himself applied, I do not think it could be said that Mrs. Nolan transcended her powers if she had honestly pledged her husband's credit to the extent that she did. However, it is said that the allowance was of itself sufficient to restrict her authority; but such a result does not follow unless the plaintiff had notice that the allowance was paid. It is against all justice that he should be prejudiced by a state of things of which he had no knowledge, and such was the opinion of the judges in *Holt v. Brien*. The same law would be if the husband had thought fit to prohibit the wife without letting the tradesman know of the prohibition. Such a case would fall within the principle adverted to by Fitzgerald, J., and also by Byles, J., in *Jolly v. Rees*. Such liability is not founded on any rights peculiar to the conjugal relation, but on higher grounds. But while the wife is so authorised to bind her husband to this extent, it by no means follows that the husband must be answerable for all her debts. If the goods are supplied upon her credit alone, he cannot be answerable. That matter was left to the jury, who found that the goods were supplied on the husband's credit. In my opinion the verdict is against evidence, greatly against evidence, and should not be allowed to stand. The plaintiff relied on the presumption in his favour which the law raises from the position of the wife. I think there is enough on the evidence of the plaintiff himself to shew that he gave credit to the wife and not to the husband, and that he never gave credit to the husband. He was wholly unknown to the husband. Among the earliest of the dealings was a loan of money to the wife. So far as that was concerned the loan was to the wife, and she had no authority to pledge her husband's credit to that extent. From that period there was not a solitary application to the husband for payment. In December, 1863, the sum of £86 was due. For that a three months' bill on the wife is given for value received; that is, an acknowledgment that the value of the bill was received by Mrs. Nolan, and not by the defendant. According to the evidence, she gave a bill as cash, saying it would be paid. Though an account was kept, the plaintiff admits that the bill was not credited to the husband, and further it was made payable at the plaintiff's own place of business for the purpose of concealment. It was presented by mistake at the husband's house, and afterwards the plaintiff said to the defendant's son, who went to him about it, that he had been looking for the bill, and that he would be sorry that it caused his mother any trouble. A new bill was drawn and accepted by Mrs. Nolan for the

whole amount then due. The plaintiff says he would not have taken her acceptance only she told him she would have to leave the house if her husband knew she was so much in debt. The sister of the wife was also sent to the plaintiff. Now, this whole course of proceeding is inconsistent with the supposition that credit had *bona fide* and honestly been given to the defendant. It is only to be reconciled with the theory that from the first credit was given to the wife, and not to the husband. I confess that when I find a trader combining with a married woman to keep concealed that which the husband ought to know, it is strong evidence that there is not credit given to the husband, and it would be wrong of us to give any encouragement to such a course of conduct. I think, therefore, that there ought to be a new trial on the ground that the verdict in this case was against evidence. In this I am confirmed by a case of *Bentley v. Griffin* (5 Taunton, 356). That was an action brought by the plaintiffs, who were dressmakers, against the defendant, to recover the amount of their charges for dresses furnished to the defendant's wife. It appeared, upon the trial, that the defendant was an attorney, not in very extensive practice, and depending upon his practice for an income. He did not occupy, with his own family, the whole of the house in which he lived. The plaintiffs had, in about a year and a half, furnished articles of fashionable dress to the defendant's wife to the amount of £183; and they proved that the charges were, for such articles, reasonable. They proved that the wife had sometimes come in a curricule to their shop, and ordered goods. They had debited the wife in their books; they had been partly paid for their goods by three bills of exchange, which they had from time to time drawn, directed to the defendant by the name of Mr. Griffin, but there was no proof that they were ever presented to him for acceptance; and the wife had accepted the bills, signing only the the initial letter of her christian name, and she had paid those acceptances. The husband and wife lived together; and it was proved that the wife had, in the husband's presence, worn some of the articles furnished by the plaintiffs. For the defendant it was proved that the curricule in which the lady had been seen was not his, but that of an acquaintance; that when some of the articles were sent home, the wife had directed the servant to put them away, that her husband might not see them; that in the presence of the defendant, and one of the plaintiffs, she had said that "her husband never paid her bills, she always paid her own." That one of the bills drawn on the husband and accepted by the wife, which the plaintiffs had paid away to Hillyard, a lace-merchant, being dishonoured, the plaintiffs had written in urgent terms to the wife, praying her to provide for the bill, but had made no application to the defendant. Heath, J., before whom the case was tried, left it strongly to the jury to consider whether the credit in this case had not been given to the wife, and not to the husband. The jury however found a verdict for the plaintiffs for the whole amount. Upon motion however, it was held that the verdict should be set aside as against evidence, and that there should be a new trial. Heath, J. said "at the time of the trial

I told the jury that there was strong evidence to shew that the plaintiff gave credit to the wife, and not to the husband, in the three bills being accepted and paid by the wife, and in the wife telling the servant to carry away the dresses when brought home. I was much dissatisfied with the verdict." Chambre, J. said—"It is clear that the verdict is grossly wrong; it is unnecessary to go into the circumstances; the cause must go down to another trial." Dallas, J. said—"The question is whether the general liability of the husband is not repelled by circumstances which shew that the credit was given to the wife. I think most clearly that the credit was given to the wife, and that the husband is liable for no part of the charges." Now, adopting the language of Justice Chambre, I think, notwithstanding the opinion of my brother on the left, that the verdict in this case was grossly wrong. The tradesman knew from the beginning that it was a concealment against the husband, and that he was joining in a conspiracy against the husband. It is said here that the present verdict has met the approval of the judge below. I do not understand that. He only says that supposing his charge was right the verdict was right. But I do not think that the verdict was according to the evidence as given by the judge in his report. Upon the whole I think that on the ground of the verdict being against evidence, and the weight of evidence, it ought to be set aside.

O'BRIEN, J.—In this case I concur with my brother Hayes in thinking that the verdict was not in accordance with the evidence. But I shall go further. With regard to the other point in the case, my opinion is, that the direction of the learned judge, at the trial, was not correct, and that the attention of the jury was not called to matters which ought to have been submitted to them. The simple question which the judge left to them was whether the plaintiff himself sold the goods upon the credit of the husband or of the wife, and he prefaced that by what the jury must have taken as a positive direction that there was no case made by the defendant at all, to rebut the presumption of authority that the wife had. In other words the way he put the case to the jury was this:—the wife had full authority to bind the husband, notwithstanding all that passed; and the sole question is, did the plaintiff contract with the wife or the husband. Now having regard to the principles laid down in this case, the question to be submitted to the jury should be of a different character. I shall read a few lines which relate to this part of the charge. He says,—“I told the jury that when husband and wife are living together, the wife was presumed, by law, to have authority to order goods suitable to the establishment, for the supply of it, and that the husband was liable for goods so supplied on the wife's order.” With that general statement of the law no fault can be found; but he goes on then to say—"that that presumption was capable of being rebutted, but that a mere private arrangement between husband and wife, not communicated or known to the party supplying the goods would not of itself be sufficient to rebut it." With every respect I think that proposition, laid down so generally, is not to be assented to. Having taken away the

effect of this arrangement, and having said that it alone would not affect the presumption, he goes on to tell them only that he left the question to them "whether the goods supplied by the plaintiff, or any of them, were so supplied upon the credit of the husband, or whether they were supplied upon the credit of the wife solely, with the knowledge or belief that she was acting without authority; and in the hope that either to avoid exposure, or through the wife's influence, the husband might unwillingly be prevailed upon to pay for them." Now I apprehend it is one clear result of the authorities, though there may be certain cases of conflicting decisions, that the question of the authority of the wife to pledge her husband's credit, is a question of agency; and we shall find that in the cases which have arisen, the judges, one after another, have expressed their opinion that that was a question to be submitted to the jury. The objection taken here was not a mere formal objection. The question arises, is the relation of husband and wife such as that, though the wife derives her authority as the husband's agent, yet though she transgresses that authority, and departs from it, she is to have a right to go beyond the authority which an agent possesses. We are indebted to counsel in this case for a full research into the authorities. I shall only refer to a few of them. In the case of *Montague v. Benedict* there are some observations of Bayley, J., bearing out what was stated in *Munby v. Scott*, to which I shall refer; but I advert the more to them because of the observations of the same judge in *Holt v. Brien*, where there was notice to the tradesman of the arrangement between the husband and wife; and it was therefore unnecessary for the Court to consider what the effect would have been if that notice had not been given. Bayley, J., in *Montague v. Benedict* lays down the law to be that "wherever the husband and wife are living together, and he provides her with necessaries, the husband is not bound by contracts of the wife, except where there is reasonable evidence to shew that the wife has made the contract with his assent. Co-habitation is presumptive evidence of the assent of the husband; but it may be rebutted by contrary evidence; and when such assent is proved, the wife is the agent of the husband duly authorised." Holroyd, J. in the same case says—"where a tradesman provides articles for a person whom he knows to be a married woman, it is his duty, if he wishes to make the husband responsible, to inquire if she has her husband's authority or not; for where he chooses to trust her, in the expectation that she will pay, he must take the consequences if she does not. If it turn out that she did act under the authority of her husband when she gave the orders, he will be liable, but otherwise he will not." Now, I may notice here—and I do it for the purpose of giving an answer to what was stated—that a great deal was said about the hardship that would result from our laying down the law, that a tradesman should supply necessaries on the wife's order, and that the husband having had the benefit of these goods, either by partaking of them himself, or having his wife and children fed and clothed, should be able to get rid of his liability for them. But let us consider if it is not in the power of trades-

men themselves to relieve themselves from the difficulty. If, as in the case before us, an account is run for a long period, is it too much to ask the tradesman to apply and apprise the husband, of what is being done, and ask is it by his authority that these credits are asked for? If he does so he runs no risk of loss; if he does not, and loses, whose is the fault? But what remedy is there if the wife is to have the power of binding the husband, to the extent, which is contended for here? He may supply her with money necessary for every expenditure in the house, and she may still deal with different tradesmen on credit, and the husband not be aware of what is going on. All that the husband would see, would be that goods were supplied from somewhere. It was only in 1862 that the husband knew of this in the present case. The husband has no means of knowing; the tradesman has; and if a loss is to fall on anyone, it is on the one who has the power and does not choose to use it. In *Montague v. Benedict* the question is laid down as one of agency. Then there is the case of *Reid v. Teakle* (13 C.B. 627). That was an action to recover the price of some musical publications, supplied by the plaintiff to the defendant's wife. The undersheriff of Middlesex, before whom the case was tried, in his summing up, told the jury that the question for their consideration was whether music was a necessary for a person in the condition of life of the defendant's wife. Upon motion for a new trial, it was held that this was not the simple question to be left to the jury, but that it should also be left to them, whether upon the facts proved the wife had authority, express or implied, to bind her husband by her contracts. Well then we have the ease in 8 Exch. *Reneaux v. Teakle*, to which I shall refer, and which is the more important because I think it is at conflict with some expressions used in other cases, by the learned judge who presided when it was argued. I admit there is a conflict. I think it is manifest that in the case of *Ruddock v. Marsh* (1 Hurl. & Norm. 301), the Court were departing from the opinion pronounced in the case in 8 Exch. The case of *Reneaux v. Teakle* was an action to recover the sum of £33, for various articles of dress supplied to the defendant's wife, during a period of fourteen months. The defendant had an annual income of about £370 a year. His wife and two children resided in the same house with him, and he allowed his wife £30 a year for her dress. The articles in question, some of which were of an expensive description, were supplied to the defendant's wife, without his authority or knowledge; and it did not appear that he was aware that his wife wore them, since she was in the habit of putting them on in his absence from home, and of wearing plainer clothes when he returned. The defendant's counsel proposed to prove that the defendant's wife, without his consent or knowledge, had procured other articles of dress from different tradesmen within the same period, to the amount of £150. The learned judge rejected the evidence, and left it to the jury to say, whether the articles in question were suitable to the station in life of the defendant's wife; and they found a verdict for the plaintiff for £30 4s. 9d. The Court held that there should be a new trial. On the argument, counsel for the plaintiff contended that the

question was properly left to the jury, and argued that a wife living with her husband, had an implied authority to pledge his credit for articles suitable to her station. Upon that Martin, B., observes: "that is only a presumption arising from cohabitation, and may be rebutted. The question is one of agency. If a husband tells his wife that he will not permit her to have a particular kind of dress, she cannot bind him by ordering it." Farther on he observes: "Assuming that the wife had *prima facie* an authority to order these articles, if her husband supplied her with sufficient dress, her authority to bind him was at an end." Pollock, C.B., says: "A wife is not in a different situation from any other person in the establishment. If a servant goes to a shop, and orders goods in the name of his master, the tradesman is bound to enquire before he gives credit. If he does not, and it turns out that the order was without authority, the tradesman cannot sue the master." He goes on to say: "the apparent result of the authorities is that if a tradesman trusts a married woman, he must take his chance of payment." On these grounds he says: "The evidence was admissible for the purpose of shewing that the wife was already sufficiently provided with clothes, and therefore there could be no necessity for ordering the goods in question, or any implied authority from her husband to order them."

Now the cases relied upon by Mr. Blake, for the plaintiff were in the first place *Ruddock v. Marsh* (1 Harl. & Norm. 601); that was an action brought in the Manchester Record Court for a balance claimed to be due for goods sold and delivered. The goods consisted of groceries and other provisions. The defendant's wife, who lived with her husband, had been in the habit of purchasing groceries and provisions for the family at the shop of the plaintiff. The defendant was often employed at a distance from home, and was absent at the time when the debt in question was contracted. The defendant's wife had paid money on account at different times. On cross-examination, the plaintiff's wife said: "The defendant's wife told me she got twenty-five shillings a week to keep the house, from her husband and son. When she paid me money she did not say it was out of the twenty-five shillings a week." The defendant proved that he was absent from home sometimes three weeks, sometimes three or four months at a time; that his wages were thirty-four shillings a week, besides an allowance for his expenses when away from home. Out of his wages his wife received regularly every Saturday twenty-five shillings to keep the house, in addition to nine shillings and fourpence, the wages of his two sons. The Recorder told the jury that the only question he should leave to them was the amount to which in their opinion the plaintiff had established his claim; that the articles furnished to the wife of the defendant were all necessaries taken to the defendant's house for the sustenance of his household, and there consumed by his wife and children, and by himself when he was at home; and that he was bound to pay for them: that it was no defence to the action that the defendant had regularly supplied his wife with money sufficient to have kept his house without running into debt, and that that was all of which there was any proof; that no notice had been given to the

plaintiff, and that there was nothing to bring home knowledge of the fact to the plaintiff. There was a rule for a new trial on the ground of misdirection which was discharged, and Pollock, C.B., in delivering the judgment of the Court said: "The objection taken to the ruling of the learned Recorder was, that he had directed the jury that the wife was a general agent for the husband. Without saying that a wife in every case has such an authority to bind her husband, we are of opinion that the direction was correct with reference to the circumstances of this case. A partner is a particular kind of agent who has a general authority to bind his partners by contracts made in the course of business; and in like manner a wife has authority with reference to such matters as are usually under the control of the wife. If that authority is broken in upon, it must be by special circumstances which do not appear in the present case." That case therefore turns on its particular facts. I admit that in the case of *Johnston v. Sumner* (3 Harl. and Norm. 261) he expresses an opinion which goes much farther, but there the husband and wife were separated, and the plaintiff was non-suited. The observation made by the learned judge was not necessary for the decision of the case. It was this: If a man and his wife live together, it matters not what private agreement they may make, the wife has all usual authorities of a wife. The opinion of Pollock, C.B., is directly at variance with his own opinion in the other case. Now we come to the case of *Jolly v. Rees* which is decisive in favour of the proposition contended for by the defendant. In that case the goods were necessaries. They were not actually consumed by the husband, but they were found by the jury to be necessaries suitable to the condition in life of the parties, and this was further found, that the allowance, if paid, would have been sufficient to have supplied the wife, but that it was not regularly paid. Byles, J., relies on that, having regard to the circumstance that the wife was left without funds to provide for them by the husband's neglect to pay regularly. But let us take the decision of the majority of the Court which was delivered by Erie, C.J. He lays down that the question is one of agency. "We consider," he says, "that the wife cannot make a contract binding on her husband, unless he gives her authority as his agent to do so." He then gives the judgment of the Court. This case appears to me to be an authority to shew that the proposition laid down by Deasy, B. was a direction calculated to mislead the jury, and that the simple question which was left to them, whether the plaintiff gave the goods on the credit of the husband or the wife, was not the question. The question should have been one of agency. The whole question of the arrangements between husband and wife should have been laid before the jury so that they might have considered it, and that not having been left to them I do not think the verdict right. I must say I never saw a case in which it was clearer that the tradesman dealt with the wife than the present. We have an account commencing on the 1st June. Cash was lent, £5 cash the very first day; the order being for 12s. worth of goods. The account went on until October. Week after week the goods were supplied, but the £5 were left out. There was a further loan in Oct.,

and where the goods were paid for on the first four weeks, and the money left out, I think that is strong to shew that the credit was given to the wife. But the subsequent transaction of the bill, puts the matter beyond a doubt. During the whole of the period the husband was never applied to. The tradesman draws a bill on the wife alone. That bill when it falls due is by mistake brought to the defendant's house, and the son goes to complain, and the wife mentions the way she would be in if the husband knew of it. I do not think the attention of the jury was directed to the question they had to try. On both grounds I think there ought to be a new trial.

LAWSON, C.J.—In this case I might satisfy myself by saying that upon the grounds stated by my brothers O'Brien and Hayes, I am clearly of opinion this verdict cannot stand. The grounds to which I advert amount to evidence of a clear conspiracy between the shopman and the wife to keep the husband in the dark during the time the goods were supplied, during the time that the wife used her actual and supposed authority for the purpose of raising money on her credit. I should say that on those grounds it is impossible to let the verdict stand. But a grave question of law has arisen, and as I have formed a very decided opinion upon that question, and as the case may upon another occasion come before the Court, I feel it my duty though under circumstances which would make me prefer to postpone doing so, to state what my view of the law is, not deriving it either directly or indirectly from any other authority than that of the law of England, as confirmed by all the judges of England above a century ago, and which has been always adhered to, although occasional observations have been dropped by judges inconsistent with the law as laid down by all the judges of England, between that time and the late case. There are perhaps some observations somewhat inconsistent; yet the opinion of Erle, C.J., the opinion of the Chief Baron of England coincide with the authority of all the judges of England, as expressed above a century ago. Amongst those judges, were, I would observe, Sir Matthew Hale, Sir Orlando Bridgman, and though he was not one of those judges at that time, Lord Holt; and their opinions concur with that of Erle, C.J., and Pollock, C.B. I say on all those authorities I cannot hesitate to say that this verdict cannot stand on the ground on which it has been attempted to support it. And I think it is an oversight with respect to the two topics of the duties of a husband and the privileges of a husband, that has led occasionally to some decisions which are inconsistent with what I consider to be the settled law of England. What are the duties and rights to which I advert? I take it that the duty of a husband is to provide necessary food and apparel for his wife, and the family. That is his duty; and what is his right? That he shall be the person who, if he shall choose, shall provide these necessary things. He is the judge of what his means will allow him to do in that respect. It is said that that is not reasonable, but no matter whether it is reasonable or not, that is the law, and cannot be disputed, that it is not only his duty but his right; and if he makes that provision either by finding those articles which are necessary, buying them himself, or if not choosing to occupy himself in

that way, he gives a sufficient supply of money to his wife to supply those articles, and that supply is continued from time to time, there is not an authority that says or could say that under such circumstances the husband has lost his right to be the person to judge of and to supply those necessities, that he has lost his right though he supplies his wife with money instead of the articles themselves. Now, it is said, why is a private agreement between the husband and the wife to affect a shopkeeper who sends his goods to the credit of the husband? I ask why is the private agreement between the wife and the shopkeeper to divest the husband of his right and privilege of supplying the goods or the means of buying them? I agree, if the husband by his conduct has led a tradesman to give goods to his wife on his credit, and no charge is afterwards made, when once the husband has permitted this by his assent or his connivance, and by his negligence has led the tradesman into the trap of supplying goods on credit, no arrangement between him and the wife can affect his position. From the day of the marriage the husband in this case made the arrangement which he had a right to make with his wife, that he would discharge his duty by supplying money to purchase the necessary goods for his use, and he did so, and from that day to the hour at which he was furnished with a bill for goods supplied on his supposed credit, I say, there is not an atom of authority, or reason or justice, to lead me to say that the husband who set out in life making an ample provision for the only duty he was bound to discharge, and continued to discharge it, had never authorised this credit to be given or had, or given any countenance to sanction his wife's conduct. He had thus discharged his duty. I say that there is not an authority in the law that will say that he is to be deprived of the protection that the law gives him against being taking in in this sort of way by an arrangement between the shopman and his wife. Every week of his life he thought he had discharged all the duties of his life. He discharged his duty faithfully, according to the arrangement he had entered into. It does not appear that for the whole length of time during which these articles were supplied, he had the slightest intimation that they were supplied. It may be said it was a private arrangement which the law will not recognise. Every husband is entitled to discharge for himself his duty of procuring necessaries, or to give the money for procuring them; he is not liable to have a bill run up by a shopkeeper who chooses to furnish the goods upon a demand taken by his wife. Does the law invest the wife with an authority of that sort? It is a great mistake to suppose that it is a *presumptio juris et de jure*. The observations of Erle, C.J., on that ought to be written in letters of gold as exposing the absurdity of this *presumptio juris et de jure*, the absurdity of supposing that the wife has a right to supersede the husband in his duty of supplying the articles in question, and thus protecting himself from a predicament which might ruin himself and his family. What length of time might it go on? In the mean time he according to his means supplied the money; he had a right to make the arrangement to do so, and carried it out. He never led the man to furnish these goods on his credit. It

is not a private arrangement made in derogation of any engagement he made, nor did he do anything to induce the shopman to furnish these goods. He is left without a bill for four years, and then for the first time we are told this was a private arrangement which was made which the husband had no right to make with his wife. He had a right by law to supply the goods or give money for them, and it is not a private arrangement. He had given no engagement to the tradesman,—that is the point. Erie, C.J., adverts to that. The cases contain observations made on mistake and oversight when they talk of a private arrangement. If the husband had given any reason for supposing that he had authorised the goods to be supplied, it would be a different matter. In this case as in every other the question is, did the husband authorise the wife to pledge his credit? There is no presumption that the husband by a *presumptio juris* is supposed to give his wife an authority to pledge his credit. If this tradesman had sent the goods at any one time by the husband's sanction: if there was anything to induce the tradesman to think that the husband had sanctioned his wife in dealing on credit, it would be impossible to supersede the authority; but there never was anything of the kind. If there were any such authority, every man would have a right to avail himself of it? There is then no *presumptio juris*, but there is a presumption that if the husband does not discharge his duty, then the wife's authority arises of necessity, then the shopkeeper from the conduct of the husband has acquired a right to give credit to the wife to supply her necessities. If the husband has discharged his duty by supplying the money from time to time, we cannot hold him liable. When I consider that the shopman took from the wife a bill to prevent the husband knowing of the abuse, when I consider all the circumstances, I cannot have a shadow of doubt not only on the merits of the case, but I would say on the law of the case, and I am therefore of opinion that there should be a new trial.

### Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

CHADWICK v. DALY.—June 3, 12, 15, 1865.

*Construction of the words "upon or about the said works"—Construction of clauses.*

*A deed entered into by C. the trustee of the Corporation, Town Commissioners, and Grand Jury of Drogheda, and B. a contractor, for the purpose of building a new bridge over the River Boyne in that town, contained a clause "that all materials brought and left upon or about the said works by the contractor or by his orders for the purpose of being used in and about the carrying on the said works, should from time to time of their being so brought be considered as the property of and belong to the said C. as such trustee," &c. D., a creditor of B., subsequently seized in execution materials furnished by B. Upon the trial of an interpleader*

*issue between C. & D. it appeared that a portion of the materials seized was then in a yard and office hired by the contractor, on the South Quay of Drogheda, situate in the neighbourhood of the site of the proposed bridge, another portion on the South Quay (which appeared to be a public quay), at a distance of more than 120 feet from the site of the bridge and another portion on an open piece of ground also hired by the contractor, and distant about 849 feet from the site of the bridge. Held (following Montgomery v. Middleton, 8 Ir. Jur. N. S. 230), that the question whether the materials seized were "upon or about the said works," was a question for the jury.*

*A previous clause in the same deed provided that if B. should become insolvent, or for any such reason should omit to continue the works, it should be competent to C. to serve a notice on him requiring him to continue them; and that in default of his doing so within ten days after such notice, the materials should become the property of C., and he might employ others in the execution of the works. Held, that this did not operate to prevent C. from obtaining in the materials as soon as they were deposited upon the works such a qualified property as prevented the sheriff from seizing them at the suit of a creditor; and that after a ten days' notice he acquired a different sort of property in that in which he had a qualified property before.*

THIS was an issue directed by the Court of Common Pleas, under the Interpleader Act, to try whether all or any portion of the goods seized by the sheriff under the execution in the case of *Daly v. Buxton*, was or was not at the time of the seizure the property of the claimant, John Chadwick, as against Daly, the execution creditor. The case was tried before Mr. Baron Fitzgerald, in the Consolidated Nisi Prius Court, on the 30th of January last. It appeared at the trial that one Samuel Buxton was employed by the Corporation of Drogheda, the Commissioners for Improving the Port of Drogheda, and the Grand Jury of Drogheda, to remove an old bridge over the river Boyne in that town and construct a new one. The contract for the performance of such work was contained in a deed dated 14th of March, 1864, and made between the corporation of the first part, the commissioners of the second part, a number of persons named as constituting a committee on behalf of the parties of the first and second parts, and of the grand jury of the third part, the said Buxton of the fourth part, two persons as his sureties of the fifth part, and John Chadwick, the plaintiff, as a trustee of the parties of the first, second, and third parts, of the sixth part. The deed which was only executed by the parties of the fourth and fifth parts contained a clause, which was mainly relied on by the plaintiff, to the following effect:—"And further, that all materials brought and left upon or about the said works by the contractor or by his orders for the purpose of being used in and about the carrying on the said works shall from time to time of their being so brought be considered as the property of and belong to the said John Chadwick, his executors and administrators as such trustees and trustee, and shall not



on any account or pretence whatever be taken away by the contractor or any other person or persons whatsoever without the special licence and consent of the committee; but the said John Chadwick, his executors, and administrators shall not in anywise be answerable or liable for any loss or [damage which shall happen to or in respect of the said materials either by the said materials being lost, stolen, or injured by the weather or otherwise howsoever." A previous clause in the deed provided that if the contractor should be insolvent, or through any such reason should omit to continue the works, it should be competent to the committee to serve a notice on him requiring him to continue to execute them, and in default of his doing so within ten days after such notice, that then the plant and materials should become the property of the committee, and that they might employ others in the execution of the works. At the commencement of the works the contractor took from a person named Mathews a house and yard on the South quay of Drogheda, situate in the neighbourhood of the site of the proposed bridge, and on the side of it next the sea; this yard and house were up to the time of the seizure occupied by a person named Halliday and his wife. Halliday was a caretaker in the employment of Buxton, and the house was used as the office of Buxton and of his foreman at the works. A portion of the goods seized under the execution was at the time of the seizure in this yard and office. The South quay appeared to be a public quay. It was separated from the yard and office by a thoroughfare which at its narrowest part was about twenty-two feet wide. There were deposited on the South quay stones used as a material for the works by Buxton, at a distance of about 120 feet from the site of the bridge. These stones were not seized; but beyond this and further from the bridge there were deposited on the South quay certain chattels which were seized by the sheriff. On the other side of the bridge, the side furthest from the sea but on the same side of the river, the contractor, Buxton, hired from a person named Moynihan an open piece of ground, bounded on the one side by the river, and on the other side by John-street, which was distant about 849 feet from the site of the bridge; and on this piece of ground were certain other of the chattels seized by the sheriff. The only remaining goods in question were seized by the sheriff at a place called the Quarry, about a quarter of a mile from the town. They consisted of a crane and chains; and as to them, it was finally admitted at the trial that the plaintiff could not succeed in obtaining a verdict. The question therefore was as to the goods and chattels seized at the yard and office, at the South quay, and at Moynihan's premises. The contention of the plaintiff was, that these goods and chattels were materials brought and left upon or about the said works within the meaning of the deed, and thereby became the property of Chadwick as against the execution creditor. It appeared that Buxton ceased to carry on the works on the 9th November, 1864, and the clerk of the works in the employment of the engineer appointed by the committee of the three bodies, deposed at the trial that he had a communication with Chadwick the trustee; and that by Chadwick's direction he, on the

10th November, entered into charge of the works and the materials, and that he would not have allowed any of them to be taken away. He swore that he was daily on the ground, but it appeared that he did not employ any watchman to watch the goods till after the seizure in execution, which took place on the 26th November. On the part of the defendant it appeared that a night watchman had been regularly employed by Buxton from the time of the commencement of the works, who continued to watch after Buxton's departure, and received payment from him after such departure. This man swore that he had the watching of the goods seized up to the time of the seizure and afterwards. He deposed that Buxton's foreman had the charge of the goods during the day-time, and that the foreman remained after Buxton's departure at the office where Halliday and his wife also were. And it appeared that the key of the yard and office was with Halliday up to the time of the execution, when it was handed to one of the bailiffs employed in such execution. It appeared that the site of the bridge and the place where the works were actually being carried on were paled in and enclosed, but none of the goods seized were within that enclosure.

At the close of the plaintiff's case *Dowse, Q.C.*, for the defendant, called for a non-suit or direction for the defendant, on the grounds—1. That the clause relied on by the plaintiff in the deed was dependent on a condition of giving ten days' notice of default and failure to perform certain matters, and that no such notice of default was shown. 2. That the clause constituted only an equitable contract between Buxton and Chadwick, and could give no title at all to the chattels without delivery of which there was no evidence, and that the equitable contract was not complete by reason of Chadwick's not having executed the deed. 3. That there was no evidence that the property seized was upon or about the works within the meaning of the contract, and that there was no sufficient evidence of possession in the plaintiff Chadwick. 4. That the contract was a bill of sale within the meaning of the 17 & 18 Vic. c. 58, and as such required registration, which was not shown. With reference to the third objection, the judge was of opinion that there was no evidence that the goods seized were upon or about the works within the meaning of the contract; but in order to prevent the necessity of a new trial, if wrong, he thought it advisable to have certain questions submitted to the jury. Having declined to non-suit the plaintiff, the defendant's case was gone into. The learned judge left to the jury the three following questions:—1. Whether the goods in question were brought to the respective places where they were seized for the purpose of being used in carrying on the works, to which the jury answered affirmatively. 2. Whether there were or was any places or place nearer to the proposed bridge where the goods could have been reasonably placed for the purpose of being used in carrying on the works than the places whereon they were respectively placed, to which the jury answered in the negative. 3. Whether Chadwick by himself or anyone for him, had possession in fact of the goods at the time of the

seizure, to which the jury answered in the negative. *Serjeant Armstrong*, for the plaintiff, called for a direction on these findings, and also called on the judge to leave to the jury the question whether the goods were upon or about the works within the meaning of the contract, which he declined to do, and directed a verdict for the defendant, but reserved liberty to the plaintiff to move to have the verdict changed into a verdict for him as to all the goods except the crane and chains, if the Court should be of opinion that he ought to have so directed, having regard to the several points made by the defendant's counsel. The plaintiff obtained a conditional order that the verdict had for the defendant might be set aside and a verdict entered for the plaintiff, or for a new trial on the ground of misdirection by the learned judge, and because the verdict was against evidence and the weight of evidence, against which

*Dowse, Q.C.*, (with him *R. Foley*) showed cause.—The judge was right. This is a deed which uses English words, of which the judge was at least as good a judge as the jury. "Works" must mean here the site of the works, the *locus in quo*. We have it in evidence that the works were surrounded by a paling. The works mean the proposed bridge. A provision further on in the deed throws some light upon this. In case the contractor brings improper materials he is to take them away from the works. From what works? not from his own premises for which he pays rent. "About" in the Imperial Dictionary means "around on the outside." At the trial *Montgomery v. Middleton* (13 Ir. C. L. R. 173) was referred to on the other side, but it does not govern this case. *Christian, J.* says in that case that there was a question of fact, whether the vessel had arrived at Sligo or not. But here there is no question of fact, the question is upon the meaning of English words. Suppose this man had brought centres to Amiens-street and left them there, could a judge leave it to the jury to say if they were upon or about the works? Because an ambiguous word is there, is the question to be left to the jury? This is only to be done when the ambiguity is what parol evidence can qualify or explain. Another question is, if this is within the Bill of Sales Act. That Act provides that every bill of sale shall be registered with certain formalities which it is conceded were not observed here. "Apparent possession" in section 7 has received a construction. The clause in the deed relied on by the plaintiff depends upon the condition of giving the contractor ten days' notice of default. The jury have found that Chadwick did not get possession. The plaintiff may have an equitable title but none at law—*Holroyd v. Marshall* (10 Ho. of Lords). As to whether equitable claims can be the subject of interpleader order, I refer to—*Rouch v. Wright* (5 Jur. 755, note by the reporter); *Frost v. Heywood* (2 Dowl. N. S. 801); but in none of these is there a decision exactly on the point; *Hurst v. Sheldon* (13 C.B., N.S., 750).

*Serjeant Armstrong and Ferguson, Q.C.*, in support of the rule.—This clause is not a grant of future property—*Evans v. Thomas* (Croke, Jas. 172); *Earl of Rutland's case* (2 Brownlow, 388). It operates as a covenant until the thing is in existence;

then it is a grant. It is a continuing covenant. It should have the same effect as if executed contemporaneously with the bringing of the property on the ground. It is said "the works" must be considered to be the very site of the bridge. That is too narrow a construction of "upon or about the works." Take the case of the Dublin Exhibition. This is a deed made by workmen, and that is one of the reasons why the question should have been left to the jury. What is the difference between ten yards and a hundred yards? As to the word "about," the best dictionary is the popular use of the word. This word has a dozen meanings. It does not necessarily mean abutting. The jury are to say what is its meaning, having regard to all the circumstances of the case. The moment it appears that the interpretation is doubtful it is for the jury.—*Montgomery v. Middleton* (13 Ir. C. L. R. 173; s.c. reported in the Court of Exchequer Chamber, 8 Ir. Jur. N.S. 230). [*Monahan, C.J.*—Both parties called for a direction there.] If the judge should have interpreted the word "about" at all, he should have held it to mean "in the neighbourhood of;" but if he did not interpret it he should have left it to the jury.] [*Christian, J.*—It seems to me to depend more on the word "upon," and that that would mean where the workmen are working upon.] As to this being a bill of sale, a bill of sale contemplates things capable of being scheduled and enumerated—*Alsop v. Day* (7 H. & N. 457). This is not an instrument which at the time of its inception and execution operated to transfer. The meaning of the deed was, that though the property was to be in us, the duty lay upon the contractor to watch against theft. Chadwick had no right to exclude the contractor from coming and attending the materials, but he had the right to prevent them from being taken away. The possession he took was in conformity with that right. *Non constat*, but that Buxton, though he went away, might have come back on the 12th or 13th with sufficient workmen and continued the works—*Lunn v. Thornton* (1 C. B. 379); *Latimer v. Batson* (4 B. & C. 652); *Congreve v. Everts* (10 Ex. 298). There has been here by both ways the *actus novus interveniens*.

*R. Foley* in reply.—There is an early provision in the deed, that inasmuch as it will be necessary for the contractor to lay plant and materials on the roadway forming part of the approach to the bridge, the contractor shall not be liable, &c. That shows that a close proximity to the bridge was in the contemplation of the parties with reference to the ownership. The deed contemplates a watchman day and night.

*Curr. adv. vult.*

June 15.—*MONAHAN, C.J.*—This was an application to enter a verdict in favour of the plaintiff or for a new trial. The action was tried before Baron Fitzgerald in the Consolidated Court last Term. The property is not of much value, still we must decide upon it as best we can. I regret the conclusion is, that we cannot enter the verdict one way or other. This was an interpleader issue. [His Lordship stated the facts.] The plaintiff rested his title on the deed together with certain parol evidence. The deed con-

tains a provision to this effect: "And further, that all materials brought and left upon or about the said works by the contractor or by his orders for the purpose of being used in and about the said works shall from time to time of their being so brought be considered as the property of and belong to the said John Chadwick, his executors and administrators, as such trustee and trustees, and shall not on any account or pretence whatever be taken away by the contractor or any other person or persons whatsoever without the special licence and consent of the committee; but the said John Chadwick, his executors and administrators, shall not in anywise be answerable or liable for any loss or damage which might happen to or in respect of the said materials, either by the said materials being lost, stolen, or injured by the weather or otherwise howsoever." That is the provision on which Chadwick relies. It appears that the materials were not the property of Buxton, the contractor, when this deed was entered into; and Daly alleges, first, that this applies only to property left on or about the works, and therefore not having property on or about the works the deed had no opportunity of coming into operation at all. If that be the true construction, *cadit questio*, Chadwick would have no title. There is not much dispute as to the facts. The bridge was to be built. There was a public quay. Immediately behind there was a public thoroughfare; and it was provided that some of the material was to be deposited on a place which might interfere with the public thoroughfare, because it is provided that in that case they were to indemnify the contractor Buxton from all loss he might sustain. I refer to that to extract from it if I can where the parties contemplated the materials were to be laid. The nature of the structure is also to be considered. That these materials should have been immediately in contiguity was the argument made for Daly, and such, I collect, was the opinion of Baron Fitzgerald. There may be a different result as to a portion of them. The jury have found that they were in the most convenient place. Some portions were disposed in a yard which Mr. Buxton hired from a party residing on the same side of the river, other portions on an open space of ground which, however, is private property. We are of opinion, following *Montgomery v. Middleton*,\* though it decided differently from my opinion at the time, that this was a matter to be left to the jury, and not for the learned judge to take on himself to decide. It would follow from that that it was a case to direct a new trial. But then Mr. Dowse has suggested several objections why we should not grant a new trial; and we would not do so if we were satisfied that no matter how that point was found—that notwithstanding the finding being in favour of Chadwick—on other grounds the defendant would be entitled to succeed. The first objection is, that this particular clause is not as if it were taken separately, but is to be read with a previous clause and to be governed by it. The provision is rather lengthy, but in substance this: that if the contractor should be insolvent, or through any such rea-

son should omit to continue the works, it should be competent to serve a notice on him requiring him to continue to execute them; and in default of his doing so within ten days after that, that the plant should become the property of the committee and they might employ others for the execution of these works. It has been argued that this is inconsistent with the supposition that the materials were to be their property from the time they were deposited on the ground; and Mr. Dowse says if this subsequent clause has any operation it applies only to plant deposited on the premises after the expiration of the ten days' notice. I cannot follow that. I think the construction is, that from the moment they were deposited they were to be the qualified property of the committee, i.e., to this extent, that no one was to remove them from the works. That is reasonable, for in this as in such contracts some of these things were centres, which were absolutely necessary for the construction of the bridge. I think that the moment they were deposited there was a qualified property in them, such as prevented the sheriff from seizing them at the suit of a creditor; and that that is not inconsistent with this further provision, that if Chadwick wishes to use them in the construction of the works he must serve the ten days' notice, and then he acquires a different sort of property in that in which he had a qualified property before, and therefore so far as the deed is concerned Serjeant Armstrong's construction is the correct one. But then comes a question of great difficulty. It is conceded that what was seized is property which did not belong to Buxton at the time of the execution of this deed; and there is nothing better established than that a deed does not convey subsequently acquired property to the grantee under the deed. Several cases have been decided on that principle. We were referred, amongst others, to one which decided that in such a case the party had no right to take possession of subsequently acquired property; and that if he did so against the will of the party contracting, the latter might maintain trover against him. That case has not been overruled, but several cases have decided since that if there be subsequently acquired property, and the *novus actus* has taken place, and the party has got possession, he acquires a proper title by means of the possession. It is by no means clearly settled what that sort of possession is to be. But it is correctly laid down by Lord Chelmsford in *Holroyd v. Marshall* (10 H. of L. 216), that "At law an assignment of a thing which has no existence actual or potential at the time of the execution of the deed is altogether void; but where future property is assigned, and after it comes into existence, possession is either delivered by the assignor, or is allowed by him to be taken by the assignee; in either case there would be the *novus actus interveniens* of the maxim of Lord Bacon." In relation to that I think it necessary merely to refer to three cases—*Congreve v. Evetts* (10 Ex. 298); *Hope v. Hayley* (5 Ell. & Bl. 830); *Allatt v. Carr* (6 W. R. 578). It will be found in each of these cases that under a deed assigning subsequently acquired property the party having taken possession, though without express consent, there was a sufficient *novus actus*. There is no doubt, that if there was the

\* 13 Ir. C. L. R., 173, reported in error, 8 Ir. Jur., N. S., 239.

express consent, or if the property was taken under circumstances implying it, it would be a *novus actus*, but still the question will remain if it is taken not absolutely against the will of the party but without his expressed concurrence, and not against his express dissent, what the effect will be. But there is a finding by the jury that the property remained in the possession of Buxton. There is the express evidence of the clerk of the works that on the 10th of Nov. in consequence of a communication with Chadwick he took possession of the materials. There is no evidence that he kept a care-taker: there is evidence that there was a care-taker of Buxton who continued in possession. It occurs to us that the opinion formed was that the possession must have been an absolute possession excluding the other and the care-taker. It occurs to us that that is not the question, but whether the possession was taken not against the dissent of the party (in the words of Lord Chelmsford); and all that would be necessary would be, that there should be an agreement that that was to be the property of Chadwick under the deed. Therefore it is we are not satisfied whether there was the absence of such a possession as would vest the property in Chadwick. We think the attention of counsel and court must be directed to these cases, and that the question would be whether there was such a possession as passes the property, and that it need not be an exclusive one. Another question may arise whether this is a bill of sale, and on that part of the case there may be a difference as to portions of this property. Some of it was in a house rented by Buxton. At present, till we know how the possession is, it would be premature to determine whether this is such a bill of sale as should be registered to pass the property. We give no opinion on that; but on the whole we are of opinion there must be a new trial.

CHRISTIAN, J.—In the event of the case coming here again, I should not hold myself bound to an opinion in favour of the plaintiff on the first point made by Mr. Dowse, the construction of the deed.

*Rule absolute.*

## Court of Chancery.

Reported by Oliver J. Burke, Esq., Barrister-at-Law

### [MASTER LITTON'S COURT.]

[Reported by Oliver J. Burke, Esq., Barrister-at-Law]

TOUHY v. BURKE.—Nov. 24, 25, 26, 28; Dec. 5, 1864; March 1, 1865.

*Will—Construction of—Precatory trusts—Ambiguity in Will—Costs.*

O. M. having by his will, dated 21st November, 1805, made several bequests, thus proceeded—  
“I leave and appoint my ever dear and beloved wife residuary legatee to this my last will and testament, to have and to keep for her own use any further sum or sums of money I may die seised or possessed of . . . . convinced she will never de-

sert my dear and beloved children . . . and at her death divide whatever she may have among the most deserving of her children . . . and my will is, if ever she should marry she should forfeit all title, power, or control over my children and property, and to have but £60 a year during her natural life; and that all power and authority vested in her should devolve on” other parties therein named. After testator’s death, his said wife being possessed of a sum of £800 (she never having married subsequently), made her will, dated 12th of April, 1829, wherein she declared that she, in pursuance of all power and authority vested in her by her said husband’s will, bequeathed said sum of £800 to her daughter J. K. for life, and at her death . . . that the sum of £400 should be given to her grandson, and the other £400 to be equally divided between her four grand daughters,” naming them. Held—that the said expressions in O. M.’s will amounted merely to a recommendation, and did not legally bind his widow to divide whatever she might have among her children at her death, and that therefore the bequest to her grandchildren was good.

Held also—that the sum of £800 was the proper sum to bear the costs of establishing claimant’s respective claims; and further, that the personal representative of J. K. who unsuccessfully contended that J. K. was absolutely entitled to said sum of £800, was entitled to his costs out of said fund.

THIS was an administration suit; and all the monies sought for in the cause being brought into Court to the credit of the suit, the only question in dispute was as to a sum of £800.—Oliver Martyn, by his will, bearing date 21st Nov. 1805, devised and bequeathed to his wife, Elisabeth Martyn, the use for life of all his household goods and furniture of whatsoever description, plate, &c.; as also the use for life of certain real estate, and chattels real, with remainder over to his son, Richard Martyn, and then added, “I also leave to my dear and beloved wife *dominion and power* over all my other property, bond or judgment debts, or any other money due to me, hereby constituting and appointing her sole executrix to this my last will and testament, subjecting her to the payment of the following sums of money.” Testator having then specifically provided for each of his children, proceeded as follows:—“I leave and appoint my ever dear and beloved wife residuary legatee to this my last will and testament, to have and to keep for her own use any further sum or sums of money I may die seised or possessed of after settling with my children, paying all my just and legal debts, which are but few, and fulfilling every direction in this will, convinced she never will desert my dear and beloved children, but be a kind and good mother, and at her death divide whatever she may have among the most deserving of her children, but particularly among such as may appear to want it most, if equally deserving and dutiful. But if unfortunately for herself or them she should ever marry, which I do not expect or think she ever will do, but to guard against all possibility of such an injurious event, if it should ever happen, my will is, that in such case if ever she should

marry, she should forfeit all title, power, or control over my children and property, and to have but £60 a year during her natural life, and that all power and authority vested in her should devolve unto John Blake, Esq., of Windfield, and John Brown, of Moyne, Esq., or the survivor of them, or in case of their death to my eldest daughter, convinced they will never desert my said dear children." Probate of this will was duly granted forth of his then Majesty's Court of Prerogative in Ireland unto said Elizabeth Martyn, said testator's widow, which Elizabeth never married again after the death of her said husband. The following is a summary of the will of Elizabeth Martyn, deceased, dated 12th of April, 1829:—"Whereas my beloved husband, Oliver Martyn, by his last will and testament, bearing date the 21st of November, 1807, after bequeathing to me the use for life of all his estates, household goods, &c., that he might happen to die seised or possessed of," with remainder after her death to his son, Richard Martyn, or his lawful issue, male or female. She then recited that her said husband by his will left her "the sole dominion and power over all his other property, bond or judgment debts, or any other money due to him, thereby constituting and appointing me sole executrix to his last will and testament, subjecting me to the payment of the sums of money therein mentioned to said testator's children. And said Oliver Martyn left and appointed me residuary legatee to his last will and testament to have and to keep for my own use any further sum or sums of money he might die seised or possessed of after the settling with his children, paying all his just and lawful debts, which were but few, and fulfilling any direction in his will, convinced that I would never desert his said dear and beloved children but be a kind and good mother, and at my death divide whatever I may have among the most deserving of my children, but particularly among such as may appear to want it most if equally deserving and dutiful; but if unfortunately for myself or them I should ever marry, which he did not think or suspect I ever will, but to guard against all possibility of such an injurious event if it should ever happen, his will was—that if in such case I should marry, I should forfeit all power, title, and control over his children and property, and to have but £60 a year during my natural life, and that all power and authority vested in me should devolve unto John Blake of Windfield, and John Brown of Moyne, Esq., convinced they would never desert his ever dear children. . . . And whereas I am anxious to fulfil every direction in said Oliver Martyn's will, and I have never forfeited the title, power, and control, or the power and authority vested in me by his said will; and whereas I am anxious at my death to divide whatever I may have among my surviving children in manner hereinafter mentioned now in pursuance of all power and authority vested in me by said Oliver Martyn's will as executrix or residuary legatee or otherwise." She bequeathed several trifling legacies to and among three of her daughters therein named, then proceeded with respect to another daughter of hers named Julia Kelly. "I further leave and bequeath to my executors hereinafter named a sum of £700, late Irish currency, and whatever interest may be due at the time

of my death, with one government debenture of £100 at 3½ per cent. unto my executors." Testatrix then desired same to be paid to said Julia Kelly free from the control of her husband. "And I declare that I leave said legacy last mentioned upon the conviction, recommendation, and request that my said daughter Julia will provide for the education and support of her daughter, Maria Kelly, until she attains the age of twenty-one years; and upon the further conviction, recommendation, and request that my said daughter Julia will, upon her daughter Maria Kelly's attaining twenty-one years, appoint a principal sum of £700, Irish, and the aforesaid debenture, as above recited, to be payable on the said Maria's attaining the age of twenty-one years." Testatrix then having appointed John Burke of Ower her executor, and having named two other of her daughters her residuary legatees, then proceeded to deal with said £800. "It is moreover my will that if the aforesaid Maria Kelly should die before the age of twenty-one" (an event which, she being unmarried, did occur) "or unmarried, that the aforesaid sum of £700 and the government debenture of £100 should belong to Julia, and she to have the use for life of the interest of the aforesaid sum of £700 and the Government debenture; and at her death if she should survive her daughter Maria, it is my will that the sum of £400 shall be given to my grandson, Ignatius Kelly, and the other sum of £400 to be equally divided between my granddaughters," naming her four granddaughters, three Martyns and Elizabeth now the wife of Thomas O'Connor Donelan, Esq., all of whom had filed claims in this suit. The contention here then was between the said five grandchildren who claimed under said Elizabeth Martyn's will, and Edmund Jordan, Esq. the executor named by said Julia Kelly in her last will and testament, whereby the said Julia treated the disposition made by her mother, Mrs. Martyn, as a nullity, and dealt with the said sum of £800 as if same were her own property absolutely. The only question, therefore, for the Court to consider was, did the will of said Oliver Martyn create a precatory trust in favour of his children. If the Court should be of opinion that there was a trust reposed by said Oliver Martyn in his wife to divide any property she might have among her children, then, and in that case, the disposition in the said Julia Kelly's will must stand; but if there were no trust, then Elizabeth Martyn had power to make the dispositions she by her will had done, and the dispositions in Julia Kelly's will must fall.

Robinson, Q.C. (with H. O'Neill Bourke) submitted on behalf of the executors of Julia Kelly, that the will of Oliver Martyn created a precatory trust as to the residue of his estate after payment of his debts and legacies, by giving his widow, Mrs. Elizabeth Martin, a power to dispose at her death of "whatever she may have;" and by limiting over to trustees named in his will all power and authority over his children and property in the event of the said Elizabeth Martin ever marrying again; and in that case directing that she should forfeit all title, power, or control over his children or property, and have only an annuity of £60 a year for her life, for the several reasons following:—

1st,—Because the precatory words should on the

whole be considered imperative—*Gully v. Cregan* (24 Beav. 185); *Wace v. Mallard* (21 Law Jour. Ch. 355); *Shovelton v. Shovelton* (32 Beav. 143); *Godfrey v. Godfrey* (2 New Rep. 16); *Bonser v. Kinnear* (2 Giff. 195).

2nd.—Because the objects or persons to be benefited are certain—*Harding v. Glynn* (1 Atk. 469); *Brown v. Higgs* (4 Ves. 708, 5 Ves. 495, 8 Ves. 591; 5 Myl. & Cr. 92); *Shovelton v. Shovelton* (32 Beav. 143).

3rd.—Because the subject of the commendation or wish is certain—*Harwood v. West* (1 Sim. & St. 397); *Surman v. Surman* (5 Mad. 123); *Gibbs v. Tart* (8 Sim. 132); *Constable v. Bull* (3 De Gez & Small, 411).

4th.—That the power was to appoint among children living at Mrs. Martyn's death—*Kennedy v. Kingston* (2 Jac. & Wal. 431); *Bonser v. Kinnear* (2 Giff. 195); *Gibbs v. Tart* (8 Sim. 132).

5th.—It is submitted such a precatory trust having been created by the said will of the said Oliver Martyn, that his widow, Mrs. Elizabeth Martyn, by her will, which she declared to be made in pursuance of said power of appointment, appointed the sum of £800, being part of the residuary estate of the said Oliver Martyn, to Mrs. Julia Kelly, and that said sum of £800, on the true construction of the said will of the said Elizabeth Martyn, became the absolute property of the said Julia Kelly, the words of the said will being sufficient to give her the said sum absolutely the limitations to her grandchild were inoperative; said limitation being void and inoperative as not being warranted by the power in the will of the said Oliver Martyn. Cases—*Carver v. Bowles* (2 Russ. & Myl. 301); *Kemp v. Jones* (2 Keen. 756); *Sassenel v. Tierney* (1 M'Nev. & Ger. 562); *Harvey v. Stracey* (1 Drew, 73, 138, 140) *In re Lord Londes' Will* (2 Small. & Giff. 416).

*C. Kelly, Q.C.*, with *J. B. Dillon*, were in support of the claims of Victoire, Elizabeth, and Mary Martyn.—Oliver Martyn by his will, after legacies to his children, bequeathed the residue to his wife Elizabeth, we submit therefore that there was no trust for the surviving children thereby created. He bequeathed the residue to his widow "absolutely to keep for own use." He then names her, his residuary legatee, adding his conviction "that at her death she will divide whatever she may have among her children." Now, these words amount only to a recommendation, and do not legally bind his widow; and the gift is void for uncertainty of what the testator desired his wife so to deal with—*Lechmere v. Lavis* (2 My. & K. 197); 1 Jarm. on Wills, 3rd ed. 365; *Webb v. Woods* (2 Sim. N.S. 267); *Palmer v. Simons* (2 Drew, 221); *Fox v. Fox* (27 Beav. 301); *Howel v. Dewet* (29 Beav. 18); *Brooch v. Brooch* (3 L. & Giff. 280). In all the cases cited on the other side the objects and the subjects were certain. The distinction in all these cases was, that the widow should at her death leave the entire fund for the children, while in Oliver Martyn's will, and in the cases relied on upon our side, the objects and subjects were uncertain. The cases of *Curver v. Bowles* and *Kemp v. Jones*, relied upon by the other side, are distinguished in the last edition of Sugden on Powers, pp.

515, 516. Another point relied upon on the other side is, that the condition in the will in case of Mrs. Martyn's marriage shows that he did not intend to give to her the power to dispose of any part of his property. In answer to this argument we say that the condition is void because there is no gift over. And so it is thus laid down in 2 Jarman on Wills, 3rd ed. p. 40, line 15—"And so to make a condition restraining marriage effectual there must be a bequest over, in default otherwise the condition will be regarded as *in terrorem* only." A number of cases are there collected on this point. The last point pressed on the Court was one of election; Julia Kelly deceased has elected to take, and did take, under Elizabeth Martyn's will, while it was open to her to have elected and take under her father's, Oliver Martyn's will; but once having elected to take under her mother's will, she, or rather her personal representative, shall not now be permitted to dispute the appointment to persons who were not the objects of the power.

*Oliver J. Burke* appeared for Thomas O'Connor Donelan, who claimed in right of his wife, one of the grandchildren, under said will of Elizabeth Martyn. The expressions used by the testator, Oliver Martyn, in his will are insufficient to create a trust in favour of his children. There wants the certainty which was requisite as to the fund, which fund was to be the subject-matter of the trust, the words used being that she will "at her death divide whatever she may have," &c. Now, the fund here she was clothed with dominion over was, no doubt, uncertain; and the rule is thus laid down by Lord Eldon: "1stly,—That the words be imperative. 2ndly,—That the objects are certain. 3rdly,—That the property is certain." In Oliver Martyn's will the objects were certain, namely, his children, but the other requisites were wanting the property that the testator attempted to clothe with a trust was uncertain; and it has been held in many cases that a bequest of what shall be left at the decease of a legatee, or what a legatee is possessed of at the time of her death, is void for uncertainty—vid. 1 Jarman on Wills, 3rd ed. 336. where a number of cases are collected on the point. The rule is thus laid down in 2 Roper on Legacies, 1417—"When a person bequeaths property to another absolutely, accompanied with words of recommendation, request, hope, or expectation that the legatee will dispose of the gift among one or more objects, the Court of Chancery will construe such recommendation as a trust, provided that the words be imperative, that the objects are certain, and that the property is certain." No trust then is created by the testator's expression "convinced" that his widow "will divide whatever she may have," &c. *Wynne v. Hawkins* (1 Brown, C.C. 179) was where there was a "devise to testator's wife not doubting she will give whatever shall be left to my grandchildren;" and that devise was held not to be sufficiently certain to raise a trust; The Lord Chancellor, Lord Loughborough, in giving judgment, there says—"If a bill had been filed in the lifetime of the wife could I have ordered this money to be laid out, and that she should receive the interest for life, and then it should go over?" The Chancellor thought the property was uncertain and could not be held to be clothed with a trust. The

true test is—could the legatee; could Mrs. Martyn have spent this £800 she had so disposed of by her will in her lifetime; If she could, then the Court of Chancery could not impond it—*Bushman v. Filleter* (3 Ves. jun. 7); *Malin v. Kelghly* (2 Ves. jun. 333, 529); *Strange v. Barnard* (2 B. CO. 586); *Cunliffe v. Cunliffe* (Ambl. 686); *Wilson v. Major* (11 Ves. 205); *Bull v. Kingston* (1 Mer. 314); *Bland v. Bland* (2 Cox, 349). This last case is very strong in favour of the proposition we contend for—*Pierson v. Garnet* (2 Bran. CO. 38). One of the latest cases on precatory trusts is *Lefroy v. Flood* (4 Ir. Ch. 1). The rule there laid down is—that there must be a complete withdrawal of discretionary power from the legatees or there is no trust created." There is yet one other rule laid down in 1 Jarman on Wills, 2nd edition, which deserves notice is—"That where the words of gift expressly point to an absolute enjoyment by the donee himself, and that in such case subsequent words of request, recommendation, or the like will not operate to fix a trust on the prior absolute gift. [*Robinson*, Q.C. said that that was not the rule laid down in the last edition of Jarman (3rd ed. vol. I. p. 360) where the reading was "will not generally operate to fix a trust."]*Thornhill v. Hall* (2 Cl. & Fin. 22). Push the argument on the other side to its full length, and the money the widow may have at her death might include legacies from third parties, as also her own savings; in fact, from whatever source derived it would be clothed with a trust, which would be absurd.

Ignatius Kelly, one of the grandchildren mentioned in the will of said Elizabeth Martyn, and to whom she bequeathed a sum of £400, portion of said £800, did not appear by counsel on this argument, his claims being identical with those of the said other grandchildren.

*Henry O'Neill Bourke* in reply.—There is no case for an election as relied on by Mr. Kelly, Q.C., counsel for the Misses Martyn. 1stly,—There is no such case made by the pleadings. 2ndly,—There is no evidence that Mrs. Julia Kelly ever received anything under the will of Mrs. Martyn except the interest of the said sum of £800, which became due after the death of Mrs. Martyn. 3rdly,—That even if Mrs. Kelly took any benefit out of Mrs. Martyn's own property under her will, yet that no case of election would arise—*Carver v. Bowles* (2 Russ. & Myl. 301).

*Dec. 5—MASTER LITTON.*—It would be impossible for me, and I do not affect in this my judgment, to advert to the arguments which have been put forward, and to the cases which have been cited upon the serious questions which have been raised in this case. Upon a review of these arguments, and of the many authorities which have been referred to (some of them apparently very contradictory to others of them) serious doubts must be considered to hang upon the case. A great number of authorities have been cited, and other arguments have consumed four days—not too long to present the views put forward by the able counsel who have spoken to the case, but too long to enable me to advert to them; nor could it be of use that I should do so, as such a course would be but a recapitulation of the argument put forward and the cases

cited on all sides, and they are fresh in the memory of all persons interested. Suffice it then to say that no question of election arises in this case. If I considered that there was a case of election, it would be probably right to allow an amended charge to be filed raising such question. But looking to the facts of this case, and to the way in which the rights of the parties have arisen, I do not think that the question of election at all arises in the case. In relation to the principal question which has been argued before me, I have arrived at the opinion, that the expressions of Doctor Martyn's convictions, "that at his wife's death she will divide whatsoever she may have among her children," amount to a recommendation, and do not legally bind the widow. I think the propositions propounded by the counsel for the Misses Martyn and E. Burke, otherwise Donelan, are sustained by the authorities, viz. that to constitute a trust the words must be imperative, the subject must be certain, and the objects must be certain. These elements are wanting in the present case, and I am of opinion therefore that Elizabeth Martyn had the right which she professed to exercise of disposing of the fund so bequeathed to her by her husband. This being so, the question arises as to the estate which Julia took under the will of Mrs. Elizabeth Martyn; and I am of opinion that she took but an estate for life. It does not appear that my opinion is sought for upon the construction of any other portion of Mrs. Elizabeth Martyn's will. The great question in the case being whether she had a right to dispose of the fund, which I think she had.

*March 1, 1865.*—The question of costs was now argued before the court. The rule laid down in Beames on Costs is, that where there is an ambiguity in a will the assets of the testator must bear the expense of explaining the ambiguous expressions so used by the testator. Here, however, although the ambiguity occurred in Oliver Martyn's will, the £800 did not appear from any evidence before the court to be entirely Mr. Martyn's; and about Mrs. Martyn's will there was no ambiguity.

The COURT ordered that the whole sum of £900 was liable to pay the costs incurred by the several parties in relation to their claims, and that the personal representative of Julia Kelly, who had failed in establishing that there was a trust in favour of said Julia created by her father's will, and that same was her own absolute property thereunder, was nevertheless entitled to his costs.

## Court of Queen's Bench.

[Reported by William Woodlock, Esq., Barrister-at-Law.]

DUNPHY v. MOORE.—April 21.

*False imprisonment—Damage—Evidence.*

*In an action for false imprisonment it appeared that the defendant gave the plaintiff into custody on a charge of larceny; that thereupon the plaintiff was taken to the police office, and there stripped and searched in accordance with what was proved to be*



the practice of the police in such cases. The jury found for the plaintiff with £100 damages. Upon motion for a new trial on the ground that the evidence of searching was inadmissible, or that, if at all admissible it should have been alleged as special damage in the summons and plaint, and also on the ground that the damages were excessive, Held (O'Brien, J., dissentiente), that the evidence was rightly admitted, and that the verdict should stand.

This was a motion on behalf of the plaintiff to shew cause against a conditional order for a new trial which had been obtained on the ground of the damages being excessive, on the ground of the reception of illegal evidence, and as having been given against the weight of evidence. The action was for false imprisonment, and was tried before Lefroy, C. J. At the trial it appeared that the plaintiff was arrested upon a charge of larceny made by the defendant; that she had been taken through the public streets to the police office, and there stripped and searched by a female searcher. The charge against her was dismissed. There was evidence also given that it was the general practice at the police office to search persons given into custody upon such charges. The defendant objected to the reception of the evidence of stripping and searching, but the learned judge admitted it. The jury found for the plaintiff, with £100 damages. The conditional order for a new trial having been obtained by the defendant, cause was now shewn against it by

Sidney, Q.C., (with him Morris, Q.C., and M'Mahon) for the plaintiff.

Whiteside, Q.C., Butt, Q.C., and Purcell, Q.C., for the defendant. There is no averment of special damage in the summons and plaint, which is in the ordinary form. The stripping and searching, if they could have been recovered for at all, could have been recovered for only as special damage, and ought to have been averred in the summons and plaint. The stripping and searching were not the acts of the defendant, who ought not to be accountable for them. — *Holtun v. Lotun* (6 Car. & P. 726); *Lock v. Ashton* (12 Q. B. 871); *Aiken v. Bedwell*, (M. & M. 68). The police have no right to search prisoners. — *Leigh v. Cole* (6 Cox Cr. Cas. 329). The search therefore was not a result of the imprisonment for which the defendant can be liable. — *Prüchet v. Boevey* (1 Cr. & Mees. 775) shews how closely averments as to special damage are regarded. In *Louden v. Goodrigge* (Peake, 46), Lord Kenyon explains what may be proved under the allegation of *alibi enormia*. — *Hartley v. Herring* (8 T. R. 131); *Croft v. Boydel* (1 Wms. Saund. 343, n. 5). [Fitzgerald, J. — The important question is whether the police had power by law to make the search, it not being made for the purpose of recovering stolen property. O'Brien, J. — Or, supposing that the police had the power, whether the search was such a necessary consequence of the defendant giving the plaintiff into custody, as would make him liable for it.] Williams, J., in *Leigh v. Cole*, states the instances in which a search would be legal, and the present case does not come within any of them. No general order of the Police Commissioners could make that legal which is illegal. Even if the search was legal, it is special damage, and should be averred as such. [Fitzgerald, J. — No; if

it was legal, it was part of the transaction, and it would not be necessary to aver it as special damage.] Unless the defendant was standing by and assenting, he would not be liable. The amount of damages is out of all proportion to the injury.

Morris, Q.C., in reply. — The mode in which the imprisonment is effected is now always given in evidence only, although it used formerly to be set out in the declaration. Now, the plaintiff is entitled to prove it, under an allegation that the defendant assaulted and beat the plaintiff, and imprisoned her. The cases cited on the other side were cases of judicial acts by magistrates, and nothing that the magistrate did judicially, and in which the defendant did not interfere, could be brought against him in an action of false imprisonment. *Lock v. Ashton* goes upon that ground. This searching was a circumstance which accompanied and gave a character to the trespass. Such circumstances may always be given in evidence. — *Bracegirdle v. Orford* (2 M. & S. 77). In *Aiken v. Bedwell* the imprisonment was right, but the excess, the flogging, was the act of the authorities, and that makes a difference between that case and the present, where the defendant was a trespasser from the beginning, and made the police his agents. This is not a question of special damage. The stripping and searching form a specific fact. It is either general damage, for which the defendant is liable, or it is nothing at all. It is portion of the imprisonment, and the mode of it, a portion of the entire transaction which we had a right to prove. The Court will not interfere with the discretion of a jury as to the amount of damages unless they are grossly excessive, or clearly founded upon a mistaken or improper view of the matter. — *Edgell v. Francis* (1 Sc. N. R. 118). The injury here was a very grievous one.

LEFROY, C. J. — The Court are of opinion, though not unanimously, that this stripping and searching was merely part of the trespass, the mode and manner of it; that the party is answerable equally for the trespass, and for the mode and manner of it; and that there was nothing to entitle the defendant to have a more special statement of it than is made of it as part of the offence charged, and upon which the jury have found their verdict.

O'BRIEN, J. — I confess I am not able to concur in the conclusion at which the rest of the Court have arrived. I take it, that it is not merely a question of the reception of evidence, but a substantial question whether the defendant is answerable here for everything which happened during the imprisonment. I do not think he is, and there is no doubt that what happened formed a topic which necessarily influenced the jury very much, and increased the damages; and I therefore think that there should be a new trial.

HAYES, J. — I think that the verdict ought not to be set aside. I think, when once the party gave this individual into custody, he gave her into it to be dealt with as the law required and authorized, and one of the rules of the police is, that every individual given into custody for an offence against property is to be searched; and the defendant therefore must be taken to have known that that result would follow as the natural consequence of his act in giving the plaintiff into custody on such a charge.

**FITZGERALD, J.**—It appears to me that the searching was part of the usual duty of the police officers; and it is not necessary for us to inquire very particularly upon what foundation of law that rests, because there is no doubt that the practice prevails both here, and in England and Scotland, and is attended with the best results, and it often happens from it that a person arrested on one charge is made responsible for several, and that other parties are also brought to justice. I, for one, do not think it necessary to inquire upon what that practice rests. If there had been any excess in putting that practice in force, probably the officer alone would have been answerable for that, and if any such had appeared, the Lord Chief Justice would probably have told the jury that the defendant was not responsible for any excess. If then, the defendant was answerable for a search made by the police in the usual course of their duty, I do not think it was necessary to allege that search as special damage. It was part of the transaction, and need not have been specially alleged. The objection taken below was, that this was special damage, and I think that the defendant ought to be held closely to the objection which he made. It was not special damage. It was part of the transaction, and if the objection was put upon the ground that it ought to have been alleged, an amendment could have been allowed. Being of opinion on these points with my Lord Chief Justice and my brother Hayes, I think the rest of the motion falls to the ground, and that the cause shewn should be allowed with costs.

#### ENRIGHT v. ENRIGHT.—June 3.

*Arrest under fiat.—St. 3 & 4 Vict. c. 105, s. 2—  
Affidavit made before writ issued.*

*The Court will not discharge from custody a defendant arrested under a fiat grounded upon an affidavit made before the issuing of the summons and plaint, and not headed in any Court.*

THIS was a motion on behalf of the defendant to be discharged from the custody of the sheriff of the County of Cork. The defendant was in custody under a fiat granted by the Chief Baron on the 20th of May. The affidavit upon which the fiat was obtained was sworn on the 19th May, and was not headed in any Court, but it was entitled in the cause of *Enright v. Enright*. The writ of summons and plaint was not issued until the 20th May. Both the affidavit and the writ were before the Chief Baron when he granted the fiat.

**James Murphy** for the defendant.—Under section 2 of the Act for abolishing arrest on mesne process, 3 & 4 Vict. c. 105, the affidavit to ground a fiat must be made by the plaintiff in a cause. There was no cause in existence when the affidavit was sworn. The affidavit also must be one on which perjury can be assigned. This was not such an affidavit, as it is not entitled in any Court, and was not made in any cause pending.—*The King v. Aylett* (1 T. R. 63); *Regina v. Pearson* (8 C. & P. 119). This is a mere

voluntary affidavit made before a person having no jurisdiction. [**Hayes, J.**—Under the old practice, the affidavit for a marked writ was not entitled in any cause. **Fitzgerald, J.**—The section of the Act speaks of the affidavit not only of the plaintiff himself, but also “of any other person.”] That makes the case stronger. There must be a plaintiff in a cause; where there is one he may make the facts appear by the affidavit of himself or of any other person.

**Wm. M. Johnson** for the plaintiff.—**Hargreave v. Hayes** (24 L. J., N. S., Q. B., 281), is an express authority on this case. There also the affidavit was made before the writ was issued. See also Chitty's *Archbold's Practice*, vol. i., p. 737. Both the writ and the affidavit were before the Chief Baron. There is no affidavit of merits here.

**James Murphy** in reply.—It does not appear upon what reason the case cited on the other side went. Actions are commenced differently in England and in Ireland. Against *Hargreave v. Hayes* we have the authority of Lord Mansfield in *The King v. Aylett*.

**O'BRIEN, J.**—In Chitty's *Archbold*, p. 737, it is said that if the affidavit is made before the writ is issued, it ought not to be entitled in any cause. From that it would seem that the affidavit may be sworn before the writ issues. The passage in Chitty refers to two cases of *Hollis v. Brandon* (1 Bos. & Pul. 36), and *Green v. Redshaw* (1 Bos. & Pul. 227). Take also in Ireland, the case of a cause petition in the Court of Chancery; when the affidavit verifying it is made, there is no cause pending. Upon the construction of the Act of Parliament, the affidavit may be filed before the writ issues.

**LEFROY, C. J.**—The case cited of *Hargreave v. Hayes* is a clear authority on the question.

*No rule.*

### Court of Bankruptcy & Insolvency.

[Reported by John Levy, Esq., Barrister-at-Law.]

[BEFORE LYNCH, J.]

RE NORTH.—August, 1865.

*Arranging trader—Possession of estate by assignee—  
Costs—Lien—Attorney and client.*

*Where a trader petitions the court under the arrangement clauses and the usual protection is granted, and order made for the assignee to receive and possess the trader's estate, such trader cannot even by special agreement with his attorney lodge with him or transfer to him any portion of his assets as security for his costs so as to create a lien in favour of such attorney.*

*Where an attorney voluntarily hands over to the official assignee in an arrangement matter certain scrip or railway shares deposited with him by the trader who is his client, he will have no equitable claim on foot of these shares for costs due to him by his client. An attempt to establish a special title or lien on the assets of a trader which the attorney has got possession of by special contract*

*as security for his costs, such assets being bound by an order of the Court procured by that attorney, must fail, as it would be against the rights and equities of the several creditors bound by the vesting order.*

*Where proceedings are taken (although bona fide) without the authority of the Court or sanction of the assignees, the attorney is not entitled to any lien for costs, but where the assignees concede the right of proving for these costs the Court will sanction it.*

*Where there are transactions between an arranging trader and a third party, and a mistake as to the amount is made against that third party, who gives up certain railway shares in ignorance of that mistake, no lien will follow the property thus given up.*

JOHN NORTH, an arranging trader, originally contracted for the construction of the Enniskillen and Bundoran Railway. Not having sufficient funds to carry on the railway contract he applied to, and obtained from Mr. M'Birnie, one of the directors of the company, advances made, to be secured with interest, by a transfer of one thousand Enniskillen, Bundoran, and Sligo paid up shares, and some Bahia steam shares. In May, 1863, a settlement was come to between North and M'Birnie, when it appeared that North owed him on foot of that settlement a sum of £10,500 or thereabouts, for which North gave him an assignment of so much of the debt due to him by the company under his contract. Soon after this dispute arose between North and the company as to the value of the works done on the line and the amount really due on foot of his contract. On the 3rd of June, 1863, North filed his petition under the arrangement sections of the Bankrupt Act, and on that day the Court made the usual possessory order directing the official assignee to possess and receive the estate of North, the arranging trader. Soon after, and during the pendency of the arrangement, Mr. Neilson, the solicitor of North, without obtaining any order from the Court of bankruptcy, took proceedings in North's name against the company. Those proceedings were by consent referred to Mr. Dowse, Q.C., and he by a formal award declared the company to be indebted to North to the extent of £2000 after all due credits. Mr. M'Birnie intervened during the arbitration, and having procured the sum so found to be due to North to be treated as a credit to the company, he, by order of the arbitrator, handed over the scrip of shares and certain bills to North, who gave 200 of them as a security to his solicitor, Mr. Neilson, accompanied by a letter, dated the 28th January, 1864, declaring that same had been given to secure the monies then due to him for costs and otherwise. The company having been dissatisfied with the award afterwards applied to the Court of Queen's Bench and got same set aside. Mr. Neilson on behalf of North filed a cause petition against the company, which was dismissed with costs. North also instituted proceedings against M'Birnie, and during the pendency of these proceedings, in which North was unsuccessful, it was ascertained that in the settlement of accounts between North and M'Birnie a sum of £500 had been omitted to be debited against North. All the proceedings

taken by North were admitted to be *bona fide*, but were not authorised by the Court. Ultimately the arrangement proceedings were turned into bankruptcy. Mr. Neilson then filed a charge, as the solicitor of Mr. North, claiming a specific lien on the 200 railway shares transferred to him by Mr. North. Mr. M'Birnie also filed a charge claiming a lien on the railway shares and Bahia steam shares; and the case now came before the Court to decide the conflicting rights of the parties.

*Pilkington, Q.C. for the assignees.*

*Purcell, Q.C. and P. Martin for Mr. M'Birney.*

*Kernan, Q.C., Heron, Q.C., and G. Foley for Mr. Neilson.*

JUDGE LYNN delivered judgment. He said—In this case a charge has been filed by Mr. Neilson, the solicitor of Mr. North, claiming a lien or specific charge on two hundred shares in the Enniskillen, Bundoran, and Sligo Railway Company, the scrip for which was lodged in this Court, and also a lien on twenty shares of the Bahia Company lodged in this Court. To this charge the assignees have filed a discharge disputing the claim of lien or specific incumbrance. The case has not much complexity in its facts, but it raises some very material questions affecting a very extensive class of cases, namely, arrangement cases, in this Court. It appears that North filed his petition for arrangement in this Court on the 3rd of June, 1863, and Mr. Neilson was his solicitor in that proceeding. On that day this Court made an order that the assignee should be possessed of and receive the estate and effects of the petitioner, with liberty to have the trade carried on under the control of the Court, and to have the petitioner employed in the management. The evident purpose of this order was to take from the protected trader the power of disposition of his assets, and that same should be protected for his creditors, in consideration of the protection given to him against proceedings to be taken by creditors for their own protection. It appears that after the order was obtained, and during its pendency, proceedings were taken by Mr. Neilson on the part of Mr. North to recover from the railway company a large sum claimed to be due to him. It appears that Mr. M'Birnie had in his possession the scrip for one thousand shares in the railway company, he having dealt with North (though being a director) in his private capacity, and advanced money to him. He entered on the arbitration, and having procured his loan to be treated as a credit to the company, he, by order of the arbitrator, handed over these shares to Mr. North, and accordingly on the 11th January, 1864, Mr. Neilson got the scrip, and directly handed them to Mr. North; he states, and I most fully believe accurately and truly states, in order thereby to raise money to pay North's debts, and to pay the costs due to Mr. Neilson. It appears that on the 31st of December, 1863, the arbitrator awarded a large sum of money to be paid by the railway company to Mr. North—a sum that would have made him perfectly solvent. It appears that on the 16th June the company gave notice of proceedings to set aside the award, and this being done, Mr. Neilson on the 20th January, 1864, was handed back 200 scrip for these shares on the express contract contained in the letter of that date

written by North to him. This letter, no doubt, as far as North is concerned, created expressly the lien or charge claimed now by Mr. Neilson. It appears that afterwards the proceedings in the arbitration became inoperative, and Mr. Neilson, on behalf of North, filed a cause petition against the company, but this suit failed, and the petition was dismissed. It is unnecessary for me to examine into these proceedings now; I believe they were all *bona fide* carried on by Mr. Neilson, and no complaint against him has been made, or in my opinion could be made in respect of them. The only question before me now is, has Mr. Neilson any lien or specific charge to be recognised by this Court upon the 200 shares of this company, now lodged to the credit of this matter. These shares thus came into the Court at the time that the protection was first granted (3rd June, 1863). The 1,000 shares were in the hands of Mr. M'Birnie, and did not reach the hands of North until January, 1864, when the arbitrator ordered them to be given up. Mr. North afterwards requiring an extension of his protection, and it being then shown to the Court that these thousand shares had reached his hands, and the order of the 3rd June, 1863, being before the Court, the order of the 8th March, 1864, was made, same having been procured by Mr. Neilson as his solicitor. That order, in my mind, clearly refers to the 1,000 shares, and says *all* his railway scrip, no saving whatever was sought for as to the 200 shares, and no saving as to them is contained in that order. In pursuance of that order the whole 1,000 shares were lodged in Court. Mr. Neilson deposes, and I have no doubt whatever truly deposes, that in handing the 200 shares to Mr. James, he stated to him the letter of Mr. North of the 20th January, but Mr. James had no power to vary the order of the Court of the 11th of March, and accordingly Mr. James received the whole thousand shares as assets of Mr. North, bound by the order of June, 1863, and lodged by order of the 11th March, 1864. Mr. Neilson claims now (by paragraph 17 of his charge) that he has a lien on these 200 shares. As lien, it is totally impossible to maintain this claim. Mr. Neilson did not at any time claim a right of retention of this scrip; he voluntarily handed it up, stating to Mr. James his equitable title arising out of the deposit of them with him, and not claiming to hold them as for a solicitor's lien. I have, therefore, only to deal with the case on the basis of the agreement made in the letter of the 20th January, 1864. That letter is a specific contract, depositing the scrip, and giving full right of disposition of it to Mr. Neilson. In my judgment, if Mr. Neilson intended to insist on this contract, he was bound to have advanced his claim on the 11th March, and then to have had the contract recognised by the Court, but inconsistently with such claim, Mr. Neilson procures to be made the order of this Court of the 11th of March. How can his statement made to Mr. James in ministerially carrying out this order, have now the effect of controlling that order? It seems to me, therefore, if I merely confine myself to the order made in the matter, that Mr. Neilson voluntarily gave up his lien and right of retention to these documents, if he ever had such rights. It is insisted that the possessory order made by this Court

bound the assets, and that no valid contract binding its assets could be made with the trustees without the sanction of this Court. Now in deciding this case I am not bound to expound the extent and scope of this order for possession in all cases that may arise. Mr. Neilson himself procured all these orders, and he is bound by the obligation which bound his client, and in my judgment any dealing with his client to procure for himself a special title arising out of the possession of assets already bound by the order of this Court, procured by him as solicitor in this Court, is against the equities and rights of the several creditors, benefited by the vesting order. I therefore cannot recognise the contract contained in the letter of the 20th January, 1864, or any contract binding the possession of the scrip, or giving him by way of lien any specific charge thereon. It is said that the proceedings were, at the time when taken, *bona fide*, and apparently necessary. Perhaps it is true that if this Court were applied to, it would have sanctioned the proceedings; whether by actual disposition of part of the assets in Court, or how otherwise, should then have been considered. My attention is also called to some orders in the Court made in the progress of the matter, showing at least a knowledge of these suits by the Court. Now, so far as these orders are concerned, they do not seem to help Mr. Neilson; he never sought to bring these proceedings within the sanction or control of the Court, but treating them as matters outside the Court, he sought for Mr. North special privileges resulting therefrom. I therefore hold that Mr. Neilson has no right of lien on the 200 shares, but the assignees concede to him the right to prove as a creditor for his costs. This right is conceded, and I will not offer any opposition to its being carried out. I do not rule this as a contested right, but I sanction it as a right conceded by the assignees. It remains now to deal with the 20 Bahia shares lodged in Court pursuant to the order of the 30th August, 1864, which directs that Mr. M'Birnie do transfer, and Mr. Neilson do hand over to Mr. James the said shares in their possession, subject, however, to any lien they may be able to establish. This order shows that Mr. Neilson claimed his right of lien at a proper time, and in that respect differs from the case made as to the other shares. The question now is, had he the right of lien claimed at the time he gave up the shares. It appears that the shares were up to April in the possession of Mr. M'Birnie, and that a suit was brought against him as well for these shares as for other claims made against him by North. In April, however, Mr. M'Birnie admitted North's claim to these shares, and handed them over to Mr. Neilson. Admittedly now, Mr. Neilson is in honesty and fair dealing to be paid any costs necessarily incurred in reducing them into possession. But Mr. Neilson's claim is, that he has a lien on these shares for the costs in the suit then carried on against M'Birnie in respect of other and different claims resulting from the mere fact of their being in his hands as North's solicitor. In my opinion this claim is not sustainable. It was the duty of Mr. Neilson towards this Court and the creditors to have brought the matter before it, if he relied on any contract affecting the assets. The possessory order has bound the assets, and Mr.

Neilson as North's solicitor, and having carriage of the proceedings, was precluded from making any contract for himself with North, so as to prejudice the assets bound by the order made. It seems to me impossible to contend that North, after the order made in this case, could enter without fraud as against the arrangement proceedings into any contract prejudicial to the assets, and indeed this is not contended for by Mr. Neilson's counsel. If North could not do so without fraud, by reason of the obligation incurred by him by virtue of the order made, how can it be contended that Neilson, his solicitor, privy to all the proceedings and facts, soliciting on his behalf each order, could do so, and above all so as to benefit himself to the prejudice of other creditors? I cannot allow such a principle to be established in this case—it might by a very slight extension work a monstrous wrong and injustice. In saying this, I beg most distinctly to state that I do not harbour for a moment the thought that Mr. Neilson contemplated anything wrong, or intended in the least to do anything in contravention of the duty that rested on him. It was more in thoughtlessness of the effect of the right claimed, and in forgetfulness of the duty cast upon him, that he acted; but in my opinion this brings on him the penalty that he thereby failed to acquire any right of lien to be ever recognised by this Court. I must allow the costs of the suit so far as regards the recovery of these shares as a first claim in the nature of a salvage claim, and as in former claims to prove for their costs. I disallow the claim of lien on the Bahia shares also, but I give no costs—the costs of the assignees to be costs in the matter. The other branch of the case relates to Mr. M'Birnie, who intervenes to claim a lien on the 1,000 Enniskillen shares and the Bahia shares. After considerable delay on his part, Mr. M'Birnie has filed a charge claiming this lien, and to this charge the assignees and Mr. Neilson have put another charge. I do not consider it necessary to enter minutely into the facts proved in this case, for in my judgment the case resolves itself into a simple question. As to the Bahia shares recovered by confession in an action against M'Birnie, the case is not pressed by counsel, and therefore as to them it is conceded that the charge must fail. But as to the 1,000 Enniskillen shares, the case was very strongly and very ably pressed. It was contended here that these shares stood originally charged as a counter security for the sum of £9,000 advanced by Mr. M'Birnie to North on bills to that amount, and that the arrangement made by means of the arbitration had not discharged the whole of that lien, because in the accounts rendered by Mr. M'Birnie, he, by mistake, omitted a sum of £500, and that having discovered his mistake, and having vested in him the legal title to these shares up to the 30th of August, 1864, he had a right as against them still, to claim his lien for the £500 omitted by mistake from his accounts. This claim is not to have the original lien unaffected by the arrangement in the arbitration, on the ground that that arrangement was founded upon a mistaken state of the accounts. But it is to have now a partial lien declared to the extent of the mistake made in the accounts. It seems to

me that it would be unjust to concede such a right to Mr. M'Birnie. The question is not as to whether the claim of the £500 is now extinguished, nor whether the £500 bill is satisfied—the question only is, whether as to it a lien exists on these shares. That Mr. M'Birnie was not an original party to the arbitration matter makes the case in my mind much stronger against him. He stood in this position—North was his debtor, and he held these shares to counter-secure himself. He intervened in the arbitration matter, and promised the company to treat his advances as advances made by the company, and not by him, and thus preserving to himself this advantage—he places the case on a basis for settlement between North and the company, but to perfect this he was of course bound to give the bills and relinquish his lien on the shares, and accordingly in testimony of this being done, he handed up the bills and the scrip as representing the shares themselves to the arbitrator discharged of his lien. It was a mere accident that a deed of transfer was required to perfect the delivery, for *ex concessis* the delivery was then made discharged of the lien. If that formal act to perfect the title was not required, could it be argued that Mr. M'Birnie was entitled to get back these shares, and to recreate his lien on them? Mr. M'Birnie now stands on every term of his arrangement; he claims and has obtained all the benefits resulting from it; but saving to himself all its benefits, he seeks now partially to alter it in his own favour by securing to himself a lien unconnected with his own act, and this merely by reason of the fact that a naked legal title to the shares still remained in him. This would seem to me not to be according to the maxim that in seeking equity you must do equity, but rather making a maxim that because you have to enforce equity, you must yield to an inequitable demand. It is to say, a formal act remains to be done by me to carry out an arrangement beneficial to me, and on which I still insist, but inasmuch as I must do this act to perfect your title, I refuse now to do so, unless you agree to give me a further advantage in addition to what the agreement gave me. In my mind such a proposition is quite unsustainable; no authority can be cited to countenance it, and I must add that their claim seems really an after-thought, and the whole proceedings were inconsistent with it to such an extent that I might on the facts stated here be justified in holding that any lien existing had been waived, but I prefer to deal with the case in reference to the merits of the lien itself as a claim. I therefore, as to the 1,000 Enniskillen shares, rule that the charge fails, and I give the assignees their costs against Mr. M'Birnie.

## Court of Appeal in Chancery.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

**FOSS v. FOSS, AND EIGHT OTHER CAUSES.—Nov. 17 & 18, 1864.**

*Pin money—Arrears of—Principle upon which only one year's arrears of pin money is recoverable—81st General Order of 1843—Stay of suit—Priority.*

*The rule of the court is, that only one year's arrears of pin money can be recovered against the husband, which rule is founded on the presumption, that any arrears, beyond that of a year, has been applied to the maintenance of the wife, or to the general purposes of the family, with the assent of the wife. This rule, however, does not apply where the pin money has been assigned for valuable consideration to a third party, or where there is a receiver over same.*

THIS was an appeal from a portion of an order of the Master of the Rolls, taken by Henry Riddick and Charles Daly, who were the trustees of George Riddick, and who, as such, were entitled to an annuity of £44 per annum, charged on the estate of Christopher Vaughan Foss, created by a certain deed of the 1st of April, 1846. The respondents were Anne Foss (who in priority to the said appellants claimed to be entitled to an annuity of £100 per annum under the articles of her marriage settlement of 3rd of May, 1841, which by way of pin money was agreed to be charged for the separate use of said Anne Foss during the joint lives of herself and her husband) said Christopher Vaughan Foss, said Anne's husband, and Randolph Robinson, the executor of Thomas Popham Lascombe, to whom said annuity was assigned by deed of the 20th January, 1846. Against another portion of said order Anne Foss appealed. The following are the facts of the case:—By an order made on the 9th of February, 1863, it was referred to Master Litton to allocate certain cash and stock standing to the credit of those causes and matters, and to report to whom and in what proportions the rents of the lands over which a receiver was appointed should be paid: And by said order of reference it was also ordered that in making such report, and as to such future rents, the master should be at liberty to consider whether a certain annuity of £100 secured to Mrs. Anne Foss by certain indented articles of agreement of the 3rd of May, 1841, and entered into on the marriage of said Anne Foss with her husband, Christopher Vaughan Foss, should be paid out of such future rents, according to the priority of said annuity.

The petition of appeal stated that the said articles of the 3rd of May, 1841, were made between Christopher Vaughan Foss of the first part, Anne (by her then maiden name) Denroche of the second part, Mountford Longfield and Robt. H. E. White of the third part;

that said articles recited the then intended marriage; and that Anne Denroche was seised of certain undivided shares in certain lands at Liscarroll, in the county of Cork, city of Cork, and county of Tipperary, subject to certain judgments which had been recorded against her, but that owing to the want of the title deeds she was unable to set forth the particulars of the said estates: that it was witnessed that in consideration of such marriage, and with the intent to bind in equity all the said lands of the said Anne Denroche as therein stated, it was thereby declared and agreed by and between the parties, and they the said Christopher Vaughan Foss and Anne Denroche severally covenanted with the said trustees that the said Christopher Vaughan Foss and Anne Denroche would, immediately after the solemnization of the said marriage, or as soon as the settlement could be effectually perfected by sufficient deeds, well and effectually convey unto the said trustees, their heirs, executors, administrators, and assigns, all the said lands, and all other lands of the said Anne Denroche, to the uses and upon the trusts therein expressed, that was to say:—upon trust, by and out of the rents, issues, and profits thereof, to pay to the said Anne Denroche and her assigns, during the joint lives of herself and the said Christopher Vaughan Foss, an annuity or rentcharge of £100 a year, payable on the 1st of August and the 1st of February in each year, such annuity to be to her separate use as therein provided; and on further trust to pay the residue of the said rents to the said Christopher Vaughan Foss, for the joint lives of himself and the said Anne Denroche, and after the death of either to the survivor; and after the death of the survivor, upon trust, for the benefit of the issue of the marriage as thereby provided: that in the said deed was contained a power enabling the said trustees, with the consent of the said Christopher Vaughan Foss and Anne Denroche, to raise by sale or mortgage of the said lands a sum not exceeding £3,000, and to pay the same to the said Christopher Vaughan Foss for his own use. Under the above order of reference the master made his report, which report is dated 29th January, 1864, and thereby it was reported as follows:—that the several sums, which were due to several of the petitioners in several of the causes and matters therein named, and also to one Joseph Manly, have been fully paid off and discharged for principal, interest, and costs, partly by receipt of the rents of the lands mentioned in the said several causes and matters, and partly by a sale of a portion of the said lands and premises sold in the Landed Estates Court: that at the date of the said order of reference there was in the Bank of Ireland to the credit of the said causes and matters, the sum of £1402 14s. 7d. new 3 per cent. stock, and £42 13s. 1d. cash; that the said sums of stock and cash were the produce of the rents of said lands over which the receiver in these causes and matters was appointed, and collected by him since 1852. The report then found that by the said marriage articles dated the 3rd of May, 1841, executed on the marriage of Anne Foss, otherwise Denroche, with Christopher Vaughan Foss, the said Anne Foss was entitled to her separate use to a certain annuity of £100, payable on the 1st of February and 1st of August in each year during the

joint lives of Christopher Vaughan Foss and Anne Foss, charged upon the lands over which the receiver was appointed. The report of the master then found that the said annuity of £100 so agreed to be charged (by way of pin money) for the separate use of Anne Foss was assigned by deed of 13th January, 1846, to the late Thomas Popham Luscombe, as also was another annuity of £127 charged on said lands, and payable on the death of Christopher Vaughan Foss to said Anne Foss during her life. The report then found that there was due upon said annuity of £100 (being the pin money aforesaid) for arrears up to the 1st of August, 1863, the sum of £1513 13s. 6d., and that this sum was the first charge on all the monies to the credit of these causes and matters. The report next found that there was due to the estate of said Thos. Popham Luscombe, on foot of said other annuity of £127 per annum charged by Christopher Vaughan Foss on his life estate by deed of 28th November, 1844, made to the said Thomas Popham Luscombe, a sum of £2061 18s. 9d., same being for arrears of this last-mentioned annuity up to the 1st December, 1863; and this the report found to be the second charge on the stock and cash to the credit of these causes and matters.—The first objection to the master's report was, that £1513 13s. 6d. was found to be due on foot of said pin money, and it was thereby insisted that the master should have found that there was no arrear due on foot of said annuity. By the next objection it was insisted that the master should have found that the arrears (if any) due on foot of the said annuity were not a charge upon any of the funds allocated under the order of reference, because the receiver in the several causes and matters was not appointed, nor was he extended to any petition matter or suit of said Anne Foss, or any person claiming in right of said annuity; and because also neither the said Anne Foss nor any person claiming said annuity was in privity with the rents received by the receiver and allocated under the order of reference; and because Henry Riddick and Charles Daly, by reason of the receiver having been extended on the 25th of June, 1852, to the matter in respect of the annuity vested in the said Henry Riddick and Charles Daly, have ever since been and still are in privity with the rents received by the receiver and allocated by the report, and are entitled to priority over the said annuity claimed by Anne Foss and her assignee. The receiver in this case was on the 16th December, 1851, extended to a suit instituted by Joseph Manly, which suit was commenced by bill filed 24th of October, 1848, which bill prayed for a sale and an account of incumbrances. Anne Foss, Thomas Popham Luscombe, and George Riddick, were defendants in that suit. On the 19th of January, 1849, Thomas P. Luscombe filed an answer in said suit, and claimed thereby, as assignee of Anne Foss, said annuity of £100 a year. No answer, however, was filed by Anne Foss. Henry Riddick and Charles Daly, however insisted that the master should have found that the sum due to them on foot of their annuity of £44 a year was payable out of the fund in court, they having been in privity with the rents, while Anne Foss and Luscombe, her assignee, were not in such privity. And it was alleged that if Anne

Foss and Luscombe were excluded from participation in the fund of £1513 13s. 6d., being the amount reported due to them, and if the arrears of the annuity of £127 a year was found to be the first and not the second charge, then that the sum due on foot of said annuity of £44 should be found the second charge. The seventh objection to Master Litton's report was, that the rents which were received and to be received by the receiver after the date of the order of the 9th of February, 1863, were and are applicable to pay, first of all the £127 annuity, and next the said annuity to said Riddick and Daly; and that Anne Foss or her assignee were entitled to no portions of said rents in payment of said annuity of £100 a year (pin money), they not being in privity with the rents. Anne Foss claimed to be entitled to said annuity or pin money under said deed of 3rd May, 1841. Joseph Manly (who was petitioner in the suit hereinafter mentioned, and who has been paid off) was entitled to a charge of £1500 under a deed of January, 1843, on the lands over which the receiver was appointed and extended. Thomas P. Luscombe claimed to be entitled to the annuity of £127 a year under a deed of 28th November, 1844, and in 1846 he became assignee of Anne Foss's annuity of £100 a year; and Henry Riddick and Charles Daly, the said trustees of George Riddick, claimed this annuity under a deed of 1st April, 1846. The question of non-privity above mentioned was this: on the 24th of October, 1848, Joseph Manly filed a bill against said Christopher Vaughan Foss and Anne Foss, his wife; and Thomas Popham Luscombe, and George Riddick, were defendants in that suit. No answer whatever was filed by said Anne to this bill, but Luscombe did file an answer claiming the said annuity of £127 a year, and also claiming as assignee of Anne Foss the annuity of £100 a year; but neither said Anne nor Luscombe was ever in privity with any rents received by the receiver up to 1858, at which time it was insisted, and so held by the Master of the Rolls, that the suit of *Manly v. Foss* had terminated from want of prosecution under the 81st General General Order of 1843. On the 16th of December, 1851, the receiver was extended to that suit. Those several objections to Master Litton's report having been heard before the Master of the Rolls his Honor made his order, bearing date 10th of May, 1864, which order now being appealed from was in the terms following:—

"It is ordered and declared by the Right Hon. the Master of the Rolls, that the objection to the Master's report, that no arrear, or at all events not more than one year's arrear, should be found due on the annuity of £100 a year created by the marriage articles of the 3rd May, 1841, is not sustainable; the cases relied on by the appellant as to only one year's arrear of pin money, or separate estate given to a wife, being recoverable, not applying, when a receiver has received the rents or income of the property, out of which the pin money or separate estate was to be payable, when no part has been received by the husband, or applied to the use of the wife or family. And it is further ordered and declared that the suit in which Joseph Manly was plaintiff, and Anne Foss, Thomas Popham Luscombe, and others, were defendants, stood dis-



missed for want of prosecution, on the 24th October, 1858, under the 81st General Order of the 27th of March, 1843. And it is further declared that the said Anne Foss and Thomas Popham Luscombe were not, nor was either of them, nor were the representatives of Thomas Popham Luscombe entitled in respect of the said annuity of £100 a year created by the said marriage settlement of the 3rd of August, 1841, or the arrears thereof, to any part of the rents received by the receiver after the said dismissal of the said suit for want of prosecution except as to the rents received after the order of reference of the 9th of February, 1863, as herein-after mentioned. And it is further declared that the said Anne Foss and Thomas Popham Luscombe were not, nor was either of them, nor were the representatives of Thomas Popham Luscombe entitled, in respect of said annuity of £100 per annum, and the said arrear thereof, to any part of the rents received by the receiver prior to the said 24th of October, 1858, the said Anne Foss or Thomas Popham Luscombe, or his representative, not having been, in the opinion of the Court, in privity with the said rents. And it is further declared that the said Anne Foss and the representative of Thomas Popham Luscombe were, by the order of the 9th of February, 1863, put in privity with the rents received by the receiver after the date of said order, and that they are entitled to be paid the said annuity of £100 a year, and the arrears thereof, out of the rents received by the said receiver since the said 9th of February, 1863, and to be thereafter received by him; but the Court does not decide whether or not more than six years of the said arrear, accrued prior to the 9th of February, 1863, can be recovered, the question of the Statute of Limitations not having been raised or argued before the Court. And it is further ordered that the report of the Master be varied in accordance with the declarations contained in this order. And it is accordingly ordered that it be referred back to the Master to reconsider his report, having regard to the declaration contained in this order. And the Court doth declare that the said representatives of Thomas Popham Luscombe and Anne Foss, and the said Henry Riddick and Charles Daly are entitled to the costs of this motion and order along with their demand; and it is further ordered that the deposit of £10 lodged with the registrar be returned."

*M'Causland, Q.C., and Phillips* were in support of the appeal.—Here there are three annuities charged on these lands, namely, £100 a year for pin money, also £127, and one annuity of £44 charged on the life estate of Christopher Vaughan Foss by the deed of 1st of April, 1846. We then admit as against us the priority of the annuity of £127, so our struggle is that the annuity of £100 a year, and of course the arrears thereof must be altogether excluded from the allocation—at all events not more than one year's arrear of pin money can be recovered against the estate of the husband.—*Corbally v. Grainger* (4 Ir. Ch. 173); *Leach v. Way* (5 L. J., N. S., Ch. 100). In particular see *Ex parte Elder* (2 Madd. Rep. 286, note); *Caton v. Rideout* (1 M. & G. 599; 2 H. & Tw. 33). A great deal of learning on the law of pin-money is to be found in the argument

of counsel in the case of *Howard v. Digby* (2 Cl. & Fin. 634; a.c. 2 Bligh. N. S., 224).—The next point that is for their Lordship's consideration was that neither Mrs. Anne Foss, nor her assignee, Thomas Popham Luscombe, to whom she had assigned her annuity (pin money) of £100 a year, could have any right to the rents received by the receiver after the 24th of October, 1858, on which day clearly under the 81st General Order of 1843, the suit which commenced on the 24th October, 1848, stood dismissed for want of prosecution, and the Master of the Rolls has ruled that the suit was so dismissed. That order is as follows:—

"That if at the expiration of ten years after the filing of an original bill, the cause shall not have been heard by the Court upon the pleadings, the same, and all supplemental bills, and bills of revivor, shall, at the expiration of such ten years, stand dismissed out of Court, without costs, unless upon application to the Court by motion, before such period, the Court shall think fit to allow the plaintiff further time to prosecute his cause; but this order is not to affect any injunction obtained in an injunction suit. And as to original bills filed before the date of this order, the plaintiff shall have nine months from the date hereof, to apply to the Court for further time, although such ten years have already elapsed, or shall expire before the end of such nine months."

Mrs. Foss and her assignee, Luscombe, however, have appealed against this portion of his Honor's order. It was quite competent for Mrs. Foss and her assignees to keep alive that suit of *Manly v. Foss*, by a motion to stay the proceedings. That motion, however, was not made, and of course the suit determined on the 24th of October, 1858, ten years from the institution thereof. There is no controverting this position.—*Bernard v. Bond* (1 Ir. Ch. 198); *Money Penny v. Gibbings* (1 Ir. Ch. R. 201). It was held in *Woodroffe v. Greene* (15 Ir. Ch. 176), that the appointment of a receiver in a mortgage cause does not take the case out of the operation of the 81st General Order of 1843. It is further submitted that this claim for arrears must be disallowed, on the ground of non-claim thereof for so many years and of acquiescence in everything done during the number of years that have elapsed from 1849 down to the order of reference of the 9th of February, 1863. The Statute of Limitations is a bar to all arrears that accrued previous to six years anterior to the date of the order of reference.—*Grant v. Ellis* (9 M. & W. 13) *Crosbie v. Sugrue* (9 Irish Law Reports, 17.) As to the arrears that accrued due prior to the 24th of October, 1858, neither Mrs. Foss or Mr. Luscombe were in privity with the rents, and therefore they cannot successfully claim any arrears thereof.—*Davis v. The Duke of Malborough* (2 Swanst. 168).

*The Solicitor-Gen. (Sullivan), Warren, Q.C., Exham, Q.C., and May*, appeared for Mrs. Foss and T. P. Luscombe, who also appealed from a portion of the order of the Master of the Rolls.—It is perfectly true that under ordinary circumstances only one year's arrears of pin money is recoverable by the personal representatives of the wife, the presumption being, that though the wife may not have received same, nevertheless the husband in so receiving it has applied it to the maintenance of his wife, or to the general purposes of the family with the assent of the wife.—*Ex parte Elder* (2 Mad. 286). This princi-

ple, however, has no application here, inasmuch as neither husband nor wife had received it, for there was a receiver over it, and this pin money annuity of £100 a year was transferred to Thomas Popham Luscombe for valuable consideration, and a receiver has been appointed over the lands.—*Howard v. Digby* (2 Cl. & Fin. 634; s.c. 2 Bligh. N. S. 224); *Acton v. Acton* (1 Ves. 267); *Peachey*, 298, 309. The argument on the other side in support of the decision of the Master of the Rolls is unsustainable. First, the 81st General Order of 1843 does not operate here, because before the expiration of ten years the orders in the Incumbered Estates Court and the sale by that Court of the lands the subject of the suit in *Manly v. Foss*, had the effect of staying the proceedings in that suit, and therefore took it out of the operation of the 81st General Order. Lastly, the suit of *Manly v. Foss* was a suit for the payment of all incumbrances on the lands of which any creditor might have taken advantage, and as a matter of fact Mrs. Foss was a defendant therein, and a receiver was accordingly appointed.—*Mara v. Tibbeaud* (7 Ir. Ch. R. 556) *Mill v. Mills* (6 Ir. Eq. R. 106); *Carolyn v. Blake* (6 Ir. Eq. R. 100); *Young v. Wilton* (6 Ir. Eq. 106); *Huggard v. Lynch* (2 Ir. Ch. 146).

THE COURT concurred with the Master of the Rolls, that the objection that not more than one year's arrear of pin money was recoverable was unsustainable, the case here being different from that class of cases where the presumption arises that anything more than a year's arrear of pin money was spent by the husband with the acquiescence of the wife on the maintenance of the wife and family. Here there was a receiver over the annuity, and that annuity was assigned for value. The Court does not mean to give any opinion as to whether the suit of *Manly v. Foss* stood dismissed for want of prosecution on the 24th of October, 1858, under the 81st General Order of March, 1843. Expunge from the order of the Master of the Rolls so much of it as declares that the Court did [not decide whether or not more than six years of the arrears accrued prior to the 9th of February, 1863, can be recovered, the question of the Statute of Limitations not having been raised or argued before the Court. We shall then vary that portion of the order of the Master of the Rolls referring it back to the Master to reconsider his report.

The order of the Master of the Rolls was then varied accordingly.

## Court of Exchequer Chamber.

[Reported by William Woodcock, Esq., Barrister-at-Law

[BEFORE LEFROY, C.J., MONAHAN, C.J., KEOGH, CHRISTIAN, O'BRIEN, HATES, FITZGERALD, AND O'HAGAN, JJ.]

POPE v. COATES.—April 24, 26.

*Libel—Publication—Evidence.*

*A. wrote a letter to the Poor Law Commissioners*

*complaining of the conduct of B. a collector of poor's rate. The Commissioners forwarded the letter to the Board of Guardians in whose service B. was; and subsequently, on the occasion of a meeting of the Board, the letter was read by the clerk of the Union at the request of the chairman. Held—that this did not amount to a publication by A. so as to make him answerable in an action of libel at the suit of B.*

THIS was an appeal on behalf of the defendant, Abraham Coates, from the order of the Court of Exchequer obtained by the plaintiff on the 11th day of June, 1863. The action was for defamation. The summons and plaint contained four paragraphs, the first of which was for a libel, and the remaining three were for slander. The question to be decided upon this appeal arose altogether upon the first paragraph of the summons and plaint, and upon the defences to that paragraph. The first paragraph of the summons and plaint stated that the plaintiff, before and at the time and respective times of the committing of the grievances hereinafter mentioned, was a paid officer of the Clonmel Union for the relief of the destitute poor in Ireland, duly appointed a collector of poor-rates for the electoral division of Graigenagower and Ballymacarberry, in the said Union; and that at a meeting of the board of guardians for the said Union held at Clonmel on the 8th of May, 1862, and also at subsequent meetings of the said board held at Clonmel aforesaid, after the said day and before the commencement of this action, to wit, at meetings of the said board held respectively on or about the 15th May, and 22nd May, and the 29th May, the 8th June, and the 12th June, the same year, the defendant falsely and maliciously published and caused to be published of the plaintiff, and of the plaintiff as such officer and collector of poor-rates as aforesaid, and in relation to the said office, a malicious and defamatory libel containing the defamatory and libellous matter following:—"I beg to submit the following statement, having reference to the conduct of John Pope, a poor-rate collector for the electoral division of Graigenagower and Ballymacarberry, in the Clonmel Union. Those divisions being the estates of the Earl of Stradbroke, his lordship gave me, his agent, directions to have the game strictly preserved; and this Pope having for some years past been in the habit of having a gun and greyhound with him, when, as he alleges, he was engaged in collecting rates, he took the opportunity of killing game. It so happened that on the 30th of October last Lord Stradbroke's caretaker, James Belford, found him on the lands of tenants of Lord Stradbroke's, with gun and greyhound, in search of game, when the summonses were issued against him at the suit of these tenants; and after various postponements the cases were heard at the petty sessions at Ballymacarberry on the 18th March inst. when Pope was fined £5. His subsequent conduct appears to me most illegal, and justifies me in asking for an explanation by your honourable board with a view to his immediate dismissal. He (Pope) had been in the habit of furnishing me with an account of the rates payable by Lord Stradbroke; and on the last rate being struck—

namely, on the 5th of December, 1861, Pope furnished his account omitting an item—namely, nine shillings for a holding lately given up to Lord Stradbroke, and in which James Belford was put in possession as caretaker. Immediately after Pope was convicted by the magistrates, as before stated, he rushed out of the court-house with two men and proceeded to the house so occupied by Belford, and calling him a perjurer seized a gun for the rate of nine shillings; and although the sum was paid on the spot by the bailiff of Lord Stradbroke, he (Pope) charged two shillings for the seizure and two shillings each for his two men, which was also paid, and for which I hold his receipt. I am well assured this conduct will never be countenanced. Had Pope theretofore demanded the rate or included it in the account he furnished he would have got paid as he well knew. I have, &c.—ABRAHAM COATES." Meaning thereby that the plaintiff had illegally made a seizure for poor-rate payable by Lord Stradbroke without making any previous demand of the rate, and had used the powers conferred on him by his said office not for legitimate and proper purposes, but for oppression and revenge, whereby the plaintiff lost and was deprived of his said office of collector of poor-rates, and sustained damage to the amount of £500. The defence firstly pleaded to the said first paragraph was—that the defendant did not publish the libel as alleged, and an issue was joined upon that defence. The defence secondly pleaded to the first paragraph was—that the matter and publication complained of is not a libel. The defence thirdly pleaded to the said paragraph was a defence of privileged communication, the defendant thereby alleging, among other things, that he published the alleged libel in order to complain to the Board of Guardians of the Clonmel Union of the acts and conduct of the plaintiff, *bona fide* believing that the said guardians had power and authority to take cognizance of such acts and conduct of the plaintiff, then being the collector of the electoral division therein mentioned; and that he published the said matters *bona fide*, believing the same to be true, and without malice in fact, against the plaintiff. The defence fourthly pleaded to the said paragraph was—that the plaintiff had on the 2nd May, 1862, brought an action against the defendant for the same causes of action as in the first paragraph. The case was tried before the Lord Chief Baron at the adjourned sittings after Hilary Term, 1863. The plaintiff was examined upon the trial and proved that he had been an officer in the employment of the guardians of the Clonmel Union for fifteen years; for the first seven years as relieving officer, and for eight years as collector of poor rates; that he had been appointed by the said guardians poor-rate collector for the Ballymacarberry district of the said union for every rate made from the year 1854 to the year 1861, both inclusive; that he had been appointed to collect the rate struck for the said district on the 5th day of December, 1861, and his warrant for collecting the last-mentioned rate was produced by the clerk of the union and given in evidence on the part of the plaintiff. The plaintiff proved that plaintiff was in the habit of furnishing to defendant, as agent of Lord Stradbroke, a list of the rates payable by Lord Stradbroke for

premises in his own possession, and for premises in the possession of his tenants, at and under £4 per annum; that James Belford, named in the said letter of the defendant, was rated for the premises referred to in the said letter of the defendant at £7, and that such rating should not have been included in the list furnished by him to the defendant; that he had given a list of the amount of rates payable by Lord Stradbroke for the rate struck in December, 1861, to one Frank Kearney, the then bailiff of the defendant; that according to his usual practice Belford's holding should not have been included in that list; that he had asked Kearney whether he should include it in the list, and Kearney had told him not to do so; that he had on two or three occasions demanded the rate for this holding from Frank Kearney, who promised to pay it but did not do so; that previous to the 10th of March, 1862, the guardians of the union had given him, the said plaintiff, notice to complete the collection of the rate struck on the 5th of December, 1861, and to return his warrant for the collection of that rate at the then next meeting of the board on the 13th of March, 1862; that at the time he had collected all the rates struck in the said union, save those of Belford's holding and two others in that neighbourhood; that he had posted notice on the chapel of Ballymacarberry of his intention to collect those rates on the next Petty Sessions day, the 10th of March; that upwards of half an hour before making the distress, and after the business of the Petty Sessions had concluded, he demanded the rate from Belford; that the other two rates in arrear were paid to him previously on that day at the Petty Sessions Court; that he completed the collection of the rate struck on the 5th of December, 1861, without any arrears, and returned his warrant for the collection to the guardians on Thursday, the 13th of March. That on the 24th of April, 1862, there was an inquiry and investigation held by Captain Hamilton, who was appointed by the Poor Law Commissioners for the purpose of holding such inquiry into (among other matters) the conduct of the plaintiff in relation to the charges preferred against him by the defendant in the letter set forth in the first paragraph of the plaint. The plaintiff also proved that the plaintiff and the defendant were both present at such investigation; that witnesses were examined by Captain Hamilton in relation to (amongst others) the said charges, and that he believed that the evidence which was given was taken down by Captain Hamilton; that at that investigation the said Francis Kearney and James Belford had admitted in his presence and hearing and in that of the defendant that before making the distress the plaintiff had demanded from them the rate distrained for; that a new rate was struck for the said electoral division by the guardians of the said union on or previous to the 29th of May, 1862; and that the said guardians on the 10th of June, 1862, unanimously resolved to re-elect the plaintiff as collector of that rate for the said Ballymacarberry district, and forwarded to the Poor Law Commissioners a copy of the minutes of the board of that date; that on the 19th of June, 1862, the said guardians met to consider (among other things) a communication from the Poor Law Commissioners on the subject of the previous

re-election of the plaintiff to his said office. That plaintiff went to the board-room of the said guardians on the said 19th of June in order to ascertain if the sanction of the commissioners to his appointment as such collector had been given and sent down; that he then on the said 19th of June heard Mr. Oughton, the clerk of the union, read to the board the letter of the commissioners refusing to sanction the plaintiff's appointment; that Mr. Bagwell was in the chair, but defendant was not present at the meeting of the board; that Mr. Bagwell said he wished to have the defendant's letter to the commissioners read; though he had seen it in the newspaper he wished to know with greater certainty all about it; that Mr. Oughton then went to his office for it and brought it in, when Mr. Bagwell as such chairman directed that it should be read. Mr. Oughton then read it aloud; that which was so read was the copy of the defendant's letter that had been forwarded by the commissioners to the board of guardians; that Mr. Bagwell then prepared a minute addressed to the commissioners, requesting that they would sanction plaintiff's re-election, but the commissioners refused; that on the 10th day of July, 1862, the said guardians proceeded to elect a collector for the said district; and the plaintiff, James Keeffa, James Hamilton, and J. F. O'Shea were candidates for the said office; there were seventeen guardians present; that the election of the plaintiff was then again proposed and seconded by two of the guardians present, that of the guardians present seven voted for the re-election of the plaintiff, and ten voted against his re-election; and therefore Mr. J. F. O'Shea was appointed to the said office of collector of poor-rates for the said district, and the plaintiff has not since been in the employment of the said guardians. The plaintiff stated that he had on the said 19th of June seen the defendant in the immediate neighbourhood of the place in which the said guardians were assembled, but not in the board-room. The following documents, amongst others, were given in evidence by the plaintiff:—The letter from the defendant to the Poor Law Commissioners, dated the 29th day of March, 1862, and upon which the cause of action in the first paragraph was framed. Letter from the Poor Law Commissioners to the clerk of the Clonmel Union, dated the 2nd April, 1862, in which there was forwarded a copy of the defendant's before-mentioned letter, which was the copy read at the meeting of the guardians of the said 19th June. Copy letter from the commissioners to the clerk of the Clonmel Union, dated 16th April, 1863, in which they stated that with reference to the explanation furnished by Mr. Pope the plaintiff, in respect to the complaint preferred against him by Mr. Coates, the defendant, they had instructed Mr. Hamilton, their inspector to inquire into the matter, as also into any other complaints of a similar character against Mr. Pope, and to report to them thereon. Letter from the commissioners to the clerk of the Clonmel Union, dated 7th May, 1862, in which they stated that they had received a report from their inspector, Mr. W. Hamilton, together with the evidence taken by him on the inquiry recently held by him into Mr. Coates' complaint, as also into a complaint preferred against Mr. Pope by a Mr. Charles Acheson, jun.; and that

as regards the former case there appeared a doubt from the evidence that in proceeding to Belford's (the caretaker's) house direct from the court-house, after his conviction on a charge of poaching, which was supported by the testimony of Belford, and levying a distress, Mr. Pope was actuated by feelings of personal animosity against Mr. Belford. Minutes of the board of guardians of the 29th of May, 1862, for the issuing of advertisements for poor-rate collectors for the collection of the new rate; and that as regards collector Pope, who has been a most efficient and useful officer, the guardians referring to the commissioners' letter of the 7th May inst. were desirous to have the commissioners' opinion as to his qualification for re-election, as the decision of the commissioners would likely influence many guardians in the selection they would make on the occasion. Letter from the commissioners to the plaintiff, dated the 5th June, 1862, in which the commissioners stated that owing to the circumstances which transpired on the recent inquiry into the charges preferred against Mr. Pope by Mr. Coates and Mr. Acheson, the commissioners would not be prepared to sanction Mr. Pope's appointment to the office of collector. Letter from the commissioners to the board of guardians, dated 5th June, 1862, in which the commissioners stated that with regard to the guardians' inquiry as to Mr. Pope's qualification for re-election to the office of collector, the commissioners desired to state that owing to the highly unfavourable nature of the circumstances which transpired at the recent inquiry into the charges against Mr. Pope by Mr. Coates and Mr. Acheson, the commissioners would not be prepared to sanction Mr. Pope's re-appointment to the office of collector should he be elected thereto by the guardians. Minutes of the board of guardians of the 12th June, 1862, at which the re-election of the plaintiff as collector for the Ballymacarberry district was proposed and seconded and carried unanimously, whereupon it was resolved the commissioners be informed that in the opinion of the board the charges referred to in the commissioners' letter were not made knowingly in any case by the collector in the union, and the re-election of Mr. Pope, poor-rate collector, was passed; but at the same time the board were unanimous in expressing their disapproval of Mr. Pope, which formed the subject of the late investigation at the board-room, and the necessity of cautioning him against any repetition of it. Plaintiff's counsel admitted that he went on the alleged publication of the libel in the board-room of the guardians on the 19th June, 1862. At the close of the plaintiff's case Mr. Serjeant Armstrong, on behalf of the defendant, asked his Lordship to direct the jury to find for the defendant on the first paragraph, and on the first defence thereto, traversing the publication and the issue joined thereon on the ground that there was no evidence to go to the jury that the defendant published the letter of the 29th March, 1862 (the libel complained of), on the 19th of June, or that he was a party or privy to or in any way authorized the reading of it in the board-room of the guardians of the Clonmel Union on that day. His Lordship intimated that he would probably direct a verdict for the defendant upon the said defence. Serjeant Armstrong then went into evidence.

The defendant was examined, and stated that he was before, and at the time of the writing of the said alleged libel, the land-agent of the Earl of Stradbroke, who was the owner of the greater portion of the land in the said division; and that he, the defendant, was never at any meeting of the board of guardians since the investigation before Captain Hamilton; and that after writing the letter to the commissioners he never interfered directly or indirectly with respect to the plaintiff. Several documents were given in evidence on behalf of the defendant which need not be particularized as they did not affect the subject-matter of this appeal. There were also given in evidence attested copies of the proceedings in the Court of Common Pleas in another action of *Pope v. Coates*, which had been tried at Clonmel, and an attested copy of the judgment therein, which was entered on the 13th January, 1862; damages, 40s.; costs, 6d.; costs of increase, £55 3s.

*Harris, Q.C.*, on behalf of the plaintiff, admitted that the letter of the defendant set out in the summons and plaint in the said last-mentioned action was the same as the letter complained of in the first paragraph of the plaint in the present action.

At the close of the defendant's case Serjeant Armstrong again asked his lordship to direct a verdict for the defendant on the first paragraph and the said first defence and issue thereon, namely, that the defendant did not publish the libel as illegal. His Lordship upon that issue told the jury that if the reasonable and probable result of Mr. Coates sending the letter was that it should be sent to the guardians and published in their board-room, the jury might infer that the defendant did publish it as in the said first paragraph alleged. No objection was made by the counsel for the defendant to this direction of his Lordship. The jury found that the defendant did publish the libel as in the first count alleged, and assessed the plaintiff's damages on the said count at the sum of £50. His Lordship then directed the jury to change the verdict so found by them upon the said issue into a verdict for the defendant by erasing the word "yes" and substituting therefor "No," by the direction of the judge, which was done. As to the second issue upon said first paragraph as to the alleged libel "was it a libel," the jury found "Yes." As to the third issue upon said first paragraph as to the alleged libel, "Is the plea of privilege true?" the jury found "No."

As to the fourth issue upon the said first paragraph as to the alleged libel, "Is the present action for the same cause as the action at Clonmel?" the jury found "No." His Lordship also reserved liberty to the plaintiff to move to enter a verdict for £50 on the said first count if the Court should be of opinion that his Lordship should not have directed the jury to find for the defendant on the first count. On the 23rd of April, 1863, Mr. Harris, on the part of the plaintiff, obtained a conditional order from the Court of Exchequer that the verdict had for the defendant on the first count of the summons and plaint should be set aside, and instead thereof that a verdict be entered for the plaintiff on the said first count for the sum of £50 damages, and 6d. costs. On the 11th day of June, 1863, cause was shown on behalf of the defendant against the said conditional order. And it was ordered that the point saved at the trial of this

cause be ruled in favour of the plaintiff, and accordingly that the conditional order of the 23rd of April last be made absolute, and that the said verdict for the defendant on the said first count of the summons and plaint be set aside, and instead thereof a verdict be entered for the plaintiff on the said first count for £50, and sixpence costs, including the costs of the judgment as costs in the cause, and the registrar to amend the *postea* accordingly. The defendant in the case, by way of appeal, submitted that the last-mentioned order was erroneous upon the grounds—1st, that there was no evidence to go to the jury of the publication of the illegal libel by the defendant on the 19th of June, 1862. 2nd, that the learned judge was right in directing a verdict for the defendant on the first issue. 3rd, that the said alleged publication of defendant's said letter at a meeting of the board of guardians on the 19th of June, 1862, was not a publication by the defendant. 4th, that such publication was not authorized by the defendant, nor was he privy thereto; and that he could not be made legally liable to an action in respect thereof. 5th, that the reading of the said letter on the said 19th of June at the said meeting of the board of guardians was the unauthorized act of the said guardians, for which the defendant was not liable. 6th, that the defendant only authorised a publication of the said letter for the purpose of having an investigation held by the commissioners into the plaintiff's conduct; that this purpose and object was satisfied by the investigation held by Captain Hamilton by the direction of the commissioners, and that the defendant could not be, and was not, legally liable for any subsequent unauthorized publication of the said letters. 7th, that the transmission of the copy of the said letter of the defendant by the commissioners to the said board of guardians was privileged, and that the subsequent reading of it by the said board of guardians on the 19th of June, 1862, was not a publication of it by the defendant, for which the defendant was legally liable in an action at suit of the plaintiff. The plaintiff submitted that the said last-mentioned order was right upon the grounds—1st, that there was evidence to go to the jury of the publication of the alleged libel by the defendant. 2nd, that the learned judge was wrong in directing a verdict for the defendant on the first issue.

*Serjeant Armstrong and Tandy* for the defendant. There was no evidence of a publication by the defendant. *Avery v. Bowden* (6 El. & Bl. 973) does away with the notion of a scintilla of evidence. It may be said that there was some sort of a publication, but the question is, whether the defendant is responsible for it. *Ward v. Weekes* (7 Bingh. 211) is an authority that he was not. The defendant had nothing to do with Mr. Bagwell asking the clerk to read the letter to the Board of Guardians. *Smith v. Wood* (3 Campb. 323). There is neither requirement nor authority on the face of the letter to read it at the board under the circumstances which occurred. Neither was there any legal or moral obligation in the persons to whom the letter was addressed to cause that to be done.—*Tidman v. Ainslie* (10 Exch. 63). There can be no presumption of an authority to do an illegal act. *Parkins v. Scott* (1 H. & Colts. 153) somewhat resembles this. No one ever heard of an

action being brought against the proprietor of a newspaper for an article which has been copied into another newspaper, on account of that second publication.—*The Duke of Brunswick v. Harmer* (14 Q. B., 185); *Rex v. Almon* (5 Bur. 2686).

*Harris, Q.C., and John Harris* for the plaintiff.—

The Poor Law Commissioners could not have prevented the re-election of Pope by the guardians, but they could have dismissed him by a sealed order.—1 & 2 Vict. c. 56, ss. 31, 33. The discussion on the 19th of June was as to the re-election of Pope, or his non re-election, and then it was that Mr. Bagwell called for the reading of the letter. It was not the object of Coates, when he wrote the letter, to obtain an investigation. Suppose the publication in the board-room was the first publication, would the defendant be liable if Mr. Bagwell read it, even though he, the defendant, did not authorise it? We say he certainly would, and there is a long chain of authorities to support that proposition. *Johnson v. Hudson and Morgan* (7 Ad. & Ell. 233, note b) is very much in point. *The Queen v. Lovat* (9 C. & P. 462). "The moment a man delivers a libel from his hands his control over it is gone. He has shot his arrow, and it does not depend upon him whether it hits the mark or not." Per Best, J., in *The King v. Burdett* (4 B. & Ald., 126). So also Bac. Abridg. Libel, 2. Wherever a man uses noxious and injurious means, he must be presumed to have contemplated and intended the injurious but natural consequence of using such means.—*Starkie on Slander*, Prelim. Disc. lxxv. [*Monahan, C. J.*—Is the appointment of a collector complete until the Commissioners ratify it?] No. *Dela-croix v. Thevenot* (2 Stark. Rep. 63) is also an authority in our favour on the question of publication. The malicious intention of the libel is to be inferred from the mischievous tendency of the publication, unless rebutted.—*The King v. Harvey and Chapman* (2 B. & Cr. 257).

*Serjeant Armstrong* replied.

*Cur. adv. vult.*

April 26.—LEFROY, C. J.—In this case we have come unanimously to the conclusion that the judgment of the Court of Exchequer should be reversed. We have come to that conclusion unanimously, but with some shade of variety, perhaps, as to the reasons by which some of the judges may have been more or less actuated. But the ground upon which it appears to myself, and I may say to the great majority of the judges, that the case should be decided, is this, that there was no evidence to connect the defendant with the publication, upon which the Court of Exchequer came to the opinion that he was guilty of publishing the libel in question; that there was nothing furnished by the libel itself imparting any authority directly or indirectly to encourage a repetition of the publication. For one publication he suffered. Therefore, so far as the vindication of justice is concerned, he has paid the penalty. The question is now, is he to suffer a further penalty for a different and another publication. There was nothing in the nature of the libel itself to encourage that repetition of the offence. The libel did not intimate a wish that every one into whose hands it came should give it further publicity. It

was sent to a public body, and therefore by intentment it had served its purpose of communicating the necessary information to that body; the writer thought it should remain in their archives, when they had made use of it as they thought fit. But it appears that upon an occasion in which a necessary discussion arose which made it important that one member of the Board of Guardians who was not present at the time the letter had been originally read, should know what the contents of it were, it is desired, and at his instance, and for his purposes, to serve the purpose of the very party who now complains, he desired to have the document removed from the archives of the guardians, where it remained safely deposited, and where it would have rested for ever, if it had not been called forth by one of the guardians on the occasion to which I advert. That became, therefore, a new and a different publication; the document was read then, but neither directly nor indirectly, from the nature of the libel, nor from any part of the discussions which took place, is there any evidence to my mind, nor to the mind of several of the members of this Court, to connect the defendant with that publication, so as specially to make him answerable as for a second publication, when by no intentment or inference to be collected from the libel itself or any of the transactions which took place, there could be any substantial grounds for connecting him with the second publication. So far, therefore, as to my own opinion, and so far as it coincides with that of any of the other members of the Court, that is the ground which occurs to me for reversing the judgment.

The other judges concurred, and the order of the Court of Exchequer was set aside without costs.

## Court of Criminal Appeal.

Reported by William Woodcock, Esq. Barrister-at-Law.

[BEFORE LEFROY, C.J., MONAHAN, C.J., PIGOT, C.B., KEOGH, O'BRIEN, HAYES, FITZGERALD, AND O'HAGAN, JJ., AND FITZGERALD AND DEASY, B.B.]

THE QUEEN v. KING.—August 18, 22.

Indictment—Venue—Boundary—St. 9 G. 4, c. 54, section 26.

In an indictment under the statute 9. G. 4, c. 54, s. 26, enacting that offences committed on the boundaries of counties may be tried in either, it is not necessary that the county in which the offence was actually committed should be stated in the indictment, with an averment that such offence took place within 500 yards of the county within which the indictment was laid (*Hayes, J.*, dissentiente.)  
Regina v. Brown (1 Cr. & Dix. Abr. Notes of Cases, 46) overruled (*Hayes, J.*, dissentiente).

This was a case reserved by Lefroy, C. J., at the last assizes for Tullamore. The case stated was as follows:—

At the last Assizes for the King's County, holden

at Tallamore, Lawrence King the younger, a prisoner, having been arraigned for the murder of James Henry Clutterbuck, a lieutenant in the 5th Fusiliers, pleaded not guilty to the indictment, which was as follows:—

King's County. } The jurors for our lady the Queen  
to wit. } upon their oaths present that Lawrence King the younger on the 8th day of July, in the year of our Lord 1865, feloniously, wilfully, and of his malice aforethought, did kill and murder James Henry Clutterbuck, against the peace of our lady the Queen, her crown and dignity. True bill for self and fellows,

JOHN C. WESTENRA, foreman.

The said Lawrence King the younger was tried before me at an adjournment of the said Assizes, on the 4th day of August inst. and was convicted of the said murder, and was sentenced to be hanged on the 6th day of September next.

Upon his trial it was proved that the murder of Lieutenant Clutterbuck was perpetrated by Lawrence King the younger, by shooting him dead with his own double-barrelled gun, whilst they were both in a boat belonging to Lawrence King, on the river Little Brosna, near Parsonstown, on the evening of the 8th of July last, in which river, close to where he was shot, his dead body was found on the morning of the 11th. It was proved that Lieutenant Clutterbuck left Parsonstown barracks, in the King's County, about half-past four p.m. on Saturday, the said 8th July, with Lawrence King as his attendant, on a shooting excursion on and along the river Little Brosna, and in the course of the said excursion they had gone on the said river, Little Brosna, which is navigable for boats, in King's boat, and crossed over to the Tipperary side from the King's County side.

At the place where the murder was perpetrated, and for a considerable distance above and below it, the river Little Brosna was proved to be the boundary between the King's County and the county of Tipperary, and at the place where the murder was perpetrated the river was proved to be only eighty five feet wide. The evidence showed that Lawrence King the younger, when he fired the fatal shots, was at one end (the end nearest the King's County) of his boat, proved to be 13 feet 9 inches long, which was at right angles with and up to the Tipperary bank of the river, and Lieutenant Clutterbuck was at the other end of the boat, next to the last-mentioned bank; so that the murder was committed within a few feet of the boundary of the King's County, far within the 500 yards limit mentioned in the statute of 9 Geo. IV. c. 54, sec. 26, and in the said boat during the said excursion.

It was contended on behalf of the prisoner that the indictment was defective in not containing an averment that the murder was committed in the county of Tipperary, within 500 yards of the King's County, or in case the Crown relied on the 27th section of the said statute, an averment of the special facts necessary to bring the case within such section; that therefore the prisoner should be acquitted. I considered the indictment sufficient, but reserved the point as to whether it was necessary that the indictment should contain the averments as contended for, and I

respite execution till the decision of the Court of Criminal Appeal thereon was had, the convict remaining in prison under the said sentence.

THOMAS LEFROY.

*Montgomery and Constantine Molloy* for the prisoner.—The indictment was defective. The question turns on the stat. 9 G. 4, c. 54, s. 26. There are, at all events, no express words in that section enabling the pleader to lay the offence as having been committed in a county in which it was not committed. The course which ought to have been taken in framing the indictment is pointed out in *Rex v. Ruck* (1 Russ. on Crimes, 827, 3rd ed.) There should have been an averment that the crime was committed "in the County of Tipperary within 500 yards of the boundary of the King's County." *Regina v. Brown* (Cr. & Dix. Abr. Notes of Cases, 46) is an express decision upon the question, and establishes that such an averment is necessary. There are several statutes altering the common law rule that a prisoner should be tried in the county in which the offence was committed, and that the offence must be laid as having been committed in that county. Those statutes may be divided into two classes—those in which there are express words enabling the Court to try and determine the offence in a county other than that in which it was committed, and enabling the pleader to lay the offence in such county, and those which do not contain any such words. The Court will find that the authorities have held that in cases arising under the former class an averment similar to that which we contend for was not necessary, but otherwise in cases arising under the other class.—Statutes 26 Hen. 8, c. 6, s. 6 (Engl.); 38 G. 3, c. 52, s. 2 (Engl.); 53 G. 3, c. 108, s. 24; 11 G. 4 & 1 Wm. 4, c. 66, s. 54; 9 G. 4, c. 31, s. 22; 24 & 25 Vict. c. 96, ss. 41, 64, 70, 98; 24 & 25 Vict., c. 99, s. 28. Where the Court finds the Legislature passing several statutes in the same session of Parliament, enabling Courts to deal with offences in counties other than those in which they were committed, and in some of them enabling the pleader to lay the offence as committed in a county where it was not committed, and in others not giving such a power, we submit that the inference is that the Legislature meant to make a distinction; and the authorities shew that such is the inference—*Rex v. James* (7 C. & P. 553); *Rex v. Smythies* (1 Den. C. C. 498); *Rex v. Fraser* (1 Moo. C. C. 407); *Rex v. Whitley* (2 Moo. C. C. 186; s.c. 1 Car. & Kir. 150). [*Donahan*, C. J.—Is it not the true construction of the Act of Parliament that where the real venue is doubtful the county is extended for 500 yards beyond the true boundary?] No; in case of doubt there ought to be two counts, laying the venue in each county.—*The Queen v. Mitchell* (2 Q. B. 636); *Rex v. Mellor* (Russ. & Ry. 144); *Rex v. Goff* (Russ. & Ry. 179); *Rex v. Scully and Lynch* (Alc. & Nap. 262); Statutes 9 G. 4, ss. 2 & 3; 5 & 6 Wm. 4, c. 76; *Rex v. Wyndham* (Russ. & Ry. 197); *Reg. v. Loader* (2 Russ. on Crimes, 122) *Noon's case* (1r. Cir. C. 110); *Rex v. Jones* (1 Den. C. C. 551).

*The Attorney-General (Lawson)*, and *The Solicitor-General (Sullivan)* for the Crown.—The only question



is whether the indictment should have contained an averment that the offence was committed within 500 yards of the boundary of the King's County. The object of ss. 26 and 27 of stat. 9 G. 4, c. 54, was the same, viz., to make it unnecessary for the pleader to aver with certainty in which county the offence was committed. That is shewn by the preamble of the Act. Suppose two shots were fired, one in the King's County and the other in Tipperary, and it was uncertain which of them caused the death, if the case of *Reg. v. Brown* is law, there never could be a conviction. [*Pigor, C. R.*—It would be consistent with their argument that you should aver in that case that it occurred in the limit of 500 yards.] No: for if in the evidence it appeared that the parties never left the King's County, the indictment would fail unless there was an averment that the crime was committed either in the King's County or in Tipperary, within 500 yards of the King's County, and such an averment never was framed in any indictment. *Reg. v. Brown* was decided at a time when every traversable averment must have been laid with time and place. The effect of the Act is to extend the boundary of the county 500 yards.—Per Lord Denman, C. J., in *The Queen v. Mitchell* (2 Q. B. at p. 642). It would be pleading evidence to state the fact of the offence having been committed within 500 yards of the boundary. Unless the evidence showed the offence to have been committed out of the jurisdiction of the Court the conviction must be affirmed. If the crime had been averred to have been committed in Tipperary, then an averment that it was committed within 500 yards would be necessary to make an indictment in the King's County good on the face of it. The cases cited on the other side are all distinguishable. In cases of bigamy jurisdiction must be given, under the Act 1 Wm. 4, c. 66, by averring that the offence was committed out of the jurisdiction, and that the prisoner was in custody within it. That explains most of the cases cited. The words "dealt with" used in the Act which we are considering is wider than the word "indicted."—*Reg. v. Hughes* (Bell's C. C. 242); st. 14 & 15 Vict. c. 100, ss. 4, 14.

*Cur. adv. vult.*

Aug. 22.—*Pigor, C. B.*, delivered the judgment of the majority of the Court.—He said that the prisoner had been convicted of wilful murder before the Lord Chief Justice at the adjourned sitting of the last assizes for the King's County. The indictment contained the usual marginal venue, and alleged the murder to have been committed on a day specified, without however making any statement of the actual place where the deed was done. It appeared that the murder was committed by the prisoner shooting the deceased while they were both on a river which, at the place, was the boundary between the King's County and the County of Tipperary, the river being there not more than eighty-five feet wide. The boat was at the Tipperary side of the river. The crime was therefore committed far within the boundary of 500 yards, the limit prescribed by the statute. It was contended on behalf of the prisoner that the indictment was defective in not containing an averment that the murder was committed in Tipperary, within

five hundred yards of the boundary of the King's County, or an averment of the special facts to bring the case within the 26th section of the 9th G. 4, c. 54, and the case of *Reg. v. Brown and others* (Cr. & Dix. Abr. Notes of Cases, 46) was relied on in support of this objection. The Chief Justice considered that the indictment was sufficient, and the prisoner was accordingly sentenced, but in deference to the authority of the judge by whom *Reg. v. Brown* was decided, he had reserved the point. The case had been relied on in this Court also, but with the exception of Hayes, J., the Court was of opinion that the ruling of the Chief Justice was right, and that the objection was not sustainable. It should be admitted that the decision of Joy, C. B. in *Reg. v. Brown* was a direct authority in favour of the objection. It had been suggested that the report was inaccurate, but there was no reason for so supposing. Fitzgerald, J., had found, on searching in the Queen's Bench, the file of proceedings in that case which had been returned into the Court. It appeared that Brown with a number of other persons, were indicted for joining in a procession in violation of the Party Processions Act, and the offence was laid in the indictment as having been committed at a place in the County Monaghan. From one of the informations the transaction appeared to have taken place near the boundary of Monaghan and Fermanagh, within the County of Fermanagh. The case was reported by a member of the Bar, and Joy, C. B., ruled that the indictment could not be sustained, upon the ground that the averments in the indictment did not bring the case within the terms of the Act of Parliament. It had been suggested that the decision in *Regina v. Brown* had no application to an indictment framed under st. 14 & 15 Vict. c. 100, s. 23, which rendered it unnecessary to state any venue in the body of the indictment. But the application of the case could not be avoided in that way, for that Act provided that the venue in the margin should be sufficient, and therefore every fact should be taken as alleged to have occurred in the place named in the margin. The view which Joy, C. B., had taken of the statute in 1836 was said to be supported by the course taken in *Rex v. Ruck*, which is referred to in 1st Russell on Crimes, 827 (3rd edit.) But that case did not apply. There the indictment which was tried before Parke, J., laid the offence, which was burglary, as having been committed "at the parish of English Bickner, in the County of Gloucester, within five hundred yards of the boundary of the County of Hereford." The indictment had been found by a grand jury of the County of Hereford. The offence of burglary, however, had been treated as a local offence, and it had been considered necessary to shew that the dwelling-house where the offence was committed was situated at some place within the jurisdiction of the Court, and it was contended that the 7 G. 4, c. 64, s. 12, only applied to transitory felonies and not to felonies that were local in their nature; it was, however, held that the indictment was good; that the effect of the 7 G. 4, c. 64, s. 12, was to give adjoining counties concurrent jurisdiction over one thousand yards; that the words "dealt with" in the statute applied to justices of the peace, who had consequently jurisdiction over five

hundred yards in the adjoining county to that in which they were qualified to act; that the words "inquired of" applied to the grand jury; "tried" to the petit jury; and "determined and punished" to the Courts of Sessions and Assizes. The precedent afforded by *Regina v. Ruck* could not affect the case before the Court. No other authority had been cited, or could be found directly applying to the Act of Parliament. The decision in *Regina v. Brown* had remained unreversed since 1836, and the Court had now to determine whether the rule there applied was to prevail; that was, whether, where there was an indictment alleging an offence to have been committed in a particular county, and proof that it was committed within five hundred yards of the boundary of that county, but in a different one, that proof would sustain an indictment in the general form containing no statement shewing that the offence was committed within those limits. This question must be determined by the terms of the enactment, expounded by its purpose as it appeared on the Act itself, and if need was, by the language of the Legislature applied to Acts made *in pari materia*. The 26th section of the Irish Act 9 G. 4, c. 54, was in terms the same as section 12 of the English Act, 7 G. 4, c. 64. Section 27 of the Irish Act, and section 13 of the English Act applied to felonies and misdemeanors committed on any person, or on or in respect of any property in or upon any coach, waggon, cart, or other carriage whatever employed in any journey, or on board of any vessel employed in any voyage or journey upon any navigable river, canal, or inland navigation, and it enacted that the offence might be dealt with, inquired of, tried, determined, and punished in any county through any part of which such coach, waggon, cart, carriage, or vessel should have passed in the course of the journey or voyage during which the offence was committed. A previous imperial statute, 59 G. 3, c. 96, had been passed for similar objects to those of the 26th and 27th sections of 9 G. 4, c. 64, and the 12th and 13th sections of 7 G. 4, c. 54, but with a more limited range, confined to felonies, and not extending to misdemeanors. It contained two sections; the first provided for felonies committed on stage coaches, stage waggons, stage carts, or other vehicles; the second provided for the prosecution in the case of felonies, but not misdemeanors, committed on the boundary or boundaries of two or more counties, or within 500 yards of such boundaries. His Lordship thought it desirable to collate the section of the repealed, Act and the section of the Act now in force, in order to indicate the construction to be put on it. Section 2 of the 59 G. 3, c. 96, was in these words—"Whereas felonies are sometimes committed on or so close to the boundaries of two or more counties, that the offenders escape unpunished from the defect of proof, that the felony with which they are charged was actually committed within the county within which such offenders may be indicted; be it therefore enacted that from and after the passing of this Act, in any indictment for any felony committed on the boundary or boundaries of two or more counties, or within the distance of five hundred yards of any such boundary or boundaries, it shall be sufficient to allege that such felony was committed in either or any of the said counties,

and every such felony shall and may be inquired of, tried, and determined in the county within which the same felony shall be so alleged to have been committed; and all and every person and persons who shall be convicted of any such felony so to be inquired of, tried, and determined as aforesaid, shall be subject and liable to all such pains of death, and other pains, penalties, and forfeitures, as such person or persons, so convicted of such felony would have been subject and liable to, in case such felony had been inquired of, tried, and determined in the county in which the same felony was actually committed." Here there was an express provision that it should be sufficient to allege that the felony was committed in either or any of the counties. The first section of this statute 59 G. 3, c. 96, contained similar enactments as to felonies committed in stage coaches, &c. The statute 59 G. 3, c. 96, was repealed as to England by the 7 G. 4, c. 64, and as to Ireland by the 9 G. 4, c. 54, the 9 G. 4, c. 54, coming into operation on the 1st Sept. 1828, and the repealed statute being continued in force till the day preceding, the 31st August. The 26th section of the 9 G. 4, c. 54, was in these words—"For the more effectual prosecution of offences committed near the boundaries of counties, or partly in one county and partly in another, be it enacted that where any felony or misdemeanor shall be committed on the boundary or boundaries of two or more counties, or within the distance of five hundred yards of any such boundary or boundaries, or shall be begun in one county and completed in another, every such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in any of the said counties in the same manner as if it had been actually and wholly committed therein." No doubt could be reasonably entertained that the purport of the repealed section 2 of the 59 G. 3, c. 96, and the provisions of the substituted section were one and the same. The latter statute contained a variety of provisions to effect this object, as did also the 7th G. 4 in England for the improvement of the administration of justice. It used phraseology less extended and more condensed than the repealed statute, and where in the words of the section the Legislature expressed its intention to be for the more effectual prosecution of offences committed on boundaries of counties, it was manifest that it must have contemplated the difficulty which the Legislature itself had in the previous Act described in stating that felonies were sometimes committed on or so close to the boundaries of two or more counties, that the offenders escaped unpunished, from the defect of proof that the felony with which they were charged was actually committed within the county in which such offenders might be indicted. We ought to give it such a construction consistent with these words as should best express the purpose of this enactment. The terms of the 26th section itself seemed to point to this result. The second section of the 59 G. 3 recited the difficulty, and enacted that the offence might be alleged to have been committed in either county, and went on then to say that it might be inquired of, tried, and determined in that county. In the 26th sec. of the 9 G. 4, c. 54, no such words appeared as those in the 59 G. 3, which described what it should be sufficient to allege, but it used words, which, notwith-

standing the verbal criticism in *Regina v. Ruck*, appeared sufficient to embrace every part of the procedure. The term "dealt with" must, in the fair and ordinary meaning, include all that was necessary to deal with the case so as to ripen it for being tried, determined, and punished. It could not be so tried, determined, and punished, without an indictment. If that were so it might at a subsequent stage be dealt with in any of the counties as committed therein, and the case might be dealt with in pleading as in proof, as if the offence had been committed within the precincts of the venue county. The statute provided not only for offences committed near the boundary of a county, but for offences committed partly in one and partly in another county; and it enacted as to this that the offence might be dealt with, inquired of, tried, determined, and punished in any of the counties in the same manner as if it had been actually and wholly committed therein. It would go far to frustrate these provisions to hold that the indictment should specify the portion of the transaction which constituted the offence as having happened in one county, should shew then the portion which happened in the other, and trace the connection between them so as to establish the statement that they constituted one and the same transaction. The obvious meaning was that the party might be indicted for the whole offence in one county. It had been suggested that no serious difficulty could arise in the prosecution because it would always be in the power of the prosecutor to allege that the offence was committed in the limit prescribed. But this would be only to shift the difficulty. If the prosecutor alleged, for instance, in the indictment that the offence was committed in County B. within five hundred yards of the boundary of County A., he bound himself to prove that the offence was committed in County B. and not in County A. He might fail to do this by want of proof of the exact spot, or by want of proof of the exact boundary between the counties, or by proof that the offence was committed within the county in which it was laid and beyond the limit. The probability was that the accused would be acquitted. The proof might in all cases, notwithstanding the most careful inquiries, leave it doubtful if the crime was committed within or without the prescribed limits. Suppose the crime was committed on a mountain or a bog, the line must take the same direction as the line to which it ought to be parallel, and thus the prosecution might fail, because the proof did not support the allegation that the offence was committed within the limits prescribed, though it established that the offence was committed within the venue county. These views seemed to shew that the interpretation of the section was to be found in its plain words. It said that the offence may be dealt with, inquired of, tried, determined, and punished in any of the counties in the same manner as if it had been actually and wholly committed therein. It could not be dealt with in the same manner if the indictment was to be framed in a different manner. Mr. Montgomery and Mr. Molloy in their able arguments had referred to statutes which had relaxed the rule as to venue, and they ranged them into two classes—those in which the prosecutor was by express words

enabled to lay the offence in a county different from that in which it was actually committed, and those in which no such thing was in express terms contained; and they had argued that the phrase in 9 G. 4, c. 54, "deal with, inquire of, determine, try, and punish," indicated that the statute belonged to the second class. Some authorities had then been cited to shew that under statutes belonging to the second class it had been held necessary to aver certain facts. Under the 9th G. 4, c. 31, s. 22, the offence of bigamy might have been dealt with in the county where the offender should have been apprehended; and the prisoner's counsel cited *Rex v. Fraser*, in which it was held to be necessary in an indictment to shew that the prisoner was in custody in the county in which he was indicted and tried. But that had been reviewed subsequently, and the result seemed now to be that where the offence was laid as having been committed in another county it should in some way appear by the same record that the prisoner was in custody in the county where he was indicted and tried; but it had been held that this would sufficiently appear by the caption of the indictment. So it appeared from *The Queen v. Whaley* explained by *The Queen v. Smythies*, in which a similar decision was made in the case of forgery. *Rex v. Mellor* was also cited at the bar, but it only decided that in cases under the 38 G. 3, c. 52, s. 2, the indictment, though it might be framed in the county adjoining to that in which the offence was committed, ought to state the offence to have been committed in the county in which it was actually committed. That statute only enacted that the bill of indictment should be valid and effectual as if it had been found by a jury of the county in which it had been committed. The Act contained no such words as those contained in the 9th G. 4, c. 54. *Rex v. Goff* was also cited. The point there was, that the omission to aver in an indictment that the county of Hants was adjoining to the town of Southampton was immaterial, but that when the record was regularly drawn up it might be stated in the caption. *The Queen v. Wyndham* was also cited for the purpose of shewing that the course of indicting in an adjoining English county for an offence committed in Wales was to lay the offence according to the fact as having been committed in the Welsh county; and, undoubtedly, it would seem that such a mode of pleading was adopted while the statute under which that case arose was in force. It would be now difficult to trace the course of precedent on this subject, but any knowledge on that subject could not control the statute with which the court was dealing, and which had been passed for a different purpose. His Lordship believed it had also been usual in indictments for bigamy to lay the marriages as having been solemnized in the counties in which they had actually taken place, although it would seem from the precedents in *Starkie* that this was not always the case. The number of statutes was very great; their provisions varied. In some, provision was made that the indictment might charge the offence as having been committed in the county where the trial took place, in others it was not so. He might advert to this, that in one of the enactments of the 24th & 25th Vict. the words "try and determine" were omitted. In others they were retained. In others

the word "indict" was omitted, and the words "deal with" employed. In others both words were found. The object of all appeared to be to facilitate pleadings by unbinding the chains imposed by the common law; and although no decision exactly in point had been found except *Regina v. Brown*, instances occurred in which the court had endeavoured to advance the purpose of those statutes. One was the case of *The Queen v. Hinley* (2 Moo. & Rob. 524). There the indictment was against George Hinley the elder and George Hinley the younger. It charged in the first count George Hinley the younger with larceny of goods, and in a second count charged George Hinley the elder with receiving the same goods knowing them to be stolen; and there was a third count also against George Hinley the elder for receiving. The indictment was preferred, the venue was laid, and the case was tried in Yorkshire. The larceny and the receiving were also stated to be in Yorkshire. The proof was receiving in Lancashire. It was objected for George Hinley the elder that there was no proof of receiving in Yorkshire, where the indictment was laid; and it was contended that the case was not within the statute 7 & 8 G. 4, c. 29, s. 56, which only enacted that the receiver might be dealt with, indicted, and tried, &c. *The King v. Mellor* and *The King v. Frazer* were there cited. Maule, J. overruled the objection and held that the statute justified this method of indictment. The language of that enactment in no way differed from that of the 9th G. 4, c. 54, save that in the former the word "indict" occurred, and in the other the words "inquire of." The difference was too small to warrant different rules of construction being applied to the two statutes. In *The Queen v. Mitchell* the misdemeanour charged was laid to have occurred in the borough of Stamford. Stamford was in Northamptonshire, and the material facts were proved to have occurred in Northamptonshire, within 500 yards of the boundary of Lincolnshire. By inadvertence the *venire* was issued not to Northamptonshire but to Lincolnshire. At the trial and afterwards it was objected that it was a fatal objection to the proceeding. The Court of Queen's Bench arrested judgment on the ground that the *venire* had issued to a wrong county. It was urged that as the offence was committed within five hundred yards of the boundary the indictment could be tried in either county. But the Court held that the award of a wrong *venire* was not cared, though they offered an opinion that the offence might have been laid and tried in either county. Patterson, J. said—"The correct answer was given to the argument that this offence was committed within 500 yards of the boundary between the two counties; in such cases you may lay and try the offence in which of the counties you please, but you must try it where you lay it." Lord Denman said that the effect of the statute was merely to extend the boundary of the county five hundred yards. These were clearly expressed opinions of judges of high authority. In *The Queen v. Sharp* (2 Lew. C.C. 233), a case under 7 G. 4, c. 64, s. 13, to which, his Lordship said, O'Brien, J. had referred him, the marginal note stated, "The offence must be committed in or upon the coach to bring it within 7 G. 4, c. 64, s. 13." Now, here the venue was laid

in a county in which the act did not appear to have been done, and it never was suggested that any difficulty arose on that ground. On the whole the Court, with the exception of Hayes, J., were of opinion that the objection made at the trial could not be sustained, and the result would be that the judgment should be confirmed. His Lordship wished to say for himself that if he had not the concurrence of so many of his brethren he would have great diffidence in his own opinion when he found it confronted by that of Hayes, J., whose acquaintance with the criminal law was so well known.

HAYES, J. said that he stood alone, but that it was only due to the profession and the public that he should state the opinion at which he had arrived. The difficulty in the present case arose upon the true construction of the statute referred to by Pigot, C.B., the 9th G. 4. The venue in the margin of the indictment laid the offence in the King's County, thus indicating that the indictment had been found by the grand jury of that county. Reading the indictment by the light of statute 14 & 15 Vic. c. 100, it should be taken as averring and charging that the offence set forth had been committed in the King's County. Following the language of the Act, the jurisdiction was to be taken to be for all the facts set forth in the body of the indictment. In that there was some difficulty. The grand jury were to present the truth, the whole truth, and nothing but the truth. It had been set forth in the case that the offence had been committed in Tipperary, and as by the common law every offence should be tried in the county where it was committed, it would seem that a jury of the King's County had no right to try the offence. It was alleged that this infirmity of the common law had been aided by statute. That statute appeared to be made for the more effectual prosecution of certain offences. Beyond that it was not for this Court to go, unless they assumed to themselves the character of legislators. The 26th section of the statute enacted that in the three cases there mentioned an enlarged jurisdiction was given to the grand jury to present, and to the Court to try. In the language of the statutes "every such felony and misdemeanor may be dealt with, inquired of, tried, determined, and punished in any of the said counties in the same manner as if it had been actually and wholly committed therein." The 29th section having the same object, namely, the more effectual prosecution of offences provided for another set of offences, namely, those committed on stage coaches. In any of such cases the offence might be dealt with, inquired of, tried, and determined in any of the counties through which the coach passed. In the cases which he had mentioned, and in those only did the statute appear to alter the common law rule. His Lordship saw no difficulty in such cases in laying the facts in such a way as that the proof might meet the pleading. Having regard to the authorities upon several other statutes, and especially having regard to the decision of Joy, C.B. in *Regina v. Brown*, he was of opinion that the conviction could not be maintained.

*Conviction affirmed.*

THE QUEEN v. VANDERSTEIN, HARRIS, AND SOMERVILLE.—August 18, 19, 22.

*Forgery—Post office order—Principal and accessory.*

*V. abstracted a number of forms of post office orders from a local post office, filled them up for various amounts, and signed them "G. J., pro postmaster." He uttered these orders in payment for goods, and signed them as having received the amounts. Held, that although no letters of advice had been forwarded the orders were orders for the payment of money, and V. might be indicted for uttering forged orders for the payment of money.*

*At the time of the uttering of the orders by V., H. and S. remained in a cab outside the shop in which V. uttered them, and assisted V. in taking away the goods which he had purchased, but they were not in the cab for the purpose of taking part in, or aiding, or assisting in the actual uttering. H. and S. were indicted with V. for the uttering and were convicted.*

*Held that the conviction was right.*

CASE reserved by Monahan, C.J. and O'Brien, J. from the Commission for the county of the city of Dublin. The case stated was as follows:—

JOHN Vanderstein *alias* John Hamilton, William Harris, and Charles Somerville, were tried at the last Commission for the county of the city of Dublin on an indictment that they, on the 28th of June, 1865, feloniously did offer, utter, dispose of, and put off five certain forged orders for the payment of money, to wit, five forged post-office money orders, each for the payment of £10, with intent thereby then to defraud; they, the said John Vanderstein, William Harris, and Charles Somerville, at the time they so offered, uttered, and put off the said five forged orders for the payment of money, each for the sum of £10, well knowing each of same to be feloniously forged, against peace and statute, &c. It was clearly proved that in the month of May last the prisoner Vanderstein came to the post-office at Nether-stowey, near Bridgewater, in Somersetshire, England, and by pretending to the postmaster, Mr. Samuel Whedden, that he was an officer sent from the London post-office to investigate some complaints alleged to have been made, obtained from him, in order that same might be cancelled, a book containing 200 blank money orders. He also obtained from him some with the Nether-stowey stamp affixed, and also one signed order on Oharing Cross Post-office, for which he paid the amount, 2s. 6d. It was then proved that on the 28th of June, about two o'clock in the afternoon, the prisoner Vanderstein came to the shop of Messrs. Todd and Burns, in Mary-street, in this city, stating himself to be Captain Hamilton, and purchased a number of silk dresses, which he stated he wanted for his sister, and a trunk, which he directed them to be packed in, and that he said he would call, and take them away, and pay for them, in the evening. The three prisoners called at the tavern of Mr. John Burgess, in Great Britain-street, about seven o'clock on the same evening, and having had a small quantity of sherry at the bar, thought it so good

that they sent for Mr. Burgess to know whether he could let them have a dozen of it, and on his stating that he could, the prisoner Vanderstein asked him to change a £10 post-office order, which he stated he had that day received from England, but was late to get the amount at the post-office. Mr. Burgess having stated he had not sufficient money, Vanderstein offered him £1 if he would get it changed for him. Mr. Burgess took the order to some of the neighbouring shops, but none of those he applied to wished to take it, and on his stating his inability to get change for it, either Harris or Somerville said "it was of no consequence, as he or I can change it." Of course the dozen of sherry was not bought. No further evidence was given as to the particulars of the £10 order so attempted to be passed, and this transaction was not the subject of the present indictment.

A clerk in the employment of Todd and Burns happened to be at Mr. Burgess's while the prisoners were there, and saw what had occurred. Shortly after leaving Mr. Burgess's, about eight o'clock in the evening, the prisoner Vanderstein came to the shop of Todd and Burns, the other two prisoners remaining outside in a cab, so situated that they could not see or be seen by the people in the shop. Vanderstein stated to the clerk in the shop that he had come for the goods laid aside for him; that he had that day received from his father, Mr. William Hamilton, who resided near Netherstowey, £50 in post-office money orders; that on inquiring at the post office he found he was late to obtain payment of them that day, and as he was anxious to be able to leave Dublin early next morning, he would be much obliged by the cashier changing them for him, who, thinking all was right, agreed to do so, and accordingly the prisoner Vanderstein gave to him the five orders, the subject of the present indictment, each for £10, and having the Netherstowey stamp, dated the 26th of June, directed to the Post-office, Dublin, requiring that office "to pay to the person named in my letter of advice the sum of £10," purporting to be signed by G. Jones, pro-postmaster, with the name of John Hamilton signed to the receipt for the amount, which he stated was his name, and to whom the orders were payable. In exchange for the orders so passed, he received from the clerk at Todd and Burns the goods and trunk laid aside for him in the early part of the day, and £20 in gold, he having paid some few shillings change to balance the account on one of the orders. He wrote, "From William Hamilton," to designate the person who forwarded them. Immediately on getting the trunk with the purchased goods in it, Vanderstein had it brought to the cab in which the other two prisoners were waiting for him, and immediately the three drove away; and in the course of the same evening endeavoured to have the trunk forwarded to England from the Westland-row Station; and after going from one place to another, at last, about 11 o'clock at night, went to Malahide by railway, and stayed at the Royal Hotel there for the night, the three prisoners having alternately taken very particular care of the trunk from the time they obtained it till it was brought to the bed-room in which Vanderstein slept at the Hotel in Malahide. All this time they were followed and watched by a clerk in the employment of Messrs.

Todd and Burns, the clerk, who had seen the prisoners at Mr. Burgess's, having returned to Messrs. Todd and Burns just as the three prisoners were driving away in the cab, and whose suspicions were consequently excited when he heard of the five orders passed at the establishment of his employers. From inquiries made by the prisoners during the night, at Malahide, it appeared to be their intention to leave for Belfast by the first train the following day. They were arrested in the morning, when about leaving for Belfast. In the trunk was found, in addition to the goods obtained from Messrs. Todd and Burns, a great number of the blank money orders obtained in the month of May from the postmaster at Netherstowey, as also the letters of advice belonging to the five orders, the subject of the indictment, as also a stamp die, with which the Nether-stowey postmark had been impressed on the orders in question. On the prisoner Vanderstein was found £20 in gold, a gold watch, chain, and other property; and in the pocket of Somerville was found a bottle of a peculiar ink, said to be printers' ink, and a piece of chamois, probably used in the process of impressing the die; there were also found in the trunk letters and figures to be used in inserting the date in the stamp. The postmaster of Netherstowey proved that the orders in question were five of the blank orders obtained by the prisoner Vanderstein in the month of May, as already stated; that they were not issued from the office there; that the stamp impressed was an imitation of the genuine stamp; that there was no such person in the office as G. Jones, by whom, as pro-postmaster, they purported to be signed. He also proved the course of issuing money orders to be: the party applying for one states the name of the party sending it, and of the party to whom payable, the office on which it is to be drawn, and the amount; these are all inserted in the printed form of the letter of advice, which is stamped with the stamp of the office that day in use, and is forwarded by post to the post-office where the order is payable. The blank order is then filled with the amount, and name of the office where payable, and signed by the postmaster or person acting for him; the number of the order is the same as that of the letter of advice. When the order is presented for payment, the person paying same refers to the letter of advice to see that the name subscribed to the receipt is the name of the person to whom the order is payable, and should he consider it necessary, also inquires the name of the party who obtained the order. The amount of the order is then paid to the person presenting it, whether the person to whom it is payable or not, the officer being satisfied that the receipt is signed by the proper party. On the back of each order is a notice, that after once paying a money order, by whomsoever presented, the office will not be liable to any further claim.

At the close of the case, for the Crown, Mr. Curran, on the part of the three prisoners, submitted that the orders in question were not orders for the payment of money within the statute, on two grounds:—First, that there was no such person as G. Jones, by whom the order purported to be signed; and secondly, that inasmuch as no letter of advice in relation to the orders had been forwarded to the Dublin office there was no obligation on the part of that office to pay

the amount, the request being to pay to the person named in the letter of advice. And with respect to the prisoners Harris and Somerville, this further question was raised—whether they could be convicted of uttering the orders in question, inasmuch as at the time of uttering same they were not actually present, within sight or hearing of what was going forward, nor had they come to the place where they were to aid or assist in the actual act of uttering.

Chief Justice Monahan informed the jury that notwithstanding Mr. Curran's objection, the opinion of the Court was, that the orders in question were orders for the payment of money within the statute; and on the other point informed them that if the prisoner, Harris and Somerville, with the knowledge of the orders being forged, accompanied Vanderstein to the door of the shop of Messrs. Todd and Burns, in order that he might pass same, and that he did so, and that while he was so passing same they remained in the cab outside, for the purpose of taking away him and the money and goods to be obtained for the orders, that they should be convicted, notwithstanding that from the cab where they were, they could not see or be seen by the person to whom the orders were uttered, and notwithstanding they were not there for the purpose of taking part in, or aiding or assisting in the actual act of uttering.

The jury convicted the three prisoners, who have been sentenced to several periods of penal servitude—Vanderstein to twenty years, Harris to ten years, and Somerville to six years; but execution of the sentence is stayed, the prisoners remaining in custody in the meantime.

The opinion of the Court is required on the following questions:—First—Whether the fact of there being no such person as G. Jones, by whom the orders in question purported to be signed, or there having been no letters of advice forwarded to the Dublin Post-office, prevent the orders in question being orders for the payment of money within the statute. Should the Court be of opinion that they were not such orders for the payment of money, the judgment should be reversed as to the three prisoners. Second—Whether, in consequence of the prisoners Harris and Somerville having been in the cab outside Messrs. Todd and Burns' establishment, as hereinbefore mentioned, at the time of uttering the orders in question by Vanderstein, and not being there for the purpose of taking part in, or aiding or assisting in the actual uttering thereof, the jury should have been directed to acquit them. If the Court should be of that opinion, the judgment should be reversed as to them, but be affirmed and remain in force as to the prisoner Vanderstein.

The money orders are to the following effect:—

15 No. 57.  
—  
44

NETHERSTOWEY.

STAMP OF  
ISSUING OFFICE.

DATE, &c.

MONEY ORDER.

Pay the person named in  
my letter of advice the sum  
of £10.

To the Post-office at Dublin,  
G. Jones, pro Postmaster.

Received the above—

John Hamilton, } Signature of  
Payee.

A fac-simile of the money order and letter of advice is in the possession of the Clerk of the Crown, attached to the original case.

J. H. MONAHAN.  
JAMES O'BRIEN.

*Curran*, for the prisoners.—First. This document was not a warrant or order for the payment of money within the statute. "G. Jones, pro postmaster" is not the postmaster; and, besides, there was no letter of advice. There was no compulsion on the post office authorities to pay this if there was no letter of advice. A warrant or order for the payment of money must purport or must be shown by evidence to be made by some person who might command the payment of the money, and to be made upon or to a person who was compellable to pay it.—Archbold, Pleading and Evidence, 505; *Rez v. Clinch* (2 East. P. O. 938). [*Monahan, C.J.*—Is it not decided in an old case that a cheque drawn upon a bank in a fictitious name, or in the name of a person who had no money in it, is a forgery?] This is nothing more than a receipt. *The Queen v. Ansell* (8 Cox, C. C. 409); *The King v. Rushworth* (Rus. & Ry. 317). The transaction might be a matter of indictment for obtaining money under false pretences, but it cannot be the subject of an indictment for forgery. The payment of this was only conditional on the receipt of a letter of advice which never existed—*Regina v. Gilchrist* (2 Moo. C. C. 233); *The King v. William Baker* (1 Moo. C. C. 231); *The Queen v. Vivian* (1 C. & Kirw. 719; s. c. 1 Den. C. C. 35); *The Queen v. Ferguson* (1 Cox, C. C. 241). The test applied in that case would at once shew that this was not a forged order. [*Hayes, J.*—Do you think that two sections of the recent Act affect this case? One provides for any person forging "a request for the payment of money." That would seem to extend the range of criminal offences, so that if this was properly laid this would be beyond our inquiry. Thus the only question which arises is—whether this is properly laid as an order. Then there is another section, I think, which says that is not necessary to set out an instrument by its legal import, but to call it by the name by which it is generally known. Probably that would get rid of any difficulty in the indictment.] Both sections are really strongly in favour of the prisoners. The statute makes a distinction between different things. The instrument here is stated in the indictment to be an order, and one can only deal with it as an order. The other section referred to only goes to prevent the necessity of setting out the whole instrument *verbatim* or giving a *fac simile* of it. The second question in the case affects only two of the prisoners. It is admitted on the case that the parties were not there for the purpose of taking part in the forgery. There are four modes of treating persons charged with felony: first, to indict them as principals in the first degree; secondly as principals in the second degree; thirdly, as accessories before the fact; fourthly, as accessories after the fact. These men could not be convicted as principals in the first

degree, nor, under the direction of the judge, as principals in the second degree. Neither could they be convicted as accessories before the fact. Although the law permits the Crown now to indict an accessory before the fact as a principal, yet the law with respect to the offence itself is not changed; and although the accessory may be indicted as a principal felon, there must be evidence to show that he took a certain part in the transaction. There must be evidence that he abetted the principal in the commission of the offence. There is no evidence here that Somerville or Harris took part in the uttering. The transaction in the public house cannot be brought to bear to make any of them accessory to this felony—*The King v. Kelly* (Rus. & Ry. 421); *King's case* (Rus. & Ry. 332); *The King v. Soares* (Rus. & Ry. 25); *The King v. Davis* (Rus. & Ry. 113); *The King v. Badcock* (Rus. & Ry. 249); *The Queen v. Loughran* (3 Cr. & Dix. Circ. Cas. 333).

*J. E. Walsh, Q.C. and Barry, Q.C.* (with them *Conanen*) for the Crown.—The instrument here is properly described as an order to pay money. If this is not an order within the Act what is it? All the authorities are misunderstood. The arguments on the other side come to this—that there can be no such thing as a forgery at all. The document on the face of it represents that there is a letter of advice. [*Fitzgerald, B.*—The great difficulty in the way of the argument of the counsel for the prisoner is *The Queen v. Gilchrist* (2 Mood. C. C. 233).] [*Monahan, C.J.*—What makes me think that this instrument is a forgery is, that it assumes on the face of it that there is a letter of advice.] Suppose there is a letter of advice, but that for his own purposes the postmaster never forwards it, will not the other part of the instrument be still an order for the payment of money?—*Reg. v. Gilchrist* (2 Mood. C. C. 233; S. C. Car. & Marsh. 224). Whether a name forged be that of a merely fictitious person, or of a person actually existing, is immaterial.—*R. v. Lockart* (1 Leach. 94); *R. v. Wilton* (1 F. & F. 391); *R. v. Baker* (1 Mood. C. C. 231). *Reg. v. Vivian* (1 Den. C. C. 35, s. c. 1 C. & K. 719), is not an authority for the prisoner. The money order department of the post office is governed by statutes 3 & 4 Vic. c. 96, and 11 & 12 Vic. c. 87, 88. By these the document issued is, undoubtedly, called an order, and there is no reference to any letter of advice. Letters of advice exist, and form part of the machinery by which the matter is regulated, but the thing which is issued to the public is the money order. Then comes another question—is this a complete money order. In *The King v. Rushworth* the document had no resemblance to the genuine instrument. Here the document uttered is the only one which the public ever sees. How can this be distinguished in principle from the case of a cheque given in the name of a person who does not exist—*Regina v. Thorn* (2 Mood. C. C. 210). As to the second point the stat. 11 & 12 Vic. c. 46 puts an end to it.—*Hughes's case* (Bell's C. C. 242). What constitutes a principal in the second degree? Actual corporeal presence is not necessary; mere mental presence is enough—*Foster's Crown Law*, pp. 349, 350; 2 Hawkins, P. C. c. 29. s. 8; *Rez v. Elze* (Rus. & Ry. 142); *Regina v. Greenwood* (2 Den. C. C. 453);



Archbold, Pl. & Evid. pp. 6, 7); *Rex v. Skerrett* (2 C. and P. 427).

*Curran* replied.

*Cur. adv. vult.*

August 22.—LEFROY, C. J., after stating the facts of the case, and the objections which had been taken, said that after duly considering the subject, the Court were of opinion that the first objection could not be sustained, and that the post-office orders were money orders within the meaning of the statute. With regard to the second objection, the Court were of opinion that, as the prisoners, Harris and Somerville, were proved to have accompanied Vanderstein to the door of Messrs. Todd and Burns' establishment, and to have remained outside in a cab while he was uttering the forged orders with the guilty knowledge of his intention, they were participators, and were guilty of the offence charged against them. The direction of the judge was, therefore, right, and the conviction should be affirmed.

PIGOT, C. B., said that the only part of the charge of Monahan, C. J., to which he felt inclined to take exception was in reference to the money orders. Having regard to the authorities cited on the subject, he had doubts whether the orders in this case were money orders within the statute; but it was solely in consequence of the authorities, which were what he might call vexed, that he felt inclined to doubt.

MONAHAN, C. J., said that as the document referred to contained on the face of it everything constituting a money order, he thought there should be no doubt in reference to the forgery.

*Conviction affirmed.*

## Court of Exchequer.

Reported by Valentine J. Coppinger, Esq. Barrister-at-Law.

WRENFORDSLEY v. O'CONNELL.—May 1 & 3, 1865.

*Practice of Office for the Registry of Deeds—Fees—2 & 3 Will. IV. c. 87, ss. 21, 22, and Schedule B.*

The plaintiff having lodged in the office for the Registry of Deeds in Ireland, a requisition for a negative search substantially in the form given by the 2 & 3 Will. 4, c. 87, s. 21, for all acts of himself and wife from, &c., affecting premises in Dawson-street, in the city of Dublin, the officer insisted upon charging upon the search two separate sums of five shillings as being the fees provided by Schedule B. of the above statute for one negative search against names and another against lands, and, upon action brought to recover the second sum of five shillings paid by the plaintiff under protest, it was held, first, that the double charge for this "blended" search was rightly made; secondly, that in giving the form of requisition for the blended search, the object of the statute was to save the public from the inconvenience of having the information for which they sought, involved in a mass of information,

which was useless to them; thirdly, that the double check obtained by reference to the two sets of books, instead of one, afforded quite a sufficient reason on the part of the Legislature for imposing the double charge.

THIS was a motion on the part of the defendant to discharge a conditional order obtained in pursuance of leave reserved, setting aside a verdict had for the defendant at the after-sittings of Hilary Term, 1864, in an action for money paid and money received. The action had been brought for the purpose of trying the legality of a fee for a registry search enforced by the defendant as a registrar of deeds—of determining, in fact, whether the officer in the office of the registry of deeds was entitled to more than one fee of five shillings upon a search made upon a requisition for a search for acts of the plaintiff and his wife, Jane Wrenfordsley, otherwise Morris, respecting a house and premises in Dawson-street, in the city of Dublin, from the 1st of January, 1853, to the 1st of July, 1862. At the trial the requisition was proved, the payment under protest of the sum demanded, and the particulars thereof as more fully set forth in the judgment of Pigot, C.B. It was also conceded that a double search, that is, a search both against names and lands, had actually been made in the office in pursuance of the requisition. The requisition turned out to have almost followed the words of the form given by the 2 & 3 Will. 4, c. 87, s. 21, and the substantial question was, whether under the provisions of that statute a search against names limited to particular lands was to be charged for according to the number of surnames as in the case of a search against names alone, or according to the number of denominations of land in addition to the number of names—in other words, whether the charge should be for one search against names, or two searches—the one against names and the other against lands. Pigot, C.B., who tried the case, refused to express any opinion at the time on the point of law, but upon its being pointed out to him that a verdict for the plaintiff would have the effect of disturbing the long-established practice of the office, had directed a verdict for the defendant, reserving liberty to the plaintiff to move to enter a verdict for himself, with five shillings damages and costs, if the Court should be of opinion that a verdict ought to be so entered—the Court to be at liberty to draw inferences from the facts and evidence.

The Attorney-General (with him the Solicitor-General, and G. Waters) now moved on the part of the defendant that the order be discharged having stated the facts proved at the trial and questions of law arising thereon.—The course of legislation on the subject was as follows:—The 6 Anne, c. 2, founded the office. The 8 Geo. 1, c. 15, s. 2,\* gave for the first

\* Sec. 2.—And whereas by the said recited Act it is further enacted, "that every register or his deputy, as often as is required, shall make searches concerning all memorials that are registered as aforesaid, and give certificates concerning the same under his hand, if required by any person:" and whereas a doubt hath also arisen, whether the registrar, or his deputy, are obliged by the said recited Act to give negative certificates: and whereas the said Act would prove in a great measure ineffectual, and the intent thereof be frustrated, and

time a form of requisition for a negative search against names for acts affecting *all* lands. The 25 Geo. 3, c. 47, s. 2,† after reciting that the use of this form of

purchasers rendered precarious and insecure, in case negative certificates be not given by the register, or his deputy, to the person or persons requiring the same: be it therefore further enacted by the authority aforesaid, that when any person or persons shall come to the said register office, and require any such negative certificate to be given, he, she, or they, so requiring the same, shall deliver unto, and lodge with the said registrar, or his deputy, a note in writing, under his, her, or their hand or hands, and mentioning his, her, or their respective places of abode, to the following effect, (*viz.*)

"I (or we) desire to know what memorial or memorials are entered in your office of any deeds or conveyances made to any, and what person or persons; or if any and what wills made by of or concerning any and what manors, lands, tenements, or hereditaments, since the day of in the year of our Lord

And upon delivery of such note in writing, as aforesaid, the said register, or his deputy, shall file the said note, and shall be and is hereby required, as soon as conveniently may be, to give to such person or persons requiring the same, a negative certificate or certificates to the effect following (*viz.*)

"Upon diligent search made in the register office from the day in the year of our Lord

I do not find any memorial of any deed or conveyance made by to any person or persons, of any manors, tenements, or hereditaments whatsoever, entered in the said office before the date hereof, except the memorials hereinafter mentioned, (*viz.*)

Witness my hand this day of in the year of our Lord

Which certificate shall be attested by two or more credible witnesses; of which the person, or one of the persons, who brings such note, shall be one; and if such register or his deputy, shall be guilty of any fraud, collusion, or wilful neglect, in making out such certificate or certificates, whereby any person shall be aggrieved or damaged, such person so damaged, his heirs, executors, or administrators, shall recover his damages against such officer, or his deputy, with full costs of suit.

Sec. 2.—And whereas by an Act of Parliament passed in the eighth year of the reign of his late Majesty, King George the First, entitled, "An Act for explaining and amending two several Acts in relation to the public registry of all deeds, conveyances, and wills," it is enacted, that when any person or persons shall come to the register, and require any negative certificate to be given, the person so requiring the same shall deliver unto, and lodge with the register, or his deputy, a note in writing under his hand, in the words in the said recited Acts particularly mentioned, or to that effect, and that on delivery of such note, the said register or his deputy shall file the same, and give to such person a negative certificate in the words, or to the effect in the said recited Acts also mentioned; and whereas such form as is thereby prescribed for giving and requiring certificates, commonly called negative certificates, hath been found by experience to be attended with so much trouble, delay, and expense, by reason of the very great increase of memorials deposited in said office, that the intent of taking out such negative certificates hath been in a great measure frustrated, and the practice thereof very much disused; and it would tend to the advantage and security of purchasers and mortgagees if the registrar should be at liberty to limit and confine his search, and such negative certificate as is or shall be intended to be founded thereon to particular periods of time, lands, and persons: be it enacted by the authority aforesaid, that so much of the said clause in the said last recited Act, as prescribes the form or tenor of such note in writing to be delivered to, and lodged with the said register or his deputy, as a foundation for a search in the said register office, and which also prescribes the form or tenor of a negative certificate to be given thereon, be, and the same is hereby repealed; and that from and after the time of passing this Act, it shall and may be lawful for every person requiring any certificate, commonly called a negative certificate, to deliver unto, or lodge with the said register or his deputy at the said office, a note or memo-

requisition had been attended with "trouble, delay, and expense," alters and modifies the said form by enabling parties to limit their requisitions for searches "to particular periods of time, lands, and persons."

An excellent reading upon the state of the law upon the subject under this statute is to be found in the case of *Warburton v. Ivis* (1828), (1 Hudson and Brooke, p. 659). The 9 Geo. 4, c. 57, s. 16,† for the first time gave to the public a right to a search against particular lands without any reference to a name: similar searches had been, before that time, usual in the office, although it was not then compulsory upon the officer to grant them. The charges provided by Table A. of this statute for negative searches depended upon the number of references occurring in the progress of the search. Lastly came the 2 & 3 Will. 4, c. 87, ss. 21 & 22, and Schedule B.,\* which

random, fairly written on parchment, and signed with his name in the following words, *viz.*

"I desire to know what memorial or memorials are entered in your office, of any deeds, conveyances, or wills, made by, [*naming the person or persons*] of or concerning, [*naming the manor, lands, tenements, or hereditaments*] in the county of since the day of

And upon delivery of such note, the registrar or his deputy shall file the same, and shall as soon as conveniently may be, give to the person requiring the same, a negative certificate to the following effect, *viz.*

"Upon diligent search made in the register's office, from the day of I do not find any memorial of any deed, conveyance, or will made by [*naming the person*] of or concerning, [*mentioning the lands, tenements, or hereditaments*] in the county of from the day aforesaid, until the date hereof, except the memorial hereinafter mentioned. Witness my hand and seal this day of

† Sec. 16.—And be it further enacted, that the proper officer or officers in the said registry office, whenever thereto required in writing by any person, shall make searches for the memorials of all or any acts done by any person or persons named, either concerning any lands, tenements, or hereditaments generally within any specified period, or concerning any specified lands or premises within any specified period, or for all or any acts affecting any lands or premises named within any specified period; and whenever and so often as any officer shall be required to make any such search such officer shall make and certify such search, and shall deliver an authentic extract from the registry books or abstract books, setting forth abstracts containing the several particulars (under the heads comprised in the Form marked (B.) to this Act annexed) of all registered memorials coming within the terms of the requisition for such search, and that such officer shall keep and file every such requisition for a search; and that a true copy of every such requisition shall be made by such officer, whereunto the said abstracts shall be subjoined, with a certificate in the following form, subscribed by such officer:

"Upon diligent search made in the registry office of *Dublin*, I certify, that no memorials coming within the terms of the above requisition are registered, whereof an abstract is not herein truly set forth."

\* Sec. 21.—And be it also enacted, that from and after the said thirty-first day of December every person who shall require such search and certificate to be made as aforesaid, shall deliver unto or leave with the registrar or one of the assistant registrars of the said office a note or requisition, fairly written on parchment, in the words or to the effect following; (that is to say,)

"I desire to have an abstract of every memorial registered in the office for registering deeds, conveyances, and wills in Ireland, of the Acts of [*here insert the name of the person*], affecting [*here insert the denomination of the manor, lands, tenements, or hereditaments*] in the county of on and from the day of up to the time of making certificate upon this requisition: except of the memorial of the following instrument [*here insert the name and*

give a new and exceedingly flexible form of requisition, and make the charge for a search against lands dependent upon the number of denominations or alias

date of the instrument, and the name of the party or testator.]  
Dated at the day of one thousand

eight hundred and and  
(Signed) A. B. [the person making the requisition.]"

Sec. 22—Provided always, and be it further enacted, that the person making such requisition may limit or extend the search and certificate to one or several names of persons, and to a general period only or to any particular period in respect of each name, and to one or several denominations of land, and for a general period, or for separate periods in respect of each denomination, or to both a name or names and a denomination or denominations, as he or she shall think fit, and may also vary the terms of such requisition and exception, or either of them, to suit any number and variety of instruments, dates, parties' names, denominations of land, counties, baronies, and parishes, and in place of requiring an abstract of every registered memorial may require a full copy of a particular memorial or of any number of particular memorials, or of every memorial within any period or periods, and only an abstract of every other memorial coming within the terms of such requisition, and, further, may make and lodge such requisition by any attorney or solicitor of one of the Superior Courts in Ireland, but in that case such attorney or solicitor shall sign the requisition with his own name, as attorney for each person.

#### SCHEDULE (B.)

Fees to be taken in the Public Register Office in Dublin.

Upon every memorial received into the office, except the memorial next mentioned, at the time of the delivery thereof to be registered:	£ s. d.
Where such memorial shall contain not more than seven folios, each of seventy-two words . . . . .	0 8 0
Above seven,	
For every additional folio or part of a folio . . . . .	0 0 6
And for the name of every grantor beyond the first grantor . . . . .	0 0 8
For every separate denomination of land which shall have to be separately entered in the index beyond the first . . . . .	0 0 8
For every second certificate of registry or special certificate of registry, if the same shall not exceed a folio of seventy words . . . . .	0 0 6
And every additional folio thereof, or part of a folio . . . . .	0 0 6
Upon every memorial of a civil bill decree . . . . .	0 2 6
Entering the dissolution of an anonymous partnership . . . . .	0 5 0
Entering certificate of satisfaction of a mortgage . . . . .	0 5 0
From every person making searches in the office, including the liberty of taking notes or abstracts, each day . . . . .	0 2 6
For every original memorial or affidavit produced for inspection in the office . . . . .	0 0 6
For common searches made by the office under a requisition, upon names, for any period not exceeding ten years for each different surname . . . . .	0 2 6
For every additional ten years or fractional part of ten years . . . . .	0 2 6
And upon lands, the like fees for each denomination or alias denomination of land commencing with a different initial letter.	
When both names and lands are stated in requisition, the party desiring the search may direct it to be confined to either the lands or names.	
For every copy of an abstract of a memorial, whether contained in a certificate of search or otherwise . . . . .	0 1 0

denominations commencing with different letters, and that for the search against names dependent upon the number of surnames commencing with different letters. The requisition in the present case, we submit, appears from its very terms to have been for a search against names and a search against lands, and was therefore chargeable with the double fee.

Ball, Q.C., (with him Vereker) on the part of the plaintiff.—The requisition in this case was for a search against names only, limited, it is true, to certain lands, but was not for a search both against names and lands. The 25 Geo. 3, c. 47, was passed for the purpose of saving trouble to the officer by limiting the search to particular lands and limited periods. [Pigot, C. B.—It appears to me that the only saving of trouble effected by it was in the mere copying out. The search was the same; he had then no book to look into, and he must examine all the memorials relating to all lands in order to find out the particular lands.] The same form of search is retained in the 9 Geo. 4, c. 57. The state of the law at that time is laid down by Jebb, J., in *Warburton v. Ivis* (1 H. & B. p. 623). The 9 Geo. 4, c. 57, s. 12, for the first time established an abstract book; up to that time there appears to have been only one book. The 2nd & 3rd Will. 4, c. 87, established a day book, an index of names, and an index of lands. From neither the names index nor the land index do you obtain the requisite information, but either of them gives the reference to the abstract book, which does. If, therefore, the books be properly kept, the search in the second book gives no additional information. [Pigot C.B.—It seems to me that the fact that there is double trouble in making the search in both sets of books, two officers being employed in the one case to do the work which in the other is done by one, taken in conjunction with the fact that the object of the fees given by the statute is to pay the expenses of the office, helps us in the construction of the statute.]

Vereker followed on the same side.

The Solicitor-General in reply.—Where there are several denominations of land in a deed, the Names Index contains only the first of them: sometimes also the name of a denomination is differently spelled in different instruments. A search in the Names

Making certified or negative search upon a requisition, upon names, for any period not exceeding ten years, for each different surname required . . . . .	0 5 0
For every additional year beyond ten years . . . . .	0 0 6
And upon lands, the like fees for each denomination, or alias denomination of land commencing with a different initial letter.	
For each copy of any memorial or certificate not exceeding three folios (including the search for such memorial and certificate of the officer on the copy) . . . . .	0 1 6
And for every additional folio or part of a folio beyond three folios . . . . .	0 0 6
Attending to produce any memorial or memorials in Dublin, each day, for each cause . . . . .	0 6 8
The like out of Dublin . . . . .	0 13 4
And for every day beyond a second day . . . . .	0 13 4
And for the expenses of travelling to and from any place at which such attendance shall be required, for every mile . . . . .	0 0 8

Index alone, or in the Lands Index alone, would not disclose both those acts. By referring to both sets of books, not merely will new facts be disclosed, but the double search, by supplying a check, ensures greater accuracy in the return of the facts referred to in both.

*Cur. adv. vult.*

On the 3rd of May, *Pigor, C.B.* delivered the judgment of the Court.—In this case the plaintiff, *Mr. Wrenfordale*, made a requisition for a search in the registry office in the following terms—"I desire to have an abstract of every memorial registered in the Office for the Registering of Deeds, Conveyances, and Wills in Ireland, of the acts of *Joseph Wrenfordale* and *Jane Wrenfordale*, his wife, from the 1st of January, 1853, to the 1st of July, 1862, affecting a house and premises in *Dawson-street*, in the city of *Dublin*." For that search the following list of charges, which purported to be in pursuance of 2 & 3 Will. 4, c. 87, Schedule B., was presented to him for payment—

On the name <i>Wrenfordale</i> for a period not exceeding 10 years	£0	5	0
On the lands against <i>Dawson-street</i>	0	5	0
One abstract	0	1	0
Stamp duty on same	0	3	0
Ditto on certificate	0	10	0

The plaintiff objected to the second item on that list which was a charge of five shillings, on the ground that the requisition was for one search only, and that the Office was not therefore entitled to charge for two. The officer, however, still persisting in his demand, the plaintiff paid the amount under protest, and this action was brought for the purpose of ascertaining the relative rights of the Office and the Public. On the part of the defendant it was contended that the officer was entitled to charge for two searches, under the provisions of 2 & 3 Will. 4, c. 87. On the part of the plaintiff it was submitted that one charge only should have been made, and this is the issue of law which we are called upon to determine. It was conceded that a search in the two sets of books had been made. It was however urged, upon the part of the plaintiff, that a double search was not asked for by him—was of no use to him, inasmuch as whether the Lands Index or the Names Index were referred to, both alike referred him to the one common source of information—the Abstract Book. With reference to this argument, it is right to bear in mind that the system of keeping books in the office has been several times changed—the present system but dating from the 1st December, 1832. This inquiry is not, as I think, of much importance to the present case. The 2 & 3 Will. 4, c. 87, ss. 21, 22, and Schedule B., contain the law upon the subject. By the 21st sect. it is provided that in applying for a search a requisition is to be sent in, and the section then goes on to give the following form of requisition (reads the form). Next comes the 22nd section—"Provided always, and be it further enacted, that the person making such a requisition may limit or extend the search or certificate to one or several names of persons, and to a general period only, or to any particular period in respect of each name, and to one or several denominations of

land, and for a general period, or for a separate period in respect of each denomination, and to both a name or names, and to a denomination or denominations, as he or she shall think fit, and may also vary the terms of such requisition and exception, or either of them, to suit any number and variety of instruments, dates, parties, names, denominations of land, counties, baronies, parishes, and," &c. It is plain that this 22nd section empowers the person to modify the form of requisition in three ways, first, by requiring a search against parties alone; secondly, a search against lands alone; thirdly, a search for acts of one or more parties affecting particular lands. The plaintiff in the present case demanded a search of the third class. It is conceded that if the search had been of the first kind, he would have been merely liable for one charge. As it was, however, he took advantage of the 22nd section to extend his search to both names and lands. One of the arguments of counsel was that a search against names alone or against lands alone would give all the information that he required, inasmuch as the search against names would give all information with regard to lands, and that against lands, all, with regard to names, and that it could not therefore have been the intention of the Legislature to make parties pay more money by enabling them to ask for and obtain less information. It is a mistake, however, to suppose that the search of a blended character is merely a recent introduction. In point of fact something of the kind existed for many years, and it is the general search against *lands alone* that can be fairly looked upon as a modern innovation. From the 8 Geo. 1, c. 15, as observed by *Jebb, J.*, in *Warburton v. Ivie*, to the 25 Geo. 3, c. 47, a period of above sixty years, the only certificate that could have been required was against the person, and since the 25 Geo. 3, though it might have been required as to certain lands, yet it should also have been as to some certain person named in the requisition, and the officer could not be compelled to give a negative certificate against lands only. The 9 Geo. 4, for the first time gave the right to the third species of search which it had been before that time the practice of the office to give voluntarily, gave a new form of requisition, and established a new scale of charges. The 9 Geo. 4 was repealed by the 2 & 3 Will. 4, c. 87, which after reciting as part of the mischief arising from the law as it stood under that Act; that "some of the provisions of that statute had been found inconvenient, and others to occasion an unreasonable expense to parties resorting thereto for information," proceeds to make new provisions for the purpose of remedying those defects. Another form of requisition is substituted for the former one, which extended the accommodation given thereby, and enabled parties to extend or limit the search in various ways, and included searches against both lands and names. The form of requisition given by the Statute is evidently intended merely as an example to frame others by. It seems plain to me then that the effect of the 22nd section was to give the public the right to require a search against names or against lands, or against both lands and names. For these searches section 5 makes certain fees payable. Schedule B. determines their character and amount. In that Schedule we find the following:—

Making certified or negative search upon a requisition upon names for any period not exceeding ten years, for each different surname required £0 5 0  
 And for every additional year beyond ten years . . . 0 0 6  
 And upon lands, the like fees for each denomination or *alias* denomination of land commencing with a different initial letter

Thus for the scale of charges provided by the 9 Geo. 4. there is provided a more equitable set of charges. Looking at those facts, I can come to no other conclusion than that the charge made by the officer was correct. The requisition was plainly adopted, for the purpose of obtaining information of a certain character, and it seems to me that the officer would not have complied with his duty if he had not made the charge which he did. Such is the view that I would take upon the terms of the Act of Parliament alone. The evidence was such as was to be expected. One clerk searched in the Index Book of Names—another in the Index Book of Lands. This fact seems to me to afford a plain reason for the establishment of this blended search in addition to the two other kinds of searches; for, as the object of the party inquiring is to obtain information as to all acts of certain persons with regard to particular lands, no other information would be of any use to him. The other information would be rather an impediment, and therefore there is a great convenience in rejecting that which is not requisite. As possibly it may be urged that a single search either against lands or names should elicit in one shape or another the requisite information, it is to be observed that even if this were so, there is another object to be gained which it would not affect, and which I look upon as the main one. It is true, as was argued by Mr. Vereker that faith is to be imposed in the good conduct of every officer, and that it is not for the public to doubt that faith; but he must recollect that the office is composed of men whose fidelity might by possibility fail, and that it becomes very desirable that the parties interested should obtain the additional guarantee which a system of checking and counter-checking would afford. By applying for a search against lands and another against names, the same information is obtained from two different sources which check each other.

The other Judges having concurred, the rule was discharged.

## House of Lords.

[Reported by James Paterson, Esq., of the Middle Temple, Barrister-at-law.]

### ALDORTH V. ALLEN.—May 29.

*Lease for lives—Demand of renewal—Tender of fines—Delay of term—Relief of tenant by court of equity—Irish tenantry Act.*

*A., a lessee holding lands for lives, in 1844, applied for a renewal as he was entitled to do, tendering the proper amount of fines. The landlord being abroad,*

*his solicitor desired the tenant to wait till the landlord's return, but in the meantime to be ready to prove his title at a date two months later. For several years, owing to the landlord's delay, no renewal was ever granted, and no title was proved, though the tenant had the means of doing so. About sixteen years afterwards the tenant having applied for a renewal: Held, that, as the landlord, for his own convenience, had put off the renewal, the tenant was entitled to renewal on payment of such fines only as were due in 1844, and there was nothing in the Irish Septennial Act to alter that conclusion.*

This was an appeal from a decretal order of the Irish Court of Chancery. By lease, dated 1722, Richard Aldworth demised the lands of Liscongill to one James Hudson for three lives, with covenant for renewal of the same by payment of certain fines on the fall of each life. In 1818 lessor's grandson granted a renewal to James Hudson for three lives. In 1841 William Allen, sen., grandfather of the respondent, became owner of the lessee's estate, and was made in 1842, equitable tenant for life of the lands, with remainder to the respondent.

In 1844 the appellant, Richard Oliver Aldworth was the person entitled to the rent reserved and to execute a renewal of the lease. In March 1844 he was absent from Ireland, and his land agent was George Smith, and his solicitor was Noble Johnson, authorised to act in relation to the lease.

In March 1844 two of the lives having died, William Allen, sen., directed his solicitor, Mr. Daniel C. Bastable, to obtain a renewal, and he tendered a draft lease with the usual approval fee and copies of deeds showing Allen's title and wrote as follows:

Kanturk, April 10, 1844.

My dear Sir,—I have been expecting to get the draft renewal settled. Mr. Smith told me he wrote to you to settle the draft renewal; the moment you send it to me it shall be engrossed and tendered for execution. The renewal fines are ready to be paid—Yours very truly, D. C. Bastable.

N. Johnson, Esq. Sheriff's-office, Cork.

The solicitor for appellant, wrote to William Allen, sen., a letter on the 20th April 1844, in the following terms:

My dear Sir,—I am requested by Mr. Aldworth to say to you, that on his return to this country from Germany next year he will execute the renewal of the lease of Liscongill, provided that you on or before the 1st of June next satisfy me, as his agent, that you are legally entitled to the same, by the production of such certified or compared documents as may be necessary, or the originals thereof, and he has further directed me to say that he will not hold you accountable for the payment of any further septennial or other fines than those now due up to and for the present period, the amount of which appears to be ascertained by an account this day given to me of the same.—Yours very truly, Noble Johnson.

William Allen, Esq.

A correspondence went on between the parties, but no reply was given to Mr. Bastable, who on the 1st August, 1845 tendered the correct amount of renewal fines, which were refused. He also called with Allen's title-deeds at the office of Aldworth's attorneys. At last in 1846 Mr. Aldworth's attorney called for strict legal evidence of the death of the *cestuis que vie*, which request was complied with, and every effort was made by Mr. Bastable to get the renewal, but in

vain. Some ill-feeling was supposed to exist between the lessor and lessee.

Owing to proceedings in the Landed Estates Court a petition by the respondent, to have the renewal completed was presented to the Court of Chancery.

The Lord Chancellor of Ireland by decretal order declared respondent entitled to renewal on payment of fines, as calculated at 20th April 1844.

The lessor now appealed against that order.

Sir H. Cairns, Q. C. and Warren, for the appellant, contended that the right of renewal had been forfeited by wilful default or laches on the part of the tenant.

Rolt, Q.C. and Murphy, for the respondent, referred to *Leanox v. Traffard*, (2 Sch. & L. 688); *Jackson v. Saunders*, (1 Sch. & L. 443); *Kane v. Hamilton*, (1 Ridg. 180); ib. 187, 384, 469.)

The LORD CHANCELLOR (Westbury).—The Act of Parliament, which is commonly known by the name of the Irish Tenantry Act, was a measure of very liberal tendency passed by Parliament with special reference to the circumstances of the tenure of land in Ireland. In that country a great part of the land at that time was and still is held upon very long leases, sometimes renewable for ever and generally for a period of three lives. Accordingly that Act introduced this principle, that the right of renewal granted by those leases to the tenants, and frequently under particular terms in point of time, should never be deemed to be lost or forfeited by the simple neglect of the tenant. But that liberal indulgence was subject to two qualifications: one that the conduct of the tenant should never amount to that which might be deemed fraud—I suppose in the estimation of a court of equity; and the other, that if the landlord at any time discovered a default of renewal and demanded a fine and the tenant did not pay the fine within a reasonable time, the right of a renewal should be lost and put an end to. This state of things necessarily led to another rule which has been also firmly established, and it is this, that where, as in many cases, the neglect of the tenant to renew might extend over a long period of time, the landlord's right to fines should not be lost during that period of time, but that the landlord should become entitled at the expiration of every seven years to that fine which he would have received if the renewal had been granted and the life had dropped at the expiration of each such septennial period. The septennial fine therefore arises during the neglect of the tenant, and if there be no neglect the right to the septennial fine cannot arise. With these few observations I will beg leave to direct your attention to the few dates which alone are material for the determination of the present case. In the lease in question two lives had dropped anterior to the year 1844, and the last of those two lives ended in the month of November 1837. Seven years, therefore computed from the date of the termination of that life, would bring us to the month of November 1844. Now, in the month of April 1844, the present tenant, or rather the tenant for life under the settlement that had been made of the lease, applied to the landlord to renew. The fines that were then payable were computed, and as it now turns out accurately computed, and the tenant, through the medium of his

agent, applied to the landlord's agent and solicitor by a letter dated 10th of April 1844. That letter which is very short, I will take the liberty of reading to your Lordships. The solicitor of the tenant, addressing the landlord's solicitor, says: "I have been expecting to get the draft renewal settled. Mr. Smith told me he wrote to you to settle the draft renewal. The moment you send it to me it shall be engrossed and tendered for execution. The renewal fines are ready to be paid." Now it is impossible after that letter to impute to the tenant any neglect in the application to renew his lease. The tenant had ascertained what he was liable to pay, and having taken the necessary steps to obtain a renewed lease, the tenant tells the landlord most distinctly that the fines were ready to be paid. For some reason or other the landlord was disinclined to receive and to meet the tenant's application with equal promptitude. The landlord, availing himself of the fact that during a considerable part of the year his residence was generally abroad, wrote by his solicitor Mr. Johnson (to whom the former letter was addressed) to the tenant, a letter in which he distinctly tells him that Mr. Aldworth either was on the Continent, or on his way to the Continent, and that he was requested by Mr. Aldworth, the landlord, to say that on his return to this country from Germany next year, he will execute the renewal of the lease of Liscongill. I pause there for a moment in citing the language of the letter. It is perfectly clear, as I apprehend your Lordships will be of opinion, that any imputation of neglect or laches on the part of the tenant having been excluded by the application and the two letters which had passed, it was impossible that any septennial fine could afterwards accrue to the landlord during the time when the landlord excused himself from complying with the application of the tenant. I apprehend that under those circumstances your Lordships will approve of this principle and of its application to this state of facts namely, that all those things which the tenant could at that time have been required to do, and which we now find he had the means of doing, ought to be considered as things which he would have done if the landlord had answered his application on the 10th of April in a similar spirit to that in which the application was made, and said, "I am willing to receive your application to renew and to receive the fines that are payable to me, provided you show that you are the person who is entitled to that renewal." It is quite clear that the present respondent had the means of proving conclusively to the landlord that he was the person entitled to make this application of renewal. And it is shown beyond all doubt that the fines which had been calculated, and the amounts of which were stated by the tenant in his application, were the fines which at that period of time, namely, the 10th April, were all that the landlord was entitled to demand. And the tenant, therefore, upon the ordinary principles of law, had a clear right to say, "Every court of equity is bound to take it for granted that what I desired to do, and what I had the means of doing, I should certainly have done, if the landlord had been willing to receive my application, and had not postponed the consideration of that application until a future day." Then the landlord, in his letter,

goes on to tell the tenant that he requires him in the interval to satisfy his agent as to his legal title. And he is not content with doing that, but he prescribes a particular day, namely, the 1st June, before which the obligation to satisfy his solicitor as to the tenant's legal title must be performed. He then goes on to say that the landlord will not hold the tenant accountable for the payment of any septennial or other fines than those now due. Now, the argument on the part of the appellant is this. The landlord has given a conditional engagement not to demand any further septennial fines. But that engagement is subject to the proviso that the tenant shall prove his title before the 1st June, a condition which the tenant did not perform. And, therefore, it is said that the landlord became entitled to further septennial fines. The whole argument is, I apprehend, founded on this fallacy, that the landlord could have become entitled to a septennial fine as a matter of course if the tenant had not proved his title. It is a fallacy, because the moment that the landlord declined, for his own convenience, to entertain the tenant's application and urgent request to renew, all imputation of neglect upon the tenant ceased, and consequently all right to the septennial fine ceased on the part of the landlord. And, in reality, that determines the whole matter, for the first two lines of the landlord's letter, postponing a compliance with the tenant's request for his own convenience, involved this necessary consequence, that the landlord's title to any further septennial fine ended; and the landlord had no right to make his promise of a release from a further septennial fine, to which he had no title, a reason and ground for imposing upon the tenant an obligation of proving his title to a renewal before the expiration of a particular day. Let it be granted that there was an obligation upon the tenant to prove his title to claim the renewal anterior to the time when the landlord was to grant the renewal, that brings us to the subsequent part of the case for the purpose of ascertaining whether there was any refusal, or any wilful default, or gross negligence on the part of the tenant in not making out that title. An examination into the subsequent circumstances shows clearly this, that the tenant made several ineffectual efforts in order that he might obtain the means of producing to the landlord's agent the original deeds and documents upon which his title depended. The effect of those deeds and documents had been already stated, and that statement in reality had been accepted by the landlord. But, of course, the landlord had a right to have those statements verified by the production of the originals; and if there had been gross neglect or wilful default on the part of the tenant in producing those original documents, some observation might have been made. But, in reality, there was none. We find that on the landlord's return to this country in the subsequent year, namely, in the spring of 1845, the landlord then demanded the payment of the fines which he said, were then due. The landlord, therefore, treated the tenant as being under a continued imputation of neglect up to that period of time. That was the only ground upon which he claimed a septennial fine, as having accrued in the month of November, 1844. He demanded the fine accordingly. After some corre-

pondence the tenant falls back upon the computation of the fine that had been made in the month of April 1844. The question, therefore, is limited to the sole point of consideration, whether the application of the tenant for renewal, which was postponed for his own convenience by the landlord, is or is not a circumstance which disentitles the landlord to say, "Although I have refused to comply with your request for renewal, having no reason for that refusal save my own convenience, yet I will take advantage of the delay produced by that refusal to impose upon you the obligation of paying the further fine which I know will arise during that additional period of delay which is occasioned by my residence abroad. Why, it is perfectly plain that it would be contrary to all fair dealing, to all reason and justice, to allow the landlord to take that unfair advantage of his own act. If he refuses to entertain the application made to him on the 10th April 1844, because it was convenient to him so to do, he shall be compelled to receive that application when it is renewed to him in the month of April in the following year precisely in the same way in which he would have had to receive it and to deal with it if he had entertained it as he ought to have done in the month of April 1844. It is upon that principle that I think the decree of the court below is perfectly right and just, and that we ought to regard the parties as standing in the same position to one another relatively in which they stood on the 10th April 1844. And I think that, as the tenant at that time clearly had the means of proving his title, and was beyond doubt the person entitled to the renewal, and as he had accurately calculated the amount of the fines due from him, and was no doubt prepared to pay those fines, your Lordships ought to consider the parties in the month of April 1845 as if they stood in the same position in which they were in the month of April 1844, and to make your decree have reference to that state of circumstances. For these reasons I should move your Lordships to affirm the judgment of the court below, and to dismiss this appeal with costs.

LORD CRANWORTH.—My Lords, in the course of the argument at your Lordship's bar, it was contended by the learned counsel for the appellant, Sir Hugh Cairns, that inasmuch as the letter of the 10th April 1844 imposed certain terms and conditions, and as those conditions were not complied with, the case must be dealt with just as if no such letter had been written. I am quite prepared to accept that view of this case, and I will consider what ought to have been the judgment of the court below, supposing there had been no answer at all to the letter of the 10th April 1844. In my opinion, the tenant, by the letter of the 10th April put himself into this position, that supposing Mr Johnson had put that letter into the fire and had returned him no answer, he was in a condition to say that, upon the payment of the fines, as they had then been calculated, he was entitled to a renewal. The tenant had, previously to writing that letter, furnished a proper draft of the lease and he was in a condition to show that he was entitled to the renewal. He had had the fines calculated accurately, and he sends to the agent of the landlord a letter saying, "I call upon you to grant me a renewal." In my opinion he was then in a condition to enforce that claim, and



no delay afterwards on the part of the landlord could in any way prejudice his claim. Upon these grounds, thus very shortly stated, I entirely concur in the motion of my noble and learned friend on the woolsack.

**LORD CHELMSFORD.**—My Lords, I am of the same opinion with my two noble and learned friends. In considering the Irish Tenantry Act there are two things to be carefully distinguished: first the right of the tenant to relief in equity; and secondly, the loss of the right by his refusal or neglect to comply with the landlord's demand of the fines. As to the first, if there is nothing but mere lapse of time to be urged against the tenant, he is absolutely entitled to his equitable relief; the words of the Act being, "that courts of equity, upon an adequate compensation being made, shall receive such tenants or their assigns against such lapse of time, if no circumstances of fraud be proved against such tenants or their assigns." And, as Lord Redesdale said in *Lennox v. Trafford*, (2 Sch. & Lef. 688): "The principles stated by Lord Thurlow are clear and plain, that equity will relieve where there is mere lapse of time unaccounted for, without misconduct in the lessee, or where the lessee has lost his right by fraud of the lessor. With respect to the loss of the right by the neglect or refusal of the tenant to pay the fines after demand, it seemed to be assumed during part of the argument that a mere intimation from the landlord to the tenant that fines were due, and that they must be paid or the right to renew would be lost, would be sufficient to produce a forfeiture of the right of renewal if the fines were not afterwards paid. This, I think is not correct. In order to deprive the tenant of his equity it appears to me that there should be a formal demand made of the fines though it is not necessary to specify the amount which is due; and this was the opinion of Lord Redesdale, for in the case of *Jackson v. Saunders*, upon a bill for renewal under the Act, he said: "on the 1st March 1799, the lease of the other moiety of these lands was renewed by Mr. Saunders, and Mr. Jackson was then in truth called on to renew for the moiety in question, though no formal demand was made on him, nothing that would operate to exclude him from renewal under this Act." And after observing that an actual though not a formal demand had been made upon Mr. Jackson near eighteen months before, he added: "Then in October 1800 a demand is made which I take to be a sufficient demand under the statute it being a demand intended to exclude Jackson from renewal in case of non compliance, and the Act not having prescribed any particular form for such demand." Looking then first to the acts of the tenant, was there anything to deprive him of his equitable right to a renewal prior to the time when he might have been in default in consequence of a formal demand of payment of the fines having been made upon him? A great deal of time was occupied in a discussion of the sufficiency of the tender made by the respondent, on the 1st August 1845, and it was contended on the part of the appellant, that the tender was, at all events, bad, because the interest on the fines accruing between the 10th April 1844 and the time of the tender was not included in the amount tendered. The real question, however on this part of

the case is, what was the sum which was due for fines and interest at this time, not in order to determine the validity of the tender—because if no tender at all had been made, the equity of the tenant would have been the same—but with reference to the formal demand of the fines, which was afterwards made. It appears to me that the amount actually due at the time upon payment of which the tenant would have been entitled to his renewal was the sum of £47 14s. 8½d., which he was ready and willing and offered to pay. On the 10th April 1844 Mr. Bastable, the attorney of the respondent, wrote to Mr. Noble Johnson, the attorney for the appellant, informing him that he was expecting to get the draft renewal settled and that the renewal fines were ready to be paid. This was followed by the letter of Mr. Noble Johnson of the 20th April 1844, upon which so much observation has been made on both sides. Mr. Johnson writes: "I am requested by Mr. Aldworth to say to you that on his return to this country from Germany next year he will execute the renewal of the lease of Liscongill, provided that you on or before the 1st June next satisfy me, as his agent, that you are legally entitled to the same by the production of such certified or compared documents as may be necessary, or the originals thereof; and he has further directed me to say that he will not hold you accountable for the payment of any septennial or other fines than those now due up to and for the present period, the amount of which appears to be ascertained by an account that day given me of the same." The condition with respect to Mr. Allen's proving his title to the renewal of the lease on or before the 1st June, was one which the appellant had no right to impose. If he wanted to prevent delay, he ought to have made a formal demand of the fines, and then the tenant must have completed the business within a reasonable time. With respect to the passage of this letter as to the period to which Mr. Allen was to be accountable for the fines, I do not consider it as a promise either conditional or otherwise. It amounts, in my opinion, merely to an assurance that the delay occasioned by the appellant's absence abroad should not turn to the prejudice of Mr. Allen so as to render him accountable for any further fines than those which were then due. If there had afterwards been any improper delay on the part of the tenant, he might notwithstanding this letter, have been rendered liable to pay additional septennial fines and interest, but from the subsequent correspondence it appears to have been no fault of his that the matter was not concluded upon the original footing. So far as I can perceive, therefore, the tenant had done nothing to disentitle him to a renewal upon the terms of paying the fines due on the 20th April 1844 down to the 18th November 1845, when the notice which, I think, must be considered to be a formal demand under the Act was served upon the tenant and his attorney by the attorney for the appellant. This notice intimated the willingness of the appellant, to renew the lease on the tenant "showing his title thereto, and nominating lives in place of those who had died, and proving the dates of the respective deaths of such *cestui que vie* as had died (all of which the landlord had a right to require), and also upon his paying up the fines, septennial fines, and

interest due at the time of compliance with the above terms," which was an extension of the demand beyond the fines and interest payable on the 20th April 1844. It having been previously understood that the claim of the appellant was limited to the fines due on the 20th April 1844, and the tenant being always ready and willing to take the renewal on these terms, the only difference between the parties being, whether the tenant was liable to further septennial fines and interest, the resistance to this increased demand, and the omission to tender what was admitted by the tenant to be due for fines (it being clear, as was said in *Grant v. Dwyer* that the money would not have been accepted if offered) cannot be regarded as proof sufficient of neglect or refusal to pay the fines within the intention of the Act. The tenant might have filed his cause petition immediately the appellant refused to renew except upon the terms of his paying the additional septennial fines and further interest. And a notice of the intention to institute proceedings to compel a renewal was given by the tenant's attorney on the 26th February 1846. The delays in commencing proceedings, though very great, cannot have the effect of depriving the tenant of his right to a renewal, and the decree appealed from is therefore correct and ought to be affirmed.

*Decretal order affirmed with costs.*

Appellant's solicitor, *Baxter, Rose, Norton, and Co.*  
Respondent's solicitor, *E. Walmisley.*

## Court of Criminal Appeal.

Reported by William Woodcock, Esq. Barrister-at-Law.

[BEFORE MONAHAN, C.J., PIGOT, C.B., CHRISTIAN, O'BRIEN, HAYES, AND O'HAGAN, J.J., AND FITZGERALD, HUGHES, AND DEASY, B.B.]

THE QUEEN v. THOMAS GALVIN, SENR., THOMAS GALVIN, JUNR., AND MICHAEL FARRELL.—*May, 10; June, 1.*

*Evidence — Deposition — Caption — Statement of charge — Opportunity of cross-examination — Statute 14 & 15 Vict. c. 93, s. 14.*

*In a trial for manslaughter the deposition of the deceased was offered in evidence by the Crown. The deposition had been taken, not in the form A b. given in the schedule to the st. 14 & 15 Vict. c. 93, but in the form A a. It had no caption, and it appeared that no statement of any particular charge against him had been made to the prisoner previously to the deposition being taken. The deposition itself however shewed that the prisoner had stabbed the witness.*

Held—(Christian, Hayes, and O'Hagan, J.J., and Hughes, B., dissenting) that the deposition was not admissible in evidence.

Case reserved by O'Brien, J. The case stated for the Court was as follows:—

In this case, which was tried before me, at the last assizes for the city of Limerick, the indictment was for manslaughter. The first count charged the three traversers with having killed John Hickie. The second count charged Thomas Galvin, junior, with killing him, and charged the other two traversers with aiding and abetting therein. On the trial Thomas Galvin, senior, and Michael Farrell were acquitted, and Thomas Galvin, junior, was convicted. The question reserved arose on the following information, which was offered in evidence at the trial on the part of the Crown (viz.):—

CITY OF LIMERICK,—to wit.

THE QUEEN, v. THOMAS GALVIN, senior, THOMAS GALVIN, junior, MICHAEL FARRELL.	}	The information of John Hickie, of Gridiron Lane, in the city of Limerick, fisherman.
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Informant being duly sworn, on his oath, saith as follows:— That on Tuesday, the 20th day of September, inst., I had an argument with Thomas Galvin junr., at the race course; he was after striking James M'Irnerney, and I struck him with a stick. I returned to Limerick, and at about seven o'clock on the same evening when I saw the prisoners Thomas Galvin senior, and Michael Farrell in contact with James M'Irnerney, I went between them to separate them; I made a blow at the prisoner, Thomas Galvin, senior; I don't know whether I hit him or not; the prisoner Michael Farrell then caught me and held me, when the prisoner now present, Thomas Galvin, junior, stabbed me with some sharp instrument under the arm, then in the belly at both sides. I put down my hand and felt the blood coming, and immediately went to the hospital. Cross-examined by the prisoner Michael Farrell:—You spoke nothing to me but caught me by the cravat; you said to me, Let go of me, for I respect your years; I let go of you; you had one hand loose, and you had hold of me with the other. Thomas Galvin, junior, was there at the time I had a hold of you. Cross-examined by Thomas Galvin, senr.—I struck you because you struck M'Irnerney. Further examined by Michael Farrell:—It was while you had a hold of me that I was stabbed.

Sworn before me at the city of Limerick, this 23rd day of September, 1864.

J. O'SHAUGHNESSY, J.P.

Informant bound in the sum of £50 to prosecute when called on.	}
his	
JOHN X HICKIE. mark.	

The following evidence was given at the trial, as to said information. First witness for the Crown, JAMES O'SHAUGHNESSY, Esq.:—"I am a justice of the peace for the city of Limerick; I knew John Hickie, (deceased); I saw him on the evening of 23rd September last, in Barrington's Hospital, in this city, in bed, in a bad state of health. I took an information from him at that time. I saw Hickie put his mark to it; before that the prisoners Thomas Galvin, senior, and Michael Farrell cross-examined Hickey. Thomas Galvin, junior, was present; I cannot state that the three

prisoners were present the whole of the time." (Information produced to witness). "That was the document that was signed on that occasion by Hickie as a marksman in my presence. I cannot state from my recollection whether I read it to Hickie or not." Second witness, EDWARD M. BEAUCHAMP, Esq.—"I am clerk of petty sessions." (Information produced.) "I was present when that was taken, Hickie was then in bed. The information was written out by me. Mr. O'Shaughnessy, J.P., head constable O'Conner, the three prisoners, and some others were present in the room the entire time that I was writing the information. I had gone into the room with Mr. O'Shaughnessy and the three prisoners up to the bed where Hickie was; I then swore Hickie in the presence of and before Mr. O'Shaughnessy, that the evidence he would give, before the magistrate, in the charge he had against the prisoners, should be the truth, the whole truth, and nothing but the truth,—but I did not mention what the charge was. I then asked Hickie certain questions, and I took down his answers truly, and read over each answer to him after I had taken it down, as I went on. I did that with all the questions that I put and the answers—and when I had taken down the whole of his answers to my questions I read the whole over to him truly, and I told the three prisoners then that they were at liberty to cross-examine him and ask him any questions they liked. All the answers given by Hickie and what I took down, as above-mentioned, were given by him, and read by me in the presence and hearing of the three prisoners. The prisoners, Michael Farrell and Thomas Galvin, senior, then cross-examined Hickie. And I took down truly the answers he gave to their questions. And I read them truly for Hickie in the presence and hearing of the prisoners. And when those answers were taken down, I then read over truly the entire information again for Hickie in the presence and hearing of the prisoners. After that was done I put the paper before Hickie and gave him a pen. He held the pen, with which I put his mark while he held it. He then acknowledged it to be his mark, and I then handed it to Mr. O'Shaughnessy, who signed it in my presence. The signature of his name to it is in his handwriting, and the mark is Hickie's mark. I did not read it again to or in the hearing of the prisoners after it was so signed. Mr. O'Shaughnessy was present and quite near me the whole time. Hickie died the following morning in my presence. It was not, on the occasion of taking down the information, stated at any time in the presence of the prisoners or any of them, either by me or by any other person, what the charge against the prisoners was. I merely swore Hickie as above mentioned, that the evidence he should give in the charge he had against the prisoners should be the truth, the whole truth, and nothing but the truth. Nothing was said by Hickie in the presence of the prisoners, either before or after I swore him, about his state of health". Cross-examined by prisoner's counsel:—"When I took the information on 23rd of September I knew that Mr. Ellard the attorney was concerned for the prisoners. I did not communicate with him on the subject, or send him word that I was going to take the information. Hickie was very ill

at the time." Mr. Brereton, Q.C., for the Crown, proposed to read the information in evidence. Mr. O'Loughlen, counsel for the prisoners, objected that the document was not admissible or legal evidence against them, and relied particularly on the following objections:—1. That there was no caption to it. (*Regina v. Newton*, 1 F.F., 641—*Roscoe*, p. 68.) 2nd. That it did not appear that Hickie was sworn by Mr. O'Shaughnessy, and that on the contrary it appeared he was not. 3rd. That the document did not state what the charge against the prisoners was, and that the document was not in conformity with the Petty Sessions Act of 1851, 14 & 15 Vic. c. 93. 4th. That the charge against the prisoners was not stated in the caption of the document, and was not stated to Hickie or in the presence of any of the prisoners, either at the time of Hickie being sworn, or of taking the information, or at all on that occasion. 5th. That the document was not read over to or for the prisoners after it was completed by the mark of Hickie and the signature of Mr. O'Shaughnessy. Mr. Brereton, Q.C., for the Crown, cited "*the Queen v. Langbridge*" (1 Den. C.C. 448, 2 C. & K. 975, and *Archbold's Criminal Practice*, p. 220). And he further contended that the document was admissible in evidence independent of the statute. I stated to Mr. Brereton that if I admitted the document in evidence I would reserve the question for the Court of Criminal Appeal. He stated that he would nevertheless press for its reception in evidence, as he considered that without it the case for the Crown could not be sustained. I then allowed the document to be read in evidence, subject to the objection that it was not legally admissible in evidence, and reserving the question for the Court of Criminal Appeal. The document was accordingly read. Several other witnesses were examined for the Crown, but it is not necessary for the purposes of this case to give their evidence in detail. With respect to Thomas Galvin, senior, it appeared that the conflict between him and M'Inerney (which is stated in Hickie's information), took place some time previous to the stabbing of Hickie. And at the close of the case for the Crown it was contended that there was not sufficient evidence to go to the jury to sustain the charge against Thomas Galvin, senior. I was of that opinion, and the Crown Counsel did not press the case against him. I therefore directed the jury to acquit him, which they accordingly did. With respect to Thomas Galvin, junior, the evidence of some of the Crown witnesses corroborated that appearing against him on the information. As to Farrell it was questionable upon the entire of the evidence whether he held Hickie at the time of the stabbing (as would appear from the information), or whether he in any way abetted or aided in the stabbing. Mr. O'Loughlen addressed the jury for Thomas Galvin, junior, and Farrell, and examined several witnesses. One of them (head constable O'Connor) stated that on the night of the stabbing (20th of September last) he saw Hickie in Barrington's Hospital, and that Hickie (who was then collected and able to answer witness's questions) told witness it was Thomas Galvin, senior (father of Thomas Galvin, junior), who stabbed him, and that Thomas Galvin, junior, and Michael Farrell were

siding and assisting. This contradiction between the statement of Hickie to the constable and that in his information, was relied on by prisoner's counsel in his address to the jury. Other witnesses gave Thomas Galvin, junior, and Farrell, a very good character. The jury acquitted Michael Farrell, and found Thomas Galvin, junior, guilty on both counts, and I sentenced him to one year and nine months imprisonment, from the time of his committal, with hard labour, under which sentence he is now in gaol. I therefore request the opinion of the Court whether such information was legally and properly admissible and received in evidence. If it was not legally and properly admissible and received in evidence, then the conviction of Thomas Galvin, junior, is to be reversed.

JAMES O'BRIEN.

*Michael O'Loughlen* for the prisoner.—*The Queen v. Newton* (1 F. & F. 641) is a direct authority upon the necessity of the caption which is absent from this deposition. In addition to this, the form A b. in the Schedule to stat. 13 & 14 Vict. c. 93, s. 14, shews that it is necessary. The section directs that the depositions shall be in the form given in the Schedule. *The Queen v. Langbridge* (1 Den. C. C. 448) will be cited on the other side. But in the first place it is not clear whether that is a decision of the Court of Criminal Appeal at all. Next, the English Act 11 & 12 Vict. c. 42, analogous to stat. 14 & 15 Vict. c. 93, and which was in force at the time of the decision, was not referred to. In the next place there was a caption to the deposition in that case, and the objection was merely to the form of it. Then, also, it appeared that there the prisoner was informed of the nature of the charge against him, and had a full opportunity of cross-examination. Here it cannot be said that he had that opportunity. The real principle upon which these depositions are ever received in evidence is that the prisoner, at the time when he hears the statement made in his presence, had a full opportunity of cross-examining the witness; and if a prisoner is brought in, and an information is made in his presence, he being ignorant of the charge made against him, how can he be said to have had an opportunity of cross-examination, he not knowing what the charge against him is. *Reg. v. Johnston* (2 Car. & Kir. 355) will be cited on the other side, but that case only decides that there need not be a separate caption to each deposition, but that one caption to the whole body of depositions is sufficient. Another objection here is, that the deposition was taken, not by the magistrate, but by the clerk of Petty Sessions.—14 & 15 Vict. c. 93, s. 14, par. 1.

*Brereton*, Q.C., and *De Moleyns*, Q.C., for the Crown.—There has been a substantial compliance with the Act of Parliament. With respect to the objection last made, par. 3 of section 5 of the st. 14 & 15 Vict. c. 93, shews that the preparation of informations, etc., under the direction of the justices is part of the duty of the clerk of Petty Sessions. It clearly appears that the prisoner stood charged with an offence when the depositions were taken. The very word "stab" carries with it a criminal charge. The prisoner was perfectly well aware of what the charge was when the time for cross-examining came.

There is nothing in the Act of Parliament to make it necessary that the charge should be stated to the prisoner before the witness opens his lips. It is not necessary that in every case the nature of the case itself should in the first instance, and as a preliminary to the evidence of the witness, be stated in distinct terms to the prisoner.—*The Queen v. Mullen* (9 Cox. C. C. 339); *The King v. Smith* (2 Stark. Rep. 208). *The Queen v. Langbridge* (1 Den. C. C. 408; s. c. 2 Car. & Ker. 975) is a direct authority that a caption is not necessary. That is a decision of the Court of Criminal Appeal. *The Queen v. Newton*, cited on the other side, is the decision of a single judge, and the previous decision in *The Queen v. Langbridge* was not referred to. Taylor on Evidence, par. 455, shews that the opinion of the profession in England is, that *The Queen v. Langbridge* contains the true statement of what the law is.

*Michael O'Loughlen* in reply.—*Reg. v. Michael Walsh* (3 Ir. Jur. N. S. 40; s. c. 5 Cox. C. C. 115) is an important case upon the reception of depositions in evidence; it also contains important observations on the case of *The King v. Smith* (2 Stark. Rep. 210). *Reg. v. Beeston* (1 Dears. C. C. 405; s. c. 6 Cox. C. C. 425). The deposition, on the face of it, does not shew an indictable offence, and so is not admissible under the statute. To make stabbing an offence it must be stated to be done with an intent. The clerk of Petty Sessions is clerk to the justices in Petty Sessions assembled, and not to any single magistrate. On the point of the deposition having been taken by the clerk, and not by the justice, see *Caulle v. Seymour* (1 Q. B. 839). As to the necessity of the caption stating the precise charge against the prisoner, see *Regina v. Clarke* (2 F. & F. 2).

*Cur. adv. vult.*

June 1.—O'HAGAN, J., after reading the evidence in the case, and stating the offer of the deposition in evidence, and the objections made by the prisoner's counsel, said that the Court was now to dispose of the question reserved. The points relied on in argument were three. First, that the information was not taken by a magistrate, but by a clerk. Secondly, that there was no caption to the information. Thirdly, that no charge was stated to the prisoner. He thought these points exhausted the case. As to the first, the evidence seemed to him to shew that there was no foundation for it. The Petty Sessions clerk swore the witness, examined him, and wrote out the evidence in presence of the prisoner and of the magistrate. The magistrate was quite near the clerk; the maxim *qui facit per alium facit per se* applied, and it seemed to him that the acts of the clerk were the acts of the magistrate. This was not the case of the preparation of the deposition in the prisoner's absence, and reading it in his presence. His Lordship thought that such a course of proceeding would have been a wrong to the prisoner, and a fraud on the law. The cross-examination might be qualified by the examination. The prisoner was entitled to see the demeanour of the witness, and if any magisterial practice existed which deprived him of that advantage, that practice was wrong. But that did not exist in this case. The second and third points of

objection should be considered together. They arose on the first clause of the 14th section of the 14 & 15 Vict. c. 93. That clause was as follows:—"In every case where any person shall appear or be brought before any justice or justices charged with any indictable crime or offence, such justice or justices, before committing such person for trial, or admitting him to bail, shall in the presence of such person, who shall be at liberty to put questions to any witness produced against him, take the depositions (A. b.) on oath and in writing, of those who shall know the facts of the case, and such depositions shall be read over to, and signed respectively by the witnesses who shall have been so examined, and shall also be signed by the justice or one of the justices who shall take the same; and if upon the trial of the person so accused it shall be proved by the oath of any credible witness, that any person whose deposition shall have been so taken is dead, and that such deposition was taken in the presence or hearing of the person accused, and that he or his counsel or attorney had an opportunity of cross-examining such witness, it shall be lawful to read such deposition as evidence on the trial without further proof thereof, unless it shall be proved that the same was not signed by the justice purporting to have signed the same." The information received in evidence had not the caption, as it was improperly called, contemplated by the Schedule A. b., and it did not appear that any formal statement of the charge against him was made to the prisoner. For the prisoner the case of *The Queen v. Newton* was relied upon, and for the Crown *The Queen v. Langbridge*. The latter case was prior to the former; the objection there was that no offence was shown in the charge set forth in the caption of the deposition received in evidence, and the judgment of the Court was in terms an express authority on the question before the present Court. The Chief Justice stated that there was no authority requiring any title, or, as it was called, caption, to the examination. It had been said that this authority should not guide the Court—first, because it was said that the question was not argued, and next because the attention of the judges was not called to the stat. 11 & 12 Vict. c. 42, s. 17, which was analogous to the Irish Act, 14 & 15 Vict. c. 93, s. 14. Both observations had great force, but on the other hand it was said that the Chief Justice delivered a written judgment, and that it was difficult to suppose that the English judges who decided that case should have been ignorant of a piece of legislation which had then been in force for nine months. But it must be taken at all events that such an information would have been proper. *The Queen v. Newton* was a decision the other way, but that was merely the decision of one judge, Hill J. No discussion took place, and there was no reference to the decision of the Court of Criminal Appeal in *The Queen v. Langbridge*. He did not therefore think the Court could be guided by the opinion of a judge given under such circumstances. It seemed to him that the weight of authority was with the Crown. *The Queen v. Langbridge* appeared from Taylor on Evidence, par. 455, to express the view of the question adopted by the profession in England. Assuming that the question was still open it appeared to him that the effect of the statute was

this. If a person was charged with an indictable offence a justice might take evidence against him. The charge might be made in a warrant or a summons to appear or a charge sheet, or by the verbal statement of a police officer, or of the prosecutor himself. If the charge was once made, the right to take the deposition was established. The magistrate, as having received the charge, was authorised to take the deposition in the form prescribed by the Schedule to the Act. The Act contained a Schedule of which the Form A. b. was the one material in the present case. That Form commenced by a statement that it was "the deposition of X. Y. of M. N. taken in the presence and hearing of C. D., who stands charged that," and then provided for the statement of the witness. There was no direction that the recital of the charge should be read to the prisoner. What was really material to the accused was that the deposition should be taken in his presence and hearing, and that he should have an opportunity of cross-examining the witness. Both these requisites seemed to have been complied with in this case. It was for the judge who tried the case to say had he the opportunity of cross-examination. The condition of the admissibility of the evidence seemed to have been a fair ability of hearing the charge, and not a mere formal recital of it in the heading of the deposition. The question as to the statement of the cause of complaint to the prisoner was material as introductory to the consideration of the question which regarded the admissibility of the information. He saw no reason for holding that an imperfect recital, or the want of a recital, should make it inadmissible. The 36th section of the Act enacted that the several forms contained in the Schedule should be sufficient, but it also enacted that no departure from any form should vitiate or make void any proceedings if the form used was otherwise sufficient in substance and effect. In his view of the statute the departure and omission in this deposition from the form given in the Schedule did not make it void. If the statute had been intended to make a recital of the charge necessary in the deposition, it would have positively enacted it. He therefore thought that the deposition was admissible, and that the conviction should be affirmed.

DEASY, B., said that he had come to a contrary conclusion. His Lordship referred to the facts as stated in the case reserved, to clause 1 of st. 14 & 15 Vict. c. 93, s. 14, to the Form A. b. in the Schedule to the Act, and said that the question was whether the deposition taken under the circumstances in the case was admissible. The statement shewed that no charge was read to the accused. He was of opinion that the objection to the admissibility of the deposition was well-founded. Looking to the Act, he had no doubt that the Legislature intended that the deposition of the witness should contain a statement of the charge, for the double purpose of apprising the prisoner of the object with which the evidence was given, and of apprising the Court also of the nature of the charge made. A party could not cross-examine in many cases if he did not know the charge against him. It was also important that the Court should be informed by the contents of the deposition of the occasion on which, and the purpose for which the evidence was

taken, so as to see if the prisoner had the full benefit of an opportunity of cross-examining. It was plain that the Legislature intended that the statement of the witness should be preceded by a statement of the charge. He did not consider that *The Queen v. Langbridge* decided the point. *The Queen v. Newton* shewed that it was not looked upon as a decision. He was of opinion that the document was not admissible in evidence. He was of opinion that the deposition was not taken in conformity with the provisions of the statute.

HUGHES, B., said that he was of opinion that the deposition had been properly admitted. Before the Court could allow it to be received, it must be satisfied of some things—first, that the person who had made the deposition was dead; and secondly, that the deposition was taken in the presence and hearing of the party deceased; and thirdly, that the prisoner had had an opportunity of cross-examining the witness. It should also appear that the prisoner stood charged with an offence, but once these matters appeared, the 14th section made the deposition admissible, unless it was proved that the information was not signed by the justice purporting to have signed the same. The only value that could be attached to the caption was, that it showed there was a charge in existence. It was not required that a formal statement of the charge should be read to the prisoner, but the depositions of those who knew the facts of the case. But the language of the statute was different when it came to provide for the statement of the prisoner himself. In that case, the Legislature had provided in terms by the form that it had supplied, for the charge being actually read to the prisoner.—See Form A c. It seemed to him that the caption was no part of the deposition. When the Court was informed by proper evidence that the matters required by the 14th section had been taken care of, he was of opinion that the deposition was properly received in evidence.

FITZGERALD, B., said that the only question was whether the deposition was properly received in evidence. It purported to be drawn in the case of *The Queen v. Thomas Galvin, senior, Thomas Galvin, junior, and Michael Farrell*, to be sworn before and signed by J. O'Shaughnessy, J.P. His Lordship then read the evidence as stated in the case reserved, and proceeded to say that it seemed the fair result of the evidence that the three prisoners were in custody at the time of the examination. The charge was not stated to them on that occasion. Hickie died next day, and he presumed, from the effect of the wounds which had been inflicted on him. From the fact of the names of the three prisoners appearing in the title, from the heading of the paper, and the form of oath administered to Hickie, it would appear that some charge was made by Hickie against the prisoners. The question on the whole was whether the paper was allowed rightly to go to the jury against Thomas Galvin the younger. The first obligation by statute in Ireland on magistrates to take informations, was by the 10th Charles 1, sec. 2, c. 18, corresponding to the English statutes of 1 & 2 Ph. & Mar. c. 13, and 2 & 3 Ph. & Mar. c. 10. Lord Mansfield seemed to have been of opinion that there was a similar obligation upon them at common law. Then came the st.

9 G. 1, c. 54. This provision applied to cases of misdemeanor as well as of felony. None of these Acts contain provisions making the deposition evidence in case of the death or absence of the person making it. On the principle of the common law, depositions taken under the statutes were in practice admitted in evidence in the event of the death of the witnesses, but then as in every case direct proof was required of the death, and also first, that the depositions had been taken on oath; secondly, that they had been taken in a judicial proceeding, and thirdly, that the person charged had an opportunity of cross-examining the witnesses. The result was that the statute law was to be found wholly in the Act of 14 & 15 Vict. c. 93. By the first clause of the 14th section of that Act the deposition was to be made, first, on oath; secondly, in a judicial proceeding; thirdly, in the presence of the prisoner, who was to have an opportunity of cross-examination; and in the event of death then one only of the three matters need be proved. A form, however, was referred to, and according to it the deposition purported to have been taken, first, on oath; secondly, in a judicial proceeding in presence of the person charged; thirdly, it purported to have the signature of the magistrate. Having regard to the state of the law at the time the Act was passed, no form could be good which did not purport to have been taken, first, on oath; secondly, in a judicial proceeding; thirdly, to have the signature of the justice. He could not conjecture any more reasonable mode of finding the requisites of a statute than by looking to the old law. His Lordship then referred to *The Queen v. Newton*, which he did not think reconcileable with *The Queen v. Langbridge*. As in the present case there was not any ground for saying that a charge was antecedently made and stated to the prisoner, he was unwilling, without necessity, to decide that extrinsic proof of that was not admissible. One matter essential was not observed; that was that the accused had not an opportunity of cross-examination. His Lordship thought he ought to be apprised of the charge against him otherwise than by the statement of facts made in his presence by the witness. If that state of facts was to be considered as a charge on oath, it ought to be read over to him before he could be called on to cross-examine. He was to be apprised of the charge in order that he might attend to the witness. In this case he was not so apprised. His Lordship did not wish my decision to rest on any other ground than that, and was of opinion that the evidence was not admissible.

HAYES, J., was of opinion that the evidence was properly received.

O'BRIEN, J., said that on consideration he was of opinion that the deposition was not properly received. He referred to sec. 14 of the statute, 14 & 15 Vict., c. 93, and said that it had been contended that parol evidence was properly admissible to shew that the substantial requisites of the statute were in fact complied with: it was proved however, in this case that the offence charged against the prisoner was not stated to him, or in his presence, and he thought that without a statement of the charge being made before the examination the prisoner could not be said to have had an opportunity of cross-examination. The other

ground relied upon was that it was essential under the Act that the deposition should shew what the charge was. Now, one would say from looking at the statute itself, considering the state of the law at that time, the particular directions given by the statute, the care that the Legislature had taken in giving the forms to be used by the magistrates, that it was their intention that much care and caution should be adopted before evidence of this sort should be admitted. The form in Schedule A b. stated that the deposition was taken in the presence and hearing of C. D. who stood charged, &c. It was said that that direction is not given in the section of the Act itself; a similar observation would apply to the very next paragraph of the section, and the form to which it applied; when the accused was called on to make his statement the form A c. in the Schedule assumed that he was told what the charge was, and his Lordship thought it would be difficult to say that the Legislature did not contemplate that the prisoner should be apprised of the nature of the charge, and the second paragraph did not require that the witness should be present when their depositions were read over. That being so on the Act itself, the authorities were very few. *The Queen v. Newton* was a decision of two judges. As to *Langbridge's case*, the facts of the case and the observations of Wilde, C. J., shewed that the case did not apply here, and that the prisoner was in point of fact apprised of the nature of the charge against him. There, too, there was a caption, which only omitted to use the word "unlawfully." The objection there was not one of substance. If it were unnecessary that there should be any caption, and that the prisoner should be apprised, before the examination, of the charge against him, what should they have to say to a case in which it had been objected that depositions were inadmissible because they stated a charge different from that on which the prisoner was tried. Taylor on Evidence, par. 455, had been referred to, to show the opinion of the profession as concurring in the view expressed in *The Queen v. Langbridge*, but in a note upon the subject Mr. Taylor said, "See, however, *The Queen v. Newton*," and he only referred to *The Queen v. Langbridge* to show that no objection can be sustained on the ground that the title did not state with sufficient precision the charge against the accused. On these grounds his Lordship had come to the conclusion that the deposition was not properly receivable in evidence.

CHRISTIAN, J., regretted that he was about to disturb again the balance which had already been so often disturbed and again restored in this case. The deposition had been objected to in this case, first, upon the ground of the necessity of a caption; secondly, because the accused did not hear the nature of the case stated till he heard it from the lips of the accuser. He thought these two questions should be kept distinct, though they both depended on the 14th section of the statute, with such illustration as was thrown upon it by the form A b. The document in question was drawn up as a deposition under the 14th section, but it was called an information; but it was clear that if it was not a deposition under section 14 of the Act it was of no value. In order to make it admissible in

evidence under the 14th section, everything that was required by that section must be proved to have been done. If we found that such was the case, we had no right to call for a further requirement, even if we were satisfied that that further requirement would have the effect of improving our law. What were the requirements of the section itself apart from the form? He was of opinion that the first sentence of this first clause did not touch the matter of the deposition at all; that is, not the contents of the deposition. It touched matter preliminary to it. It was the instruction to the magistrate as to the occasion on which he was at liberty to proceed to take evidence. When the preliminary of jurisdiction was founded, then came the business of taking the deposition. The clause pointed out what the magistrate was to do. "Such justice or justices, before committing such person for trial, or admitting him to bail, shall in the presence of such person, who shall be at liberty to put questions to any witness produced against him, take the depositions (A b.) on oath and in writing of those who shall know the facts of the case, and such depositions shall be read over to, and signed respectively by the witnesses who shall have been so examined, and shall also be signed by the justice or one of the justices who shall take the same." He thought there were eight distinct requirements to be complied with in the taking of a deposition—first, the deposition must be taken by a justice before committing the prisoner or admitting him to bail; secondly, it must be taken in the presence of the accused; thirdly, the accused must be at liberty to put questions to the witness; fourthly, the deposition must be on oath; fifthly, it must be put into writing; sixthly, it must be read over to the witness; seventhly, it must be signed by the witness; eighthly, it must be signed by the justice. But though the statute required that in fact all these things should accompany the taking of the deposition, it did not require them to appear on the deposition, or from the matter of any statement by the justice to the prisoner. Some of them must, in their nature, appear on the face of the deposition, but but that was not the case with others. It would be very important to bear that in mind when we found the language attributed to Hill, J., in the case in 1st Foster and Finlayson. Half of the requirements were in their nature matter of extrinsic evidence, and could all be proved by parol evidence, but for the sequel of the clause that on proof of two of them it would be presumed that all the others had been complied with. He did not think that there was full proof, but he thought it was *prima facie* proof. If the witness was in a position to prove that he was not present, he had not an opportunity of cross-examination. Well, it so happened that every one of the eight requirements which he had mentioned had been complied with in this case. The parol evidence shewed that. With respect to the caption, the proper meaning of the word was the taking of the deposition by the magistrate. The words of the Act were, "shall take the depositions," but by a very common figure of speech, the formula, which was the evidence of the act of caption, had come to be called the caption. The signature of the magistrate was what evidenced the act of caption. Caption and all the other requirements did plainly



accompany the deposition. But it was said that by reference to the form we would see that there was something which did not appear in this case. That was so, but it was an abuse of speech to call that something a caption. What was called the caption was nothing but the title or heading of the document. Did the absence of that vitiate the deposition? The proper force of these forms was stated in the statute. The 36th section of the Act said that "in all proceedings under this Act, the several forms in the Schedule to this Act contained, or forms to the like effect, shall be deemed good, valid, and sufficient in law." The corresponding section of the English Act stopped there, and all the rest that was contained in this section was wanting in the English Act. Looking outside the form to the statute itself we would come to the conclusion that that heading was one of the things dispensed with by the 36th section. He did not think we were to go back either to the common law, or to the earlier statutes. We were to look to the Act itself. The authority of *The Queen v. Langbridge* was cited on the part of the Crown. Some observations were made on that case. It was suggested that it was not argued. That would apply to half the decisions of the Court of Criminal Appeal in England. The English Act was passed on the 14th of August, 1848. This case was decided on the 23rd June, 1849. A circuit had intervened since the Act came into force, and it could not be supposed that the judges were ignorant of an Act of Parliament like this. This report in 2nd Carrington & Kirwan, 975, gave us the title of the deposition. Compare it with the caption in form M. of the Act of Parliament. It was taken as a deposition under the English Act. Under those circumstances it appeared to be impossible to treat the case otherwise than as a solemn decision of the Court of Criminal Appeal on the point whether the heading in the Act must be given. Wilde, C. J., in delivering judgment, had said, "The objection is, not that the evidence, as set forth in the examination did not sufficiently appear to relate to the charge upon which the prisoner was being tried, so as to warn and apprise her of the matter to which her cross-examination should be directed, but only that the title of the examination did not with sufficient distinctness state the charge against her. The title of the deposition states the occasion of its being taken, and the matters to which it refers, and there is no authority requiring any title, or, as it is called, caption, to the examination; and it is sufficient if it be described as the examination of the witness, and that the evidence referred to the charge upon which the prisoner may be upon his trial." He took that to be a clear authority on the first objection. But it was said that this case of *The Queen v. Langbridge* was at variance with *The Queen v. Newton*. It appeared to him on reading this latter case, that the real objection to the document in it was that it was not signed by a magistrate at all. The statement of the case showed that the real caption, the signature of the magistrate, was wanting in that case. The report contained an observation by Hill, J., that "the statute 11 & 12 Vict. c. 42, s. 17, authorizes taking depositions in a particular way, and unless it appears upon the caption that the prisoners are charged with

an indictable offence, you cannot take that out by parol evidence." He had pointed out the section of the English Act corresponding with the 36th section of ours, and he thought it would be unjust to Hill, J., to say that he was responsible for everything he was made to say in a report which he did not see. He thought the only true caption was found in this case, and the want of a heading was dispensed with by s. 36. The other objection had more substance; it was that the prisoner did not hear the charge against him till he heard it from the lips of the witness. If this meant anything, it meant that the judge was to state in his own language to the prisoner the charge against him, and that no matter how clear it might be, as in this case, that he did know from the mouth of the accuser the charge against him, yet from the want of compliance with this rigid formula the deposition is bad. Of course the judges were all agreed that the essence of the deposition was the presence of the accused, and the opportunity of cross-examination. The question was, what were the methods for attaining this. What was it that the Act of Parliament required. The requirements were comprised in two sentences—first, that the party should be at liberty to cross-examine; secondly, that he should have an opportunity of doing so. It must be conceded that if he did not know the nature of the charge against him at the time of the cross-examination, he had not an opportunity of doing it. On the other hand, if he knew it, he had so far the opportunity. What was the time for cross-examining? Not till the direct examination was closed. If when it was closed he had before him in the plain language of his accuser the nature of the charge which was made against him, he had all the knowledge necessary to enable him to cross-examine. There was nothing in the Act requiring the justice to state the nature of the charge at all. It might be said that it would be more regular that the justice should state it. All he could say was, that the statute did not require that; provided that the party had the knowledge of the nature of the charge against him, the statute made no difference between his getting the knowledge from the mouth of the witness or the mouth of the justice. This construction was very strongly aided by the second clause of the 14th section, which was in these words—"Whenever the examination of the witnesses on the part of the prosecution shall have been completed, the justice or one of the justices present, shall (without requiring the attendance of the witnesses) read or cause to be read to the person accused the several depositions, and then take down in writing the statement (A. c.) of such person (having first cautioned him that he is not obliged to say anything unless he desires to do so, but that whatever he does say will be taken down in writing, and may be given in evidence against him on his trial); and whatever statement the said person shall then make in answer to the charge shall, when taken down in writing, be read over to him, and shall be signed by the said justice or one of the justices present, and shall be transmitted to the clerk of the crown or peace, as the case may be, along with the depositions, and afterwards, upon the trial, may, if necessary, and if so signed, be given in evidence against the person accused, without further proof there-

of, unless it shall be proved that it was not signed by the justice purporting to sign the same." This he read as shewing that in the contemplation of the Legislature the charge was the depositions, and that on the first occasion on which the justice was called on to put the charge to the accused, the method prescribed was by reading the depositions. Reading to him the depositions was the charge. It appeared to me that taking the two clauses together, the matter that the Legislature contemplated was this: the justice was first to satisfy himself that the party was before him charged with an indictable offence. Then as jurisdiction to take evidence was founded, he should go on to take evidence. These two were all the requirements pointed out by the first part of the section. He was then to proceed to the second part of his duty, that of interrogating the prisoner, which he was to do by reading to him the depositions of the witnesses, and asking him whether he had anything to say to that charge, and quite in conformity with that was the language of Wilde, C. J., in *The Queen v. Langbridge*, as it showed clearly that his view was what he (Christian J.) had been endeavouring to express, that whether the prisoner was to learn the charge for the purpose of cross-examination, or for his own examination, it was from the language of the witness, and not from that of the justice, that he was to learn it. Wilde, C. J., referred merely as an additional circumstance to the fact that the prisoner had been informed of the charge against her by the committing justice. For these reasons his Lordship thought that the deposition ought to have been received, and that the conviction should be affirmed.

PIGOT, C. B., said he supposed he ought to rejoice that he was about to restore the balance which, as Christian, J., had said, had been so often disturbed in this case. In his opinion this deposition ought not to be received. He concurred not only in the opinion of Fitzgerald, B., but also in the proposition to which he incline, but he was also of opinion that not only was it essential that the prisoner should be apprised by something extrinsic to the evidence of the charge against him, but also that the fact of such a charge having been made independently of the evidence should appear on the face of the deposition. With respect to the expression which had been used throughout the argument, and which, he thought, was a loose expression—he meant the term "caption,"—he rather believed that the expression arose from the use of the phrase as applied to the commencement of indictments at Quarter Sessions; the object was to show the existence of jurisdiction to do the acts, and he should use the expression in that loose popular sense, and treat it simply as that part of the deposition which shewed what was asked with reference to the individual against whom the deposition was sought to be read, and which gave jurisdiction to the magistrate. In any view that might be taken of the case, this was plain, that unless a person was charged with a criminal offence, a justice of the peace had no jurisdiction to receive evidence on oath against him. But without going into the former history of the law, he should just for a very few moments advert to what he thought useful to this question, to the words by which the Legislature seemed to him, not in one clause only, or one

form, but in several portions of the Act of Parliament, to indicate their intention with respect to the very subject now before the Court. It had been during a portion of the discussion suggested that great difficulty would exist in complying with a requirement that the magistrate should state in terms the charge on which the party was brought before him, and that might be extracted from the evidence. He thought that the Legislature had acted as if such an apprehension was groundless, and ought not to prevail. In several parts of the statute the Legislature contemplated the absolute necessity of indicating what the charge was against the prisoner, and indicated in precisely the same terms as where it was said to be impossible to execute what the Legislature directed. He turned to the sections 13, par. 6, and 16, par. 1, providing for witnesses and parties charged with indictable offences respectively being bound by recognizance to appear at the trial, and on referring to the form of recognizance C. given in the Schedule to the Act, he found that in the recognizance the cause of complaint was to be stated, and that, in the case of prosecutors and witnesses, the obligation was to attend the Court, and there "to prefer (or prosecute, or give evidence upon) a bill of indictment against the said C.D. for the said offence," and that in the case of the party charged the obligation was to surrender himself, "and plead to any indictment found against him for said offence, and take his trial for the same." So in respect to the examination of the party accused, the form (A.c.) given in that case indicated in the same manner that the document which the magistrate was to sign as the statement of the accused was to be preceded by a statement of the charge. But there was another part of the statute which furnished a conclusive answer, for in the 11th section it was enacted that "in all cases of indictable crimes and offences (where an information that any person has committed the same shall have been taken in writing and on oath) the justice shall issue a warrant (B.b.) to arrest and bring such person before him or some other justice of the same county, to answer to the complaint made in the information; or if he shall think that the ends of justice would be thereby sufficiently answered, it shall be lawful for him, instead of issuing such warrant, to issue a summons in the first instance to such person, requiring him to appear and answer to the said complaint." That seemed to place upon the magistrate an obligation to state in the summons the substance of the charge. He referred to these passages of the Act, to shew that the Legislature contemplated that a statement of the charge should be made in every case. Now, coming to the 14th section, he confessed that he could not give to the words "in every case where any person shall appear or be brought before any justice or justices charged with any indictable crime or offence" any meaning but this, that the jurisdiction of the magistrate should be exercised only where the prisoner stood charged with a criminal offence, and that by those words he must understand that the prisoner himself had that charge communicated to him. What succeeded in that section was a description of what was to be done in his presence; "such justice or justices, before committing such person for trial, or admitting him to bail, shall, in the

presence of such person, who shall be at liberty to put questions to any witness produced against him, take the depositions (A. b.) on oath and in writing of those who shall know the facts of the case, and such depositions shall be read over to, and signed respectively by the witnesses who shall have been so examined, and shall also be signed by the justice or one of the justices who shall take the same." The Legislature evidently intended that the prisoner should be apprised of the charge. The first form in the Schedule was that of an information, which was preceded by no such inducement as that given in the form of a deposition of a witness, because it preceded the presence of the prisoner, and everything but the issuing of the warrant, but when the thing called a deposition of a witness and so described in the Schedule, came to be given, the Legislature in the form which it gave used the words, "The deposition of X. Y. of M. N., taken in the presence and hearing of C. D., who stands charged that." How would that be read in common parlance? A person "stands charged with an offence." That implied that to himself the charge was made that he was guilty of the particular offence. So in the form of statement of the accused (A. c.) the inducement was contained "a charge having been made against C. D. before the undersigned justice that." Here there was no statement of evidence, nothing that had fallen from the lips of the witness, nothing but the statement "a charge having been made?" What was the plain meaning of all that? This examination of the prisoner, just as the examination of the witness, was all stated as a transaction happening at the time, and what was most important with reference to the case before the Court, as recording what was done before the magistrate. It was perfectly true that the reading of the charge was not contained in the form of the deposition of a witness, but he was using the examination of the prisoner for the purpose of showing that in the passage corresponding with that in the deposition precisely the same expressions were used. Section 35 of the Act seemed also to him to remove all reasonable ground of doubt as to what the Legislature meant. After enacting that the forms in the Schedule should be deemed good, valid, and sufficient in law, and should be the proper forms to be used, it went on to say, "But no departure from any of the said first-mentioned forms, or omission of any of the particulars required thereby, or use of any other words than those indicated in such forms shall vitiate or make void the proceeding or matter to which the same shall relate, if the form used be otherwise sufficient in substance and effect, and the words used clearly express the meaning of the person who shall use the same." In his judgment these expressions, "if the form used be otherwise sufficient in substance and effect," clearly shewed that in each part of the form there was something substantial and effective; the mere form might be changed, but from that which the form was intended to convey, there was no power to depart. It appeared to him to be impossible to hold that the statement in the form of deposition that the prisoner "stands charged" was not a necessary part of the deposition. Upon that view of the Act of Parliament it appeared to him that whatever might be the consequence the Act of Par-

liament prescribed the necessity of having its requirements complied with, and that unless that was done the deposition could not be read. With respect to *The Queen v. Langbridge* he would feel bound to treat it with great respect. It was, however, a decision on another Act which did not contain the words which were in this one. It was not the same with that upon which the other judges decided; it was made immediately after the passing of the Act of Parliament. With respect to *The Queen v. Newton*, in the first place he regarded it as a very clearly reported, well-established statement of the decision of the judge, and his reason for saying that was this, that Mr. Foster who was responsible for the report on this case was himself engaged in it, and engaged as prosecuting counsel, and it was he who argued the question as to the caption. We had therefore a member of the Bar conducting the prosecution, raising the objection, and receiving the decision of the Court against it. He thought, therefore, that we could not consider that other than as a deliberate report. Hill, J., himself made the objection as to the caption. What was the meaning of his reference to Mr. Bailey? It was that he was not the magistrate who took the deposition in question. It was he who took the other informations. The caption which was annexed to the depositions signed by Mr. Bailey could not cure the want of a caption to the deposition taken by Mr. Jeffcock, the other magistrate. Then Mr. Foster argued the case, and Hill, J., decided that the deposition was not admissible as a dying declaration. Now that was a binding decision; and what was the ground of it? It was this as stated by Hill, J., "The statute 11 & 12 Vict. c. 42, s. 17, authorizes taking depositions in a particular way, and unless it appears upon the caption that the prisoners are charged with an indictable offence, you cannot eke that out by parol evidence. It would be opening a very dangerous door to false accusations if parol evidence of what was the nature of the charge on which the evidence against a prisoner was given in the depositions could be supplied." This therefore was a document admissible on the ground that it was made in a judicial proceeding, and it was so made admissible by the Legislature on certain conditions which the Legislature prescribed. He could not understand that this document could be treated as admissible otherwise than under the Act of Parliament. This statute repealed the former statutes, and the document could only be receivable under the Act of Parliament itself. In the present instance the conditions were prescribed by the Act of Parliament; the deposition was to be used on the conditions being fulfilled, and he thought that the ordinary rule applied that where it was essential that that which gave jurisdiction should be shewn, where the jurisdiction came in question at all, it ought to be shewn on the face of the document. It appeared to him, therefore, that the view taken by Hill, J., was the true and sound view, that that which alone gave the magistrate jurisdiction ought to appear on the deposition itself. It ought to be so with a view to the general provisions of law; he thought it was so with respect to this Act of Parliament. It appeared to him to be clear and essential that the document should shew that the party was charged by its shewing on

the responsibility of the magistrate in writing, and signed by him that the jurisdiction did attach. Now, he would say one word as to *The Queen v. Beeston* (1 Deasel. C. C. 405), which seemed to him to be a strong authority. That case was decided in 1854, and the language of Jervis, C. J., seemed to assume that the deposition ought to have been taken on a charge; the language with which he closed his judgment shewed conclusively his view of the subject. Martin, B., and Crowder, J., used expressions which, for his part, he did not understand. If he were called upon to select between that opinion of Martin, B., as applicable to the case now before the Court and another, he would without doubt, though with great respect, dissent from that opinion of Martin, B. That opinion was not the judgment of the Court; he looked upon it that we had the authority of Jervis, C. J., for holding that a charge ought to precede the deposition, and he did not think that *The Queen v. Langbridge* governed the case. He was therefore of opinion that the conviction should be quashed.

MONAHAN, C. J., said that the circumstance of the other members of the Court being equally divided as to the point in question, a matter of which he had been aware a considerable time ago, made the judgment of the Court ultimately rest upon himself; whatever opinion he formed would be the judgment of the Court. He did not take to himself any credit for having carefully considered any case; but, knowing in this particular case that it was one in which the members of the Court had come to different conclusions, he was apprised that the case was one of great difficulty, and whether he was right or wrong in his conclusion, he certainly never considered a case with more attention, or with more considerable doubt for a considerable time as to the conclusion to which he should come. The first question which he had had to consider was whether the case was concluded by authority, for if he had found that it was, such was the uncertainty in his own mind as to the proper conclusion to come to, that he should consider himself as bound by the authority, if there were any; but after considering the matter he had come to the conclusion that the question now considered by this Court was not considered in *The Queen v. Langbridge*. The question that arose in that case was not whether a deviation from the form prescribed by the Act of Parliament rendered invalid the deposition which was tendered in evidence. He could not suppose that if the attention of the Court had been called to the Act of Parliament and the Schedule to it, they would not in their judgment have referred to the Act, and stated that in their opinion there had been a substantial compliance with its requirements. But instead of that the judgment of the Chief Justice did not do so; it was a case that arose very recently after the Act was passed in England. He did not think it a matter so very improbable that a judge should not recollect that a particular Act was passed unless his attention was called to it. The objection taken to the deposition in that case was merely that the examination stated that the charge was for obtaining money, not adding "unlawfully." That being so, Wilde, C. J., stated that "the judges are unanimously of opinion that the objection is not valid, and that

the deposition was properly received in evidence. The objection is not that the evidence as set forth in the examination did not sufficiently appear to relate to the charge upon which the prisoner was being tried, so as to warn and apprise her of the matter to which her cross-examination should be directed, but only that the title of that examination did not with sufficient distinctness state the charge against her." He (Monahan, C. J.) asked if the objection which was considered was this, if the question under consideration was the effect of a deviation from the Act of Parliament, would Wilde, C. J., not have referred to the Act? Well, then, to come to the case in which there was no doubt that the question arose as in the present case, the case of *The Queen v. Newton*. One of the reporters of that case was one of the prosecuting counsel in the case. There it was sought to put in evidence a deposition taken by a magistrate, a Mr. Jeffcock, which had no caption. It was attached to the depositions of other witnesses taken before a Mr. Bailey another magistrate, which depositions were preceded by a caption. Hill, J., said, "How can I admit it? This is a deposition which has no caption, taken as a separate paper; and if taken with the other depositions, it appears from the caption to which they are attached to have been taken before Mr. Bailey, the magistrate, which was not the fact. How, in this state of facts, is it proposed to make it evidence? Without the caption it is not shewn on what charge the evidence was given." He referred to this case merely for the purpose of saying that he could not come to the conclusion that Hill, J., did not decide against the admissibility of the document upon the ground which arose here. He confessed it occurred to him that if we were to suppose Wilde, C. J., recollected the Act of Parliament, it was just as likely that Hill, J. recollected the case of *The Queen v. Langbridge*. But he did not conceive that either of the cases was coercive or binding, and he thought that we should make out what was the meaning of the Act itself. He concurred with Pigot, C. B., O'Brien, J., Fitzgerald, and Deasy, B. B. He would be willing to allow his judgment to rest on the reasons given by them, but that as he was to decide the case he thought that he should state the reasons which influenced him. Now the question must turn upon the 14th section of the statute 14 & 15 Vict. c. 93. The first clause of that section was as follows:—"In every case where any person shall appear, or be brought before any justice or justices charged with any indictable crime or offence, such justice or justices, before committing such person for trial, or admitting him to bail, shall in the presence of such person, who shall be at liberty to put questions to any person produced against him, take the deposition (A. b.) on oath and in writing of those who shall know the facts of the case, and such depositions shall be read over to, and signed respectively by the witnesses who shall have been so examined, and shall also be signed by the justice or one of the justices who shall take the same; and if upon the trial of the person so accused, it shall be proved by the oath of any credible witness, that any person whose deposition shall have been so taken is dead, and that such deposition was taken in the presence or hearing of the person accused, and that he or his

counsel or attorney had an opportunity of cross-examining such witness, it shall be lawful to read such deposition as evidence at the trial, without further proof thereof, unless it shall be proved that the same was not signed by the justice purporting to have signed the same." The first question was, What was the meaning of the words "charged with any indictable crime or offence." He was of opinion that it was this, that the party must be brought before the justices, and that he must be there to answer a charge. He did not think that the party was charged within the meaning of the section till he was apprised of what it was he was called upon to answer, and he had come to that conclusion from the words of the 14th section itself, from the form A. b. in the schedule, and from the other portions of the Act. Well, then, what was the magistrate desired to do before committing this person for trial or admitting him to bail? He "shall in the presence of such person, who shall be at liberty to put questions to any witness produced against him, take the depositions (A. b.) on oath and in writing of those who shall know the facts of the case." Now, what were "the depositions (A. b.)"? He should first refer to the form A. a. The failure of justice would arise in this case from the fault of those who were employed in the preliminary stage of the proceeding: the fault here was that the Petty Sessions clerk and the magistrate had used, not the form A. b. required by the 14th section, but another, the form A. a. The form A. a. was that to be used in the absence of the accused, when no charge was made against him, except that contained in the information itself. It was as follows: "The information of A. B. of M. N. who saith on his (oath or affirmation) that "giving the cause of complaint. What was the reason, and was it for no purpose that these forms were different? One form was that used, not at the trial, but before it; the other was that used at a *quasi* trial. The evidence must be given at a thing in the nature of a trial. The party must be brought up, and have an opportunity of cross-examination, and therefore it was that the different forms were given, one to be used on one occasion, and the other on another. The section then provided for other matters; one was that "if upon the trial of the person so accused, it shall be proved by the oath of any credible witness that any person whose deposition shall be so taken, is dead; and that such deposition was taken in the presence or hearing of the person accused; and that he or his counsel or attorney had an opportunity of cross-examining such witness; it shall be lawful to read such deposition as evidence on the trial, without further proof thereof, unless it shall be proved that the same was not signed by the justice purporting to have signed the same." There was no doubt that if the justice signed the proper form, that was a certificate of the justice that everything stated in the form had been done. To corroborate the view of the necessity of the prisoner being charged, and that the fact of the charge having been made, ought to appear in the caption of the deposition; he would mention this. The Act of Parliament prescribed that before the justice committed the party for trial "whenever the examination of the witnesses on the part of the prosecution shall have been completed; the justice, or one of the justices present shall (with-

out requiring the attendance of the witnesses) read or cause to be read to the persons accused the several depositions, and then take down in writing the statement (A. c.) of such person." He was aware that that clause required that the depositions should be read over to the party accused; but let us look to the form of declaration which the prisoner was to make. It was this:—"Statement of the accused. complainant. defendant. Petty Sessions District of county of A charge having been made against C. D., by the undersigned justice that." Now the question was, when was the charge made? It appeared to him that that was a statement that the charge had been formally made before the evidence in support of the charge was given. The form went further on to state: "and the said charge having been read to the said C. D., and the witnesses for the prosecution having been severally examined in his presence." He confessed that from that he had come to the conclusion that the Legislature intended that when the party was brought before the magistrate, the charge should be read, and then the evidence taken against him. From the words of the section, and from the forms attached to the Act, it was plain that the intention of the Legislature, was that the party should be made aware of the charge before the evidence was given against him, and also, that the intention was that the charge so made should have been read to him; and he believed that in point of fact that was the general practice. He could only say that if a failure of justice occurred in any particular case the fault was with those who did not perform the duty which they were paid for doing. These were some of the reasons, in addition to those which had already been stated, for which he had come to the conclusion that the conviction should be quashed.

*Conviction quashed.*

## Court of Exchequer.

Reported by Valentine J. Coppinger, Esq. Barrister-at-Law.

[BEFORE THE FULL COURT.]

MORGAN v. GRAY.

*Taxation of costs—Of briefs—Of pleadings—Fees—Refreshers—Apportionment—Time—Deductions, how to be made—16 & 17 Vict. c. 113, s. 60.*

*On motion that it be referred back to the Taxing Master to re-consider his taxation of certain bills of costs, it appeared that after the trial of an action consisting of eight different counts, had been had at Nisi Prius, and had, after lasting for eleven days, resulted in a disagreement of the jury, it had been referred to arbitrators to adjudicate upon the several differences existing between the parties; that the arbitrators had made an award, the terms of which were construed by the Court to amount to a decision that the costs of the respective parties should be taxed as if the defendant had succeeded upon the trial,*

upon five of the counts specifically mentioned, and as if the plaintiff had succeeded upon all the other counts, and had obtained a general verdict, and that the difference between the amounts should be paid to the party entitled thereto. The Taxing Master had, upon the one hand, disallowed the plaintiff the costs of these portions of the briefs and pleadings, which were exclusively applicable to the issues upon which he had failed, and also such portion of the fees and refreshers to his counsel at the trial, as he considered would not have been incurred if the counts upon which the plaintiff failed had never been introduced into the writ of summons and plaint; and upon the other hand, had allowed the defendant the costs of the entire of those portions of his briefs and pleadings as were exclusively applicable to the issues upon which he had succeeded, as well as all that portion of the fees and refreshers to his counsel, which he considered would not have been incurred, had the issues which were found in his favor never been introduced into the writ of summons and plaint. Held 1—that where on a trial by jury, certain issues are found for the plaintiff, and certain issues for the defendant, and a general verdict is given for the plaintiff, the general rule, since the passing of 16 & 17 Vict. s. 113, c. 60, as well as before that statute, has been, that the plaintiff should be declared entitled to all the costs which were not ascertained to be exclusively applicable to the issues upon which he had failed, while the defendant is only entitled to the costs ascertained to be exclusively applicable to the issues upon which he had succeeded; but in no such case can the defendant be entitled to an apportionment of any costs, unless the taxing officer has, within his reach, reasonable and satisfactory means of ascertaining the costs exclusively applicable to the portion of the case upon which he has succeeded.

2. That in such a case the taxing officer has a reasonable and satisfactory means of ascertaining the portion of the costs of the briefs, the pleadings, and the fees to counsel on the trial, as well on the side of the plaintiff as of the defendant, which are exclusively applicable to the issues upon which the parties respectively succeeded; but that he has no such means of apportioning the amount of the refreshers, payable either to plaintiff's or defendant's counsel at the trial, which are exclusively applicable to the issues upon which each party succeeded, and there can therefore be no apportionment thereof.

The amount of the plaintiff's fees to counsel on the trial that should be disallowed when some of the issues are found against him, is found by subtracting the fees, that would have been payable thereon, if the writ of summons and plaint had not contained the counts on which he failed, from the actual fees payable thereon.

The amount of the defendant's fees to counsel, on the trial that should be allowed to him when he has succeeded on some of the counts and failed on others and had the general verdict against him, is to be ascertained by deducting the fees that would have been payable thereon, had the summons and plaint originally contained only those counts on

which the defendant had failed, from the sum that would have been payable, supposing him to have succeeded on all the counts which the summons and plaint actually did contain.

THIS was a motion to review the taxation of both the plaintiff's and the defendant's costs of an action for libel, the trial of which, after having lasted for nine days, had resulted in a disagreement of the jury; and having subsequently been referred to arbitration, had been determined by an award allowing to the plaintiff and defendant respectively, as against one another, certain portions of the costs of the trial therein described in general terms, but the respective amounts of which were to be ascertained by the taxing master in the usual course of taxation. The terms of the award were as follows:—

Whereas a consent was executed by plaintiff and defendant in this action, bearing date the 11th day of June, 1863, whereby it was referred to the undersigned Richard Armstrong and Edward Sullivan, two of her Majesty's serjeants-at-law to settle and determine the subject-matter of the suit between the said parties in such way as they should think proper, and to make any award which to them should seem fit, independent of any finding on the issues or any of them, or without any finding on said issues or any of them, with liberty in case of any difference between them to call in any member of the Irish bar, who should have the like power and authority as was thereby conferred on said arbitrators. And it was by said consent provided that the decision of said arbitrators or umpire, or any two of them, should be final and conclusive, and that they should have absolute powers to determine every question and matter existing, or which should arise in the case in order to its full and final adjustment; and that it should not be incumbent on them to hear or go into evidence; but that they should be at liberty in determining the premises to act on the evidence which had been given on the trial. And it was thereby further provided, that said consent should be made an order of said Court. And whereas said consent was accordingly made an order of said Court, on the 22nd day of June, 1863. And whereas the said arbitrators being unable to agree, did in pursuance of the power so reserved to them as aforesaid, appoint Matthew O'Donnell, Esq. one of her Majesty's counsel as umpire. Now we the said Matthew O'Donnell, Edward Sullivan, and Richard Armstrong, having examined and heard, and duly considered and weighed, as well the evidence given at the trial of this action, as the observations made thereon before us by counsel for plaintiff and defendant, do in pursuance of said reference make and publish this our award in writing, of and concerning the premises, that is to say, we do award that the costs of the issues arising upon the first, second, third, fourth, and seventh counts of the summons and plaint be allowed when taxed to defendant, and that the costs of all the issues arising on the fifth, sixth, and eighth counts of said summons and plaint, and of the cause generally, save as aforesaid, to be taxed as upon a verdict for the plaintiff on said fifth, sixth, and eighth counts, and the balance to be paid by the defendant to the plaintiff. And we further award, that each party shall abide his own

costs of the reference and of the demurrer, and that upon payment of said balance by defendant to plaintiff a *stet processus* shall be entered.

MATTHEW O'DONNELL.  
EDWARD SULLIVAN.  
RICHARD ARMSTRONG.

It thus appears, that without any special findings upon the issues submitted to them, it was provided that the differences between the parties should be finally adjusted by the defendant's paying to the plaintiff, the excess of the costs to which he would have been entitled over that to which the defendant would have been entitled, if the plaintiff had, at the trial, succeeded upon the fifth, seventh, and eighth counts of the writ of summons and plaint, and had obtained a general verdict, while the defendant had succeeded upon the first, second, third, fourth, and seventh counts thereof. In pursuance of said award, the matter had been referred to the Taxing Master. The plaintiff's costs were furnished to the amount of £426 2s. 10d., of which the Master struck off items to the amount of £311, making the sum payable to the plaintiff £115 2s. 10d. The defendant's costs were furnished to the amount of £515 13s. 10d., of which the master struck off items to the amount of £74 9s. 2d., making the sum payable to the defendant, £441 4s. 8d. The result would be, that the costs payable to the defendant exceeded those payable to the plaintiff, by the sum of £326 1s. 10d., and that there would be no balance of monies payable by the defendant to the plaintiff, as contemplated by the award. In making those deductions from the plaintiff's costs, the master, who had a verbatim report of the trial before him, appears to have calculated from the materials within his reach, that the result of the insertion in the summons and plaint of the counts on which the plaintiff was to be considered as having failed, had the effect of putting the defendant to that additional expense; and he had therefore disallowed the plaintiff the costs of considerable portions of his briefs, of his pleadings, of his fees to counsel at the trial, as well as of his refreshers to his counsel for seven out of the nine days which the trial had lasted, while he had allowed the defendant the greater portions of his costs of briefs, pleadings, and fees to counsel on the trial, and allowed him the refreshers to his counsel for seven days of the trial.

*Macdonogh, Q.C.*—We are entitled to the "general costs of the cause. See *Hibbert v. Fox* (5 Taunt. Rep. 660); *Jones v. Cuthbert* (Ex. Ch. Ver. & Scr. 505), referring to *Miles v. Jacob* (Hob. 6); *Blain v. Wilson* (3 Ir. C. L. R. 134); 2 *Ferguson's Practice*, 1191, "What the Statute of Gloucester gave the plaintiff, in addition to his damages, are the costs of his writ, that is, all legal costs of the suit which he is therefore entitled to, though he recover but a portion of his demand; and it is the Court, and not the jury, that is directed by the statute to award the costs;" 2 *Tidd's Practice*, last edit. 973-4, this was prior to *English Rules of Hilary Term*, 1834; 2 *Archbold*, 1376, (8th edit. 1847): the Rules of Will. 4 were in being at that time. [*Pigot, C.B.*—My impression is that the Rules made under the statute that bears my name did not make any alteration in the practice existing in this Court before the passing of that Act:

see *Ferguson's Practice*, vol. 2, p. 1209. *Fitzgerald, B.*—The defendant must satisfy the Court that some effect has been given to the provision of the award that the plaintiff was to have the general costs of the cause. I am aware of no rules by which a distribution of that time can subsequently be made into that occupied by one issue and that occupied by another; you cannot, therefore, approach the subject of deduction until you have been furnished with a principle upon which to act in making that deduction, and this I challenge the defendant's counsel to do.]

*Sidney, Q.C.* was about to address the Court on behalf of the defendant, when the Court intimated a wish that the case should stand over until the next term, for the purpose of obtaining the report of the Master, and thus ascertaining the principles on which he had acted. The case accordingly stood over.

May 30.—*Sidney, Q.C.* having read the Master's report, as follows;—

To the Lord Chief Baron and the Barons of the Court of Exchequer.

MY LORDS—In obedience to the direction of your Lordship's that I should "report to the Court the principle which I applied in the taxation of the costs in this cause and the reasons upon which I founded my decision as well as any course of practice in the taxing and any precedent or authority I may have acted upon," I beg leave to submit the following as my report of the matters so referred to me. In the first place a principle of taxation of costs settled by a long course of authority, is that the respective rights of the parties to costs must depend entirely on and be co-extensive with the success obtained by them respectively as the result of the litigation as appears on the record when finally made up; and the rule has been peremptorily laid down that the taxing officer has no authority to admit any other ingredient into his consideration in determining the rights of parties to costs. In the present case the extent of the respective rights of the plaintiff and defendant to costs depend on the award of the arbitrators in this cause (standing in place of a judgment of this Court), and on the construction that may be put on that award. In construing and carrying out that award, I have allowed to the plaintiff the costs of the issues, founded on the 5th 6th and 8th counts of the summons and plaint, as if he had obtained a verdict thereon, including (as a matter of right consequent thereon), the general costs in this cause, and to the defendant the costs of the issues, founded on the 1st 2nd 3rd 4th and 7th counts of the summons and plaint, excluding every portion of the general costs of the cause, and confining the defendant's costs exclusively to those incurred in respect of the issues so last specified. On perusal of the record, I find that the several counts or paragraphs of the summons and plaint, deal with separate and distinct causes of action, that to these counts separate and distinct defences are made, and that the parties join in distinct issues on the pleadings so framed, and that the arbitrators in their award properly recognize and act upon that frame of the record, and carries out that distinction. I then separated the portions of the costs of so much of the pleadings, preparation of



issues, statements of case, briefs, proofs, and evidence, and of the time consumed by the trial of the issues so respectively allotted to each party, giving to the plaintiff in addition thereto, the general costs of the cause, and depriving the defendant of every item or portion of item, that could be considered as costs in the cause. The terms "costs in the cause," and "costs of issue" are known to the profession, and through a very long course of practice and authority, both in England and Ireland, are well and clearly defined as classes of costs, and any confusion of this distinction would lead to much injustice. The costs of the cause for the plaintiff, are all the costs necessarily incurred by him in obtaining the extent of success which he has achieved, and as if the portion of the summons and plaint on which he has succeeded, stood alone on the record, including in such costs all term fees, attendances on counsel, marking judgment, and completing the record, being in the nature of "costs in the cause." The costs of issues for the defendant are the "extra costs," the plaintiff has compelled the defendant, to incur by including in his summons and plaint, a cause of action, which the result shews he could not sustain, and should not have set up—but excluding all "costs in the cause." On reperusal of the two bills of costs in this cause, it seems to me, that I have given to the plaintiff every item of costs in the cause, and also of costs of pleadings, issues, proofs, case, and so much of the time occupied by the trial, and making his award a rule of court, and taxing his costs thereunder. And that I allowed the defendant, excluding such portion of the costs of the case, for proofs of the briefs, and of the time occupied on the trial of the issues, founded on the 1st, 2nd, 3rd, 4th, and 7th, counts, excluding all items and portions of items as could be held in any way to be costs in the cause. For the purpose of dividing the time of the trial between the parties, I carefully read the report of the trial, and the *Nisi Prius* briefs of both sides, and heard the parties and their counsel. The duty of dividing the time occupied by the trial is one of old standing, and now of very constant occurrence, and the respective parties can be approximated very closely, and the practice of the office in cases of divided finding is to lean liberally in measurement and in questions of doubt as to fact to the plaintiff who has the verdict, which I endeavoured to do in this case. As to the briefs in this case, I think it right to add, that when they were under examination, an application was made by the plaintiff that the defendant's brief should be submitted to his attorney, and that I should make a rule or order to that effect; I declined to do so. Very weighty reasons will occur to the minds of the Court as to the inexpediency, or even impossibility of adopting such a course of practice, even where all parties desire mutually to examine and agree as to the briefs, I consider it my duty very respectfully to examine and measure them both as to the pertinence of the matters of which they are composed, and as to their length, and that I have no authority to transfer the adjudication of a matter so materially affecting the interests of the suitors to any other authority. As to the fees to counsel, I have according to practice reduced them to such a scale as I think would according to the general average of the

amount of money requisite for the trial of each set of issues be fair and full, as applied to the respective success of the parties. The taxing officers both in England and Ireland, are greatly averse to interfere with counsels' fees, considering it a portion of the money fairly expended by the attorney; and they are never reduced with reference to each individual counsel, but so as to keep the amount paid to each bar within the scale ordinarily allotted to the trial according to the nature of the case, and merely avoiding anything in the nature of special fees. In my opinion, the inequality appearing in the results of the taxation as to the amount of costs, arises not from any confusion as to the classes of costs to be allocated to each party, but from the very great inequality of the expenses attending the pleadings, statements, proofs, and trial of the respective sets of issues, the costs whereof are allotted by the award of the arbitrators. It was pressed upon me in argument that the words used towards the close of the award "that the balance should be paid by the defendant to the plaintiff," should govern the construction of the award to extend the costs of the plaintiff. It seemed to me that the arbitrators having ascertained and fixed the right of each party, any miscalculation as to the effects which their finding might have over the pecuniary interest of the parties, could not alter the rights so ascertained.

And it further appeared to me from what was stated on the discussion, that the arbitrators used those words as matter of form enabling the plaintiff to recover his costs more easily if there should be a balance in his favour, all which I respectfully submit as my report.

HENRY COLLIER.

The case of *Jones v. Cuthbert* (1 Ver. & Scr. R. 505) is no authority in the present case, for there the defendant got no costs at all. [*Fitzgerald, B.*—But the plaintiff there lost some of his costs.] At that time, if the plaintiff succeeded substantially upon the whole, he was entitled to his full costs, although he had failed on some of the counts. General Rules, Easter Term, 1832, Rule 40, altered the law on this subject—see Moore and Lowry's Rules, p. 277. In 1841, when the case of *Blain v. Wilson* (3 Ir. L. R. 134) was decided, the taxing officer could therefore only reduce from the plaintiff's costs, the costs of those pleas on which he had failed. The Court had then no power to make the plaintiff pay the defendant the costs of defending those counts on which he had failed. Then came the Common Law Procedure Act (Ireland) 1853, s. 60. For meaning of "general costs of the cause," see Gray's Law of Costs, pp. 36, 37. The defendant is entitled to the costs of the issues found for him, including that of a portion of the briefs and fees to counsel, as well as those of the mere pleadings, *Hazelwood v. Buck* (9 M. and W. page 1); this case was subsequent to the Rules of Hilary Term, 4th Wm. 4. The number of counsel to be allowed is peculiarly within the discretion of the Master—*Lockstone v. The London, Brighton, and South Coast Railway Company* (12 C.B., N.S., 243.) In *Mann v. The Great Southern and Western Railway*, an unreported case decided in this Court a few years since, upon motion that it should be referred back to Master Colles to reconsider his taxation, this Court made the order, that

certain costs arising from the extra time occupied by the case should be allowed, the Master having previously disallowed them. I have here the original of the costs as originally taxed, and also the amended costs. Another portion of the same case is reported 4 Ir. Jur. N.S. 93, which contains the pleadings. Whether particular costs, incurred in relation to the trial of a cause, are referable to one issue or to another, is a question of fact for the decision of the taxing officer, and being so, cannot be called in question by this Court—*Smith v. Webber* (4 Nev. & M. 381.) [*Pigot, C.B.*—In the case of *Mann v. Great Southern Railway Company* we have no means of ascertaining the grounds of the alterations made, unless we can see the Master's report.]

*Dowse, Q.C.* on same side.—If the Master be right in principle, he cannot be interfered with in a mere matter of detail. [*Pigot, C.B.*—That is true.] The plaintiff has not been disallowed a single item that falls under the head of "costs in the cause generally." What are "costs in the cause generally?" They are the costs which he would have got if the counts upon which he failed had not been inserted in the writ of summons and plaint. Morgan would have got £80 less, if he had not been entitled to "costs in the cause generally." [*Fitzgerald, B.*—The costs of the cause generally seem to me to be the costs of the whole case; it is from this, that the deductions are to be made; and there is a distinction between the deductions which the plaintiff and defendant respectively are entitled to make, inasmuch as the defendant is to be allowed those only which are exclusively applicable to the issues upon which he has succeeded.] As to the different classes of costs to be allowed to defendant, see *Bird v. Higginson* (5 Ad. & E. 93); *Reynolds v. Harris* (3 C. B. N.S., 267); *Milner v. Graham* (2 Dowl. P. C., 422); *Fraherney v. Gardner* (8 E. & B. 161); *Hazlewood v. Buck* (9 M. & W., 1.) Costs of issues include costs of the trial of them.—*Eyre v. Thorp* (6 Dowl. P. C., 768. What are costs of the cause, a question for the Master (29 L. J., Exch. 293. [*Fitzgerald, B.*—The real question is, has the Master made an apportionment where there is no principle of apportionment applicable.]

*Byrne* in reply.—The case of *Pearson v. Lee* (2 B. & P., 330), taken in conjunction with *Blain v. Wilson* (3 Ir. L. R., 134), gives weight to the argument founded on the absence of authority, on the subject of costs of counsels' briefs; observe particularly the observations of Chambre, J. The observation of Mr. Gray in his Book on Costs is not founded on authority; and it is to be borne in mind that the book was published very soon after the passing of the English Common Law Procedure Act, and before the subject could be much mooted; observe however the later text books. 1 Chitty's Archbold, 11th ed. 501; Lash's practice (1856) 691; Marshall on Costs, 191, 292.

*Cur. adv. vult.*

On the 1st July, 1865, Fitzgerald, B. delivered the judgment of the Court.

FITZGERALD, B.—This is an action for libel. The summons and plaint contained eight counts, each of which alleged a distinct libel, and to each count there

were several pleadings by way of defence, to one of which the plaintiff demurred. Though the libels alleged in each count were distinct publications, yet those mentioned in the first, second, third, fourth, and seventh counts were conversant with the same subject-matter, viz. the conduct of the plaintiff, who is one of the law agents of the corporation of Dublin in relation to a Parliamentary measure for supplying Dublin with water, which was promoted by the Corporation. The libel alleged in the fifth count was conversant with the conduct of the plaintiff in relation to the appointment of a medical officer to one of the Dublin prisons, and the distinct libels alleged in the sixth and eighth counts were conversant with the conduct of the plaintiff with relation to a bill before Parliament for the creation of a new market in Dublin, which was opposed by the Corporation. The action was tried in the Court of Exchequer in the month of February, 1863. The trial occupied nine days, and the jury were discharged without having come to any agreement. On the 11th of June, 1863, the parties entered into an agreement, whereby it was referred to two gentlemen of eminence at the Bar "to settle and determine the subject-matter of the suit between the said parties in such way as they should think proper, and to make any award which to them should seem fit, independent of any findings on the issues or any of them, or without any finding on the said issues, or any of them, with liberty, in case of any difference between them, to call in any member of the Irish Bar who should have the like power and authority as was thereby conferred on the said arbitrators." It was further provided that "the decision of the said arbitrators or umpire, or any two of them, should be final and conclusive, and that they should have absolute power to determine every question and matter existing, or which should arise in the case in order to its full and final adjustment," &c. The arbitrators having called in an umpire, a final award was made on the 11th of December, 1864, "that the costs of the issues arising on the first, second, third, fourth, and seventh counts of the summons and plaint be allowed, when taxed, to the defendant, and that the cost of all the issues arising on the fifth, sixth, and eighth counts of said summons and plaint, and of the cause generally, save as aforesaid, be taxed as upon a verdict for the plaintiff, on said fifth, sixth, and eighth counts, and the balance be paid by the defendant to the plaintiff." It was further awarded that each party should abide his own cost of the reference and of the demurrer, and that upon payment of the said balance by the defendant to the plaintiff, a '*set processus*' should be entered." The parties having proceeded to tax their costs under this award, the plaintiff's costs were furnished to the amount of £426 2s. 10d. of which the Master struck off items to the amount of £311, making the sum payable to the plaintiff £115 2s. 10d. The defendant's costs were furnished to the amount of £516 18s. 10d., of which the Master struck off items to the amount of £74 9s. 2d., making the sum payable to the defendant £441 4s. 8d. The result would be that the cost payable to the defendant exceeded those payable to the plaintiff by the sum of £326 1s. 10d., and there would be no balance of monies payable by

the defendant to the plaintiff, as appears to have been contemplated by the award. I am, however, of opinion that if the Master has proceeded upon correct principles in making the taxation directed by the award, the fact that the result of that proceeding is different from that contemplated cannot in any way affect the taxation. On the twenty-eighth of April, 1865, the defendant served notice of a motion that the plaintiff should, within the time fixed by the Court, pay to the defendant the said sum of £326 1s. 10d. On the 1st of May, 1865, the plaintiff served notice of a cross-motion that it should be referred back to the taxing master to re-consider his taxation, and that the same might be reviewed, and that the said Master's rulings might be altered by allowing to the plaintiff the several items in his bill of costs, which the said Master disallowed, and which are particularised in the first schedule to the notice, and by disallowing to the defendant the several items in his bill of costs, mentioned and set forth in the second schedule to the notice, and that the Taxing Master be directed to apply to the taxation the principle that the defendant should only be allowed such costs as were exclusively applicable to the issues on which he succeeded. The question upon the cross motion has been argued before us. The cost mentioned in the two schedules to the plaintiff's notice of motion, so far as they involve any principle of taxation, may be reduced to four heads—first, cost of briefs; second, cost of pleadings; third, fees payable to counsel with the briefs for trial; fourth, the refreshers payable to counsel during the trial. Under each of these heads, the Master has, having regard to the issues upon which the parties respectively succeeded, made an apportionment of the cost which each party would have been properly entitled to, if he had succeeded *in toto*, allowing so much as he considered applicable to the issues upon which such parties failed. If the Master be right in making the apportionment, and if also in making that apportionment he has proceeded upon the right principle, the Court cannot interfere with the amounts allowed or disallowed to each party. I think there can be no doubt that, by the award, the arbitrator and umpire intended, as they were empowered, to do without any findings on the issues arising on the first, second, third, fourth, and seventh counts, to determine that for the purpose of taxation of cost the defendant should be dealt with as if he had succeeded at the trial on all the issues arising on these counts, and that the plaintiff should be dealt with as if he had succeeded at the trial on all the issues arising on the other counts, and that the plaintiff should be entitled to the general costs of the action. The rights, therefore, of the plaintiff and defendant respectively seem to me to be identically what they would have been if the plaintiff had actually succeeded on the fifth, sixth, and eighth counts, and as if the defendant had entirely succeeded on the other counts at the trial by jury. If in the case of an actual trial, and of actual findings by a jury, there be any distinction applicable to the taxation of the costs between those cases in which all the several counts are for distinct causes of action, and those in which the counts are only different forms of stating the same cause of action, the provision in the award that the plaintiff

should have the costs of the cause generally would seem to exclude the application of any such distinction to the case before us. I am far from meaning to intimate that any such distinction does exist in cases in which the Court has not exercised its power under the 54th section of the Common Law Procedure Act, 1853, of permitting different causes of action to be tried in the same record. It seems to me, therefore, that the case is to be treated as an ordinary case of trial by jury, in which the plaintiff succeeds upon some issues, and fails on others. The present law applicable to this case is to be found in the 60th section of the Common Law Procedure Act of 1853, which enacts "that the costs of every issue, whether of fact or law, shall follow the finding or judgment upon such issue, and be adjudged to the successful party, whatever may be the result of the other issues, and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs, if the defendant shall, proceed with due diligence to tax the same; and the costs of all issues found for the plaintiff, shall be deducted from the defendant's costs if the plaintiff shall proceed with due diligence to tax the same; and if said costs, so to be deducted, shall not, in either case, be taxed in time for the purpose of deducting the same from the costs of the opposite party, they shall be separately recoverable by execution when taxed and ascertained." In truth, however, the statute made no substantial alteration in the law as regulated by former statutes, and the rules and practice of the Courts, and in applying this power of the statute, regard is to be had to antecedent decisions. I think it may be treated as being the settled practice, both before and since the Act, that the party who is entitled to costs of the cause is entitled to the costs of the issues found for him, though such costs were applicable to the issues found against him, while the other party is entitled only to the costs applicable exclusively to the issues on which he has succeeded. Now, with respect to the first two classes of items, which are the subject of the plaintiff's objection to the taxation—those for briefs and pleadings, it is manifest that there is no difficulty in ascertaining how much of them exclusively relate to the issues upon which the parties have respectively succeeded. It is not disputed that the Master has, in his taxation of those branches of the costs, proceeded on the principle of ascertaining the portions of briefs and pleadings so applicable, and no case has been found in which an apportionment of the costs of briefs and pleadings has not been made upon this principle. I think therefore that the objection with reference to those two classes fails. The third class of items objected to consists of the fees payable to counsel with the briefs for the trial. Of those the master has made an apportionment, disallowing a part of those claimed by the plaintiff on the ground that such part was exclusively applicable to the issues on which the plaintiff failed; and he has allowed a part of those claimed by the defendant, on the ground that such part is *exclusively* applicable to the issue on which the defendant succeeded. The objection is—that there is no principle or general rule according to which any such apportionment can be correctly made. The objection does not appear to me well founded. The real question is—whether the

taxing master can, on reasonable grounds, ascertain by how much the fees on either side were increased by reason of what was exclusively applicable to the issues upon which either party failed. If this can be done, I am very clearly of opinion that it *ought* to be done; and without meaning at all to lay down that the master is to be called upon in every case to enter into a minute mathematical calculation, but being, on the contrary, quite prepared to confide in the master's experience applied on principle to the circumstances of each particular case, I think that I can point out the manner in which, without going one step beyond his ordinary duties, an apportionment of the fees in question can be made. It seems to me quite within the Master's ordinary duties to ascertain, in the first instance, what the proper amount of fees payable to the plaintiff's counsel would be, supposing him to have succeeded on all the issues, and in the next place to ascertain what the proper fees would have been, supposing that the action had been brought on those counts only on which the plaintiff had failed, and the difference between those two amounts will represent the fees exclusively applicable to the issues on which the defendant has succeeded. As I understand the master's report, this is substantially the rule which he has adopted, though, I dare say, the sums arrived at are not the result of working out a sum in arithmetic, but of experience accurately applied. I think therefore that the objection to the third class of items also fails. There remains the fourth class of items—the refreshers of counsel during the trial; and I confess there appears to me to be no reasonable or satisfactory mode of approaching the subject of those fees in such a manner as to ascertain how much was or was not *exclusively* applicable to the issues on which the parties respectively succeeded or failed. In point of fact the master had allowed refreshers for seven days of the trial to the defendant's counsel, and for two days only to the plaintiff's counsel; but I am unable to discover anything like a principle upon which this has been done; and it is not pretended that in point of fact any one day of the trial was exclusively devoted to the particular issue or issues. What the Master appears to have done is from the materials which were before him, including a printed report of the trial, to have formed the best calculation he could of the time which the trial would probably have taken had it been tried on those issues only on which the plaintiff has succeeded and to have considered the rest of the time which it *did* occupy as applicable exclusively to the issues on which the defendant succeeded. In the case of the fees to *defendant's* counsel, the principle is not perhaps so direct in its application; however, it seems to me equally intelligible and reasonable that the proper fees payable to defendant's counsel, supposing that the defendant had succeeded on all the issues, may be ascertained, and in the same manner the proper fees payable, supposing the action to have been brought only on the counts on which the defendant failed, and the difference between those two amounts will represent the fees *exclusively* applicable to the issues on which the defendant succeeded. I cannot persuade myself that this is a reasonable or satisfactory mode of proceeding, or at all consistent with the general rule, which gives the plaintiff the costs applicable to the

issues on which he fails, if applicable also to those on which he succeeds, and deprives the defendant of the costs applicable to the issues on which he succeeds, if also applicable to the issues on which he fails. I think therefore that the refreshers for all the days ought to be allowed on the costs of the plaintiff, because applicable to the issues on which he has succeeded, though also applicable to those on which he has failed; and that all refreshers in the case of the defendant ought to be disallowed, whether applicable to the issues on which he has failed, or to those on which he has succeeded. I presume that in form the taxation must be set right in this respect by the master; but it seems to me that the reference will be merely of a formal character, as the bills of costs afford means almost sufficient to enable the Court itself to perform the operation. With reference to what was said in the course of the argument as to the practice in England with regard to the apportionment of the costs of a trial according to the time which such trial occupied, I may add, that although enquiry has been made by the Chief Baron, we have not been able to learn that such an apportionment has in fact been made in the taxation of the costs of a trial at *nisi prius* in any case that has yet occurred, though we believe such an apportionment has been made by some of the taxing officers in reference to the attendance of counsel and attorneys in taxing the costs of different issues after a reference, when certain days had been ascertained to have been exclusively devoted to the trial of those issues which had been found for the party not entitled to the general costs of the cause.

### House of Lords.\*

[Reported by James Paterson, Esq., of the Middle Temple,  
Barriester-at-law.]

SPREAD v. MORGAN.—June 12.

*Will—Election—Continuing in possession of both estates—Intention—Decree to enforce trusts—Admission of ownership.*

*Though knowledge of the law is imputed to every person, yet knowledge of the rule of equity as to the doctrine of election is not. Election is a question of intention, and is generally to be inferred only from a series of unequivocal acts.*

*Thus, where S. continued in the possession and enjoyment of settled estates till his death, but he had mortgaged the lands to H. in fee-simple, these facts did not prove an intention to elect under the settlement; nor, on the other hand, did the facts that S. had disentailed the estates and mortgaged them afford proof of an intention to take against the settlement.*

*If a party, who is bound to elect between two estates, continues, without being required to elect, in possession of both, such possession and enjoyment, inasmuch as it affords no proof of preference, cannot*

\* From the *Law Times*, by permission.

*be held to be an election to take one and reject the other.*

*N., the devise in trust under the will of S., who had been bound to elect between two estates, and continued in possession of both till his death, instituted a suit to ascertain which of the estates of S. were charged with debts and legacies, and A. consented to a decree:*

*Held (reversing the order of the Irish Court of Chancery), that A.'s consent to such a decree did not impliedly admit that S. had power to devise all the estates which his will purported to devise, but that it merely admitted the validity of the will and of the trust so far as there were means of carrying it into execution.*

*Semble, a party having an equity to compel an election, does not forfeit that equity by delay in enforcing it: (per Lord Chelmsford.)*

THIS was an appeal from a decree of the Lords Justices of Appeal in Ireland.

John Spread, being seised in fee of the lands of Ballynoran and Springfield, by will, dated 16th Jan. 1745, devised the same to his son, William Spread the elder (who was great-grandfather of the present appellant) for life, with remainder to the first and other sons successively in tail male. Under that will William Spread the elder went into possession, and, being seised in fee of the lands of Ballycannon, Kilbeg, and others, he by indenture of settlement, dated 27th April, 1763, executed upon his marriage, conveyed the same lands to the use of himself for life, with remainder after his death to the use of trustees for a term of 300 years, upon trust to raise a sum of £1,000 for younger children, and subject thereto to the use of his first and other sons successively in tail male.

Richard Spread was the eldest son of the marriage, and on the death of his father went into possession of the lands comprised in the settlement of 1763 as tenant in tail, and also went into possession of the lands of Ballynoran and Springfield as tenant in tail under the will of John Spread. In 1793 Richard Spread suffered a recovery of the lands of Ballycannon, Kilbeg, and others, thereby converting his estate tail into a fee-simple; but he never suffered a recovery of the lands of Ballynoran and Springfield.

On Nov. 26, 1794, Richard Spread, after the birth of his eldest son, William Spread, jun., executed a post-nuptial settlement reciting that he was seised in fee-simple of the lands of Ballynoran and Springfield, and also of Ballycannon, Kilbeg, and others, and purported to convey all the said lands to the use of himself for life, with remainder to the use of John Westrop and Henry Peard for a term of 500 years, and subject thereto to the use of his son William Spread, jun., for life, with remainder to the use of the first and other sons of the said William Spread, successively in tail male, with other remainders, with power to the said Richard Spread to charge the lands with the sum of £1,000. In pursuance of this power Richard Spread raised the sum of £1,000 by mortgage dated 30th April, 1818.

Richard Spread had, nine children, viz., William Spread, jun., his eldest son; a second son Richard Spread, who died without issue on 2nd May, 1823; a third son Palmes Spread, who died without issue in 1844; a fourth son Thomas Spread, the father of the appellant William Spread. By a deed of 1819 Richard Spread granted to his eldest son William Spread, the elder, annuities which he charged on the lands of Ballycannon, and by lease of 1824, he demised to the said William Spread the lands of Ballynoran for the life of Richard Spread, at a rent of £300. Richard Spread never suffered a recovery of the lands of Ballynoran and Springfield, and died in 1831.

William Spread, jun., thereupon entered into possession of the lands of Ballynoran and Springfield.

The younger children filed a bill in Chancery, praying for a sale of the premises for payment of charges in their favour, and the bill charged that Richard Spread was seised in fee-simple of all the lands, and William Spread, in his answer, admitted that his father had died seised in fee-simple. The trustees of the younger children sued out elegits on the foot of the judgments obtained, and continued in possession of Ballynoran and other lands till 1839. Ultimately a decree was made in the suit for a sale of the premises.

In 1838 William Spread, jun., caused a case for opinion to be laid before counsel as to his title to the lands of Ballynoran and Springfield, and on the 2nd Jan. 1839 he executed a disentailing deed of Ballynoran and Springfield. In 1845 he mortgaged those lands to Heney in fee-simple. He died in 1849, and the appellant was his heir-at-law. William Spread, jun., also devised his lands on trust to pay certain charges.

A suit of *Neuve v. Spread* was commenced in 1850, for the purpose of having the trusts of this will carried out, and of declaring on what estates of the testator certain legacies and annuities were charged.

The appellant, in August, 1858, executed a disentailing deed of the lands of Ballynoran and Springfield, and in Sept. 1858 filed his petition in this cause, praying the Court to declare that William Spread, jun., had in his lifetime, by his acts and conduct, elected to confirm the indenture of settlement of 26th Nov. 1794, and to take the lands of Ballynoran and Springfield under the same settlement, and that the persons who represented his estate were precluded from refusing to give effect to such settlement, and that accordingly the said lands of Ballynoran and Springfield were bound by and subject in equity to the trusts of the same indenture, and that the appellant, as being the only son of Thomas Spread, the fourth son of Richard Spread, sen., might be declared to be entitled in equity to the said lands for an estate in fee-simple, and in case the Court should be of opinion that the said W. Spread, jun., had not in his lifetime elected whether he would take under or against the settlement of 26th November, 1794, and that it was still open to the respondents to make such election, then that the said respondents should be directed to make such election. The Lord Chancellor of Ireland, by his decree, declared that the late W. Spread, jun., had made his

election in his lifetime to confirm the settlement of 26th Nov. 1794.

The respondent appealed to the Court of Appeal in Chancery in Ireland, when the decree was reversed without prejudice to the appellant to take proceedings to vary or alter the decree in *Neuve v. Spread*. The present appeal was then brought to the House of Lords against the latter decree.

*The Attorney-General (Palmer), Solicitor-General of Ireland, and Macmahon*, for the appellant contended that on the death of Richard Spread in 1831 a case of election arose against William Spread the younger to accept the life-estate granted to him by the settlement of 26th Nov. 1796. That he knew, or must be assumed in a court of equity to have known, that he was bound to elect. From 1831 to 1849 he enjoyed the interest for life given by the settlement, and asserted his claim as such tenant for life by mortgaging his life-estate in Ballycannon and Kilbeg, and other acts. Even if there had been no concluded election, his representatives are now bound to elect. The decree in *Neuve v. Spread* was the common decree to account and to carry the trusts of the will of William Spread the younger into execution, and was not inconsistent with the decretal order of the Lord Chancellor:—*Buttrick v. Broadhurst*, (1 Ves. jun. 71); *Wake v. Wake*, (1 Ves. jun. 335) *Giddings v. Giddings*, (3 Russ. 241); *Worthington v. Wiginton* (20 Beav. 67); *Briscoe v. Briscoe* (1 J. & L. 334); *Tibbits v. Tibbits* (19 Ves. 662); *Greenwood v. Penny* (12 Beav. 403); *Duke of Leeds v. Amherst* (14 Sim. 357); *Green v. Green* (19 Ves. 665).

Sir H. Cairns, Q.C., and Chatterton, Q.C. for the respondent.

Rolt, Q.C., and Andrews, Q.C., for other respondents.

Cases referred to:—*Dillon v. Parker* (1 Swanst. 359; Jac. 505; 1 Cl. & F. 318); *Edwards v. Morgan* (McCl. 541); *Rathbone v. Lord Aldborough* (Hayes, 216); *Padbury v. Clarke* (2 Mac. & G. 298); *Brice v. Brice* (2 Moll. 21).

THE LORD CHANCELLOR (Westbury).—My Lords, this is an appeal from an order of the Lords Justices of Appeal in Ireland, reversing the decree of Lord Chancellor Napier, made in the suit instituted by the appellant. By that decree dated the 7th Nov. 1859, it was declared that William Spread did in his lifetime elect to confirm the settlement of 1794, and to take the lands of Ballynoran and Springfield under that settlement. This was reversed by the Lords Justices of Appeal, on the ground solely of a prior decree in a cause of *Neuve v. Spread*, in which the appellant was a defendant, and by which decree the Lords Justices considered that the appellant was precluded from raising a case of election against William Spread and those claiming under him. The facts are of a complicated nature, and some short statement of them is necessary to render an opinion intelligible. In the year 1794 a settlement was made by Richard Spread, the father of William Spread. It proceeded on a recital, that Richard Spread was then seised in fee of the lands of Ballynoran and Springfield, in the County of Cork, and also of several other estates in the same county, and it conveyed all these lands to the use of Richard Spread for life, with remainder,

subject to an annuity for his widow, to trustees for a term of years upon trust to raise £3,000 for younger children, with remainder to W. Spread for life, with remainder to his first and other sons successively in tail male, with remainder to his daughters as tenants in common in tail, with remainder to the first and other sons of Richard Spread by Susanah his wife successively in tail, with remainders over. The whole of these lands, exclusive of Ballynoran and Springfield, were subject to judgment-debts and some prior incumbrances. Richard Spread, the settlor, died in 1831. On his death W. Spread entered into possession of all the estates comprised in the settlement. In 1832 a suit was instituted for the purpose of raising the portions for younger children, and in 1836 a decree was made for the sale of a portion of the settled estates. It was then discovered that Richard Spread, the settlor, was at the time of the settlement tenant in tail male of the lands of Ballynoran and Springfield. A case of election therefore arose against W. Spread. If he determined to withdraw from the lands of Ballynoran and Springfield, and not to confirm the settlement of 1794, he became bound to make compensation to the parties entitled under that settlement to the extent of the value of his own interest under the same, provided the value thereof did not exceed the value of the lands of Ballynoran and Springfield. The question which then arises is, did W. Spread make any election during his life? And this must be answered by considering the effect of his acts and conduct subsequently to the discovery of the entail. W. Spread continued in possession of all the lands comprised in the settlement which remained unsold, and in Jan. 1839 he executed a disentailing deed of Springfield and Ballynoran and declared the uses to himself in fee. In the month of Jan. 1845, he executed a mortgage of the fee-simple of the lands of Ballynoran and Springfield, and of his life estate in a certain portion of the other lands comprised in the settlement of 1794, to one James Heney to secure £500 and interest; and this mortgage was afterwards transferred to one William Morgan, who advanced to W. Spread the further sum of £1,200 on the same security. This mortgage deed recited the entail of Ballynoran and Springfield, and the disentailing deed. By various other acts William Spread asserted his right and interest as tenant for life of all the estates comprised in the deed of 1794, and he continued in possession and enjoyment of those estates until the time of his decease on the 20th Sept. 1849. It is material to observe that there is nothing to prove that William Spread was informed of his equitable obligation to elect between the entailed estates and the other estates comprised in the settlement. In the opinion of Mr. Warren, which first stated the tenancy in tail, nothing is said of the obligation to elect. It is true, as a general proposition, that knowledge of the law must be imputed to every person, but it would be too much to impute knowledge of this rule of equity. Election is a question of intention, and of course implies knowledge. There may be a series of unequivocal acts from which an intention to elect, and the fact of an actual election, may be inferred. But under the circumstances of the present case, it does not appear to me that any such inference can

be drawn. William Spread continued in the possession and enjoyment of the settled estates until the time of his death, but this circumstance furnishes no conclusive proof of any intention of taking the lands of Springfield and Ballynoran under the settlement, inasmuch as he had mortgaged these lands to Mr. Henry as tenant thereof in fee simple, and still less do the facts of the disentailing deed and mortgage afford proof of an intention to take against the settlement, inasmuch as he continued to enjoy, and to act as the owner of, all the other estates which were comprised in it. The first inference was much pressed, and it was urged that, having continued in the enjoyment of the settled estates for many years after the discovery of the real nature of his title, W. Spread could not be heard to say that he had not elected to take under the settlement. But I concur with Lord Cottenham in opinion that if a party who is bound to elect between two estates, continues, without being required to elect in possession of both, such possession and enjoyment, inasmuch as it affords no proof of preference, cannot be held to be an election to take one of the estates and to reject the other. My opinion is that W. Spread believed he was entitled to the enjoyment of both estates; that he was ignorant of the equity to which he was in fact subject, and that he did not intend to take either of the estates in preference to the other. The conclusion therefore is, first, that a case for election existed, and still exists; but, secondly, that W. Spread cannot be taken to have made any election; and thirdly, that those who claim under his will an interest in the estates of Ballynoran and Springfield are bound to make a compensation for the value of the interest so claimed by them to the parties who are entitled under the settlement. But before effect is given to this conclusion it is necessary to consider the grounds on which the Lords Justices of Appeal have reversed the decree of Lord Chancellor Napier. For this purpose it is necessary to state that W. Spread by his will, dated 6th July, 1849, and which was duly executed and attested for the devise of real estates, charged the estate of Ballynoran and Springfield with the payment of his debts and legacies, and also with a perpetual annuity of £100 to his daughter Mrs. Sullivan and her issue, and subject thereto he gave the same estates to the appellant, and he appointed one Frederick Newe and another person to be the trustees and executors of his will. At the time of the death of W. Spread, who died without leaving issue, the appellant being the eldest son of Thomas, who was the fourth son of Richard Spread his first, second, and third sons being dead without issue, became and was entitled as tenant in tail male in possession to the estates comprised in the settlement of 1794. Shortly after the death of W. Spread a suit was instituted by Mr. Newe as trustee and executor against the appellant, and others entitled under the will of W. Spread, for the purpose of having his estate administered and the trusts of his will carried into execution by and under the direction of the Court. The answer of the appellant, who was then an infant, was put in by his guardian, and it raised an issue as to the sanity of the testator, W. Spread. But on the appellant attaining the age of twenty-one years, he admitted the sanity of the tes-

tator, and assented to a decree for the administration of his estate. That decree was in the usual form, and it directed an inquiry as to the estates of the testator which passed under his will and were charged with the payment of his debts and legacies. There was no adjudication therefore as to the estates of Ballynoran and Springfield having passed under the will of W. Spread. That was the subject of inquiry only, and under that inquiry the case of election might have been raised, and the appellant might have contended that W. Spread had no title to devise the lands of Ballynoran and Springfield, inasmuch as they were bound by the trusts of the settlements. But the Lords Justices of Appeal appeared to have held that the appellant, by consenting to the decree in *Newe v. Spread*, had conclusively admitted that the testator had power to dispose of the lands of Ballynoran and Springfield, and that they passed both at law and in equity under his will, and were subject to the trusts thereof. This, however, is not the result, or the legal effect of the decree, and, as I have already observed, there is nothing in the decree which involves any judicial determination as to the testator's ownership of the lands in question. I am of opinion, therefore, that this decree was no bar to the relief sought by the appellant in the present suit, and that it contains no judicial determination of any of the questions now raised by the appellant. I must, therefore, advise your Lordships to reverse the decree of the Lords Justices of Appeal. This reversal brings us to consider whether the decree of Lord Chancellor Napier ought to be affirmed, and for the reasons which I have already given I must advise your Lordships that that decree also ought to be reversed. Lord Chancellor Napier came to the conclusion that W. Spread did in fact elect and take under the settlements. The Lord Chancellor appears to have considered that the fact of the election must be inferred from his continuing in the enjoyment of the settled estates. But, in my opinion, the better principle is that which is furnished by the judgment of Lord Cottenham. Great injustice might be done if it were presumed from the fact of continuing in possession that a party intended to decide a question which it does not appear that he was ever required to consider. I must, therefore, advise your Lordships to reverse the order of the Lords Justices, and also the decree of the Lord Chancellor. The proper form of your Lordship's order remains to be considered. I think it should reverse the decree of the Lords Justices and of the Lord Chancellor, and should then declare that W. Spread became, and was on the death of his father, Richard Spread, bound to elect between his title as tenant in tail to the lands of Ballynoran and Springfield, and his title as tenant for life of those lands comprised in the settlement of 1794; and declare that, inasmuch as, in the judgment of this House W. Spread did not make any election during his lifetime, it is competent to the defendant, W. Morgan, and the other defendants claiming under the will of W. Spread, to make such election; and if they shall elect to take the estates of Ballynoran and Springfield to the extent of their interest in the same against the settlement, declare that the real and personal estate of W. Spread is applicable to the extent



of the amount of the receipts of W. Spread as tenant for life of the other estates under the settlement, to make good to the parties entitled under such settlement the full value of the lands of Ballynoran and Springfield, and that all proper accounts ought to be directed for the purpose, including the accounts of the real and personal estate of W. Spread, and of the moneys received by him as tenant for life of the other estates in such settlement: and with these declarations remit the cause to the Court below.

**LORD CRANWORTH.**—My Lords, the principal question raised in this cause, was whether W. Spread, the son of R. Spread, the late grandfather of the appellant, did or did not make his election to take a life interest in certain lands comprised in a post-nuptial settlement executed by the said R. Spread, instead of an interest as tenant in tail male of certain other lands which had descended to him under the will of his great grandfather. The said R. Spread married in the year 1793, and had a son, the said W. Spread, born before Nov. 1794. By a settlement bearing date the 26th Nov. 1794, and made between the said R. Spread, Susanna his wife, of the first part, Thomas Westropp and Henry Westropp of the second part, and John Westropp and Henry Peard of the third part, reciting that the said R. Spread was then seised in fee of the lands of Ballynoran, in the county of Cork, and of the lands of Springfield, in the north liberties of the city of Cork, and also of the lands of Ballycannon and Kilbeg, in the said north liberties of the said city of Cork, and of the lands of Coolnegrah and Belivah, Knockrogery, Shanvaghy and Carrigatan, in the said county of Cork, it is witnessed that for the considerations therein mentioned the said R. Spread did grant, release, and confirm to the said Thomas Westropp and Mrs. Westropp, and their heirs, to the use of the said R. Spread for his life, and after his decease subject to a provision for the said Susanna his wife, for her life, and to a trust term of 500 years for raising a sum of £3,000 as portions for the younger children of the marriage, to the use of the said W. Spread for life, without impeachment of waste, and after his decease to the use of his first and other sons successively in tail male, with remainder to the use of his daughters as tenants in common in tail, and for default of such issue to the use of the first and other after-born sons of the said Richard Spread by the said Susannah, his wife, severally and successively in tail male, with divers remainders over. The settlement then contained powers enabling the said W. Spread to charge the settled property with a jointure not exceeding £300 per annum, and with portions for younger children not exceeding £4,000, and also a power enabling the said R. Spread to charge the whole by way of mortgage, with any sum not exceeding £1,000 and interest. The whole of the property then settled, except Ballynoran and Springfield, was, under the settlement made on the marriage of the parents of Richard Spread, subject to a charge of £1,000 in favour of his brothers and sisters. It was also liable to several judgment-debts, as well of the said Richard Spread as of his ancestors. R. Spread had nine children by the said Susanna his wife, i.e., the said W. Spread, his eldest son R. Spread, his second son, Palmes Spread his third son, Thomas Spread

his fourth son, and five younger children. R. Spread, the second son, died without issue in his father's lifetime, and Thomas, the fourth son, also died in his father's lifetime, on the 10th Feb. 1831, leaving the appellant his son and heir. Richard, the father, having survived the said Susannah, his wife, died on the 15th May, 1831, three months after the death of his son Thomas. In Feb. 1832, a suit was instituted in the Irish Court of Chancery against the said W. Spread and other necessary parties by persons claiming a share as well of the £3,000 portions charged by the settlement of Nov. 1794 as of the £1,000 due under the older settlement, for the purpose of having those sums as well as the amount of several prior charges raised and paid. To the detail of these proceedings it is unnecessary to advert. It is sufficient to say that by a decretal order of the 11th of June, 1836, the amounts due on the several charges affecting the settled lands having been ascertained it was ordered that these lands, or a competent part of them, should be sold for the purpose of raising what had been so found due. On investigating the title of the lands thus ordered to be sold, it was discovered that R. Spread, the settlor, in 1794 was, as to the lands of Ballynoran and Springfield, not seised in fee-simple, but was only seised as tenant in tail male under the will of his grandfather John Spread, dated in 1745. As to these lands, therefore, the settlement of 1794 was inoperative, and William, as the eldest son of Richard, became on his father's death tenant thereof in tail male. The charges ascertained by the decree of June, 1836, were all raised by sale of the lands included in the settlement exclusive of Ballynoran and Springfield, and exclusive also of Ballycannon, part of the lands of which Richard was seised in fee at the date of the settlement. From the time of the sale W. Spread continued in possession of all the unsold lands, and on the 2nd Jan. 1839, he executed a disentailing deed of Ballynoran and Springfield, declaring the uses to himself in fee. William had married in 1826, and there was an issue of the marriage, an only child, Elizabeth, but she died without issue in 1844. Palmes Spread, the third son of Richard, the settlor, also died without issue in 1843. On the 28th Jan. 1845, W. Spread, by a deed, reciting his title to the lands of Ballynoran and Springfield, as tenant in fee simple under the whole entail, and his disentailing deed, and his title to the lands of Ballycannon as tenant for life under the settlement of 1794, mortgaged all those estates to James Heney, for securing to him a sum of £500 and interest, and on the 15th Nov. 1845, W. Spread and James Heney concurred in transferring the mortgage to W. Morgan, in consideration of £500 paid by him to Heney, and of a further advance of £1,200 made by him to W. Spread. On the 6th July, 1849, W. Spread executed a will duly attested for passing real estates, and thereby directed his debts and legacies to be raised out of his estate and lands of Ballynoran and Springfield thereafter mentioned, and he bequeathed to his natural daughter Eliza, the wife of William Sullivan, and her issue for ever, an annuity of £100 chargeable on the said lands; and after giving some small legacies, he bequeathed his estates and lands of Ballynoran, situate in the barony of Orrery and Kilmore, in the county of

Cork, and his lands of Springfield, in the north liberties of the city of Cork, to the appellant and his issue subject to the said annuity; and he appointed Frederick Newe and another gentleman to be executors and trustees of his will. On the 20th of Sept. 1849, the said W. Spread died without having revoked or altered his said will, leaving the appellant his nephew and heir-at-law. The said Frederick Newe alone proved the will, and undertook to execute the trusts thereof. The appellant is the eldest son of Thomas, the fourth son of Richard, and was the person entitled on the death of William as tenant in tail male in possession to the lands included in the settlement of 1794. In the month of April, 1850, the said Frederick Newe filed his bill in the Court of Chancery in Ireland against the appellant and other persons claiming under the will of the said W. Spread praying amongst other things that the trusts thereof might be carried into execution under the direction of the Court. The appellant, being an infant under the age of 21 years, answered the bill by his guardian, and stated that he had been informed and believed that the said W. Spread was not of disposing mind at the date of the said will, and he submitted his rights to the protection of the Court. In March, 1851, the appellant attained his age of twenty-one, and abandoned all questions as to the soundness of mind of the said W. Spread, and by a decree in the said suit of *Newe v. Spread and others* it was by consent ordered and decreed that the trusts of the said will should be performed and carried into execution, and it was referred to the Master to inquire and report on what estates of the testator the legacies and annuities given by his will, and his debts were charged; and further directions were reserved. In these circumstances, and before the Master had made his report, the appellant, on the 31st of Aug. 1858, executed a disentailing deed of the lands of Ballynoran and Springfield, and the 14th Sept. 1858, he filed his cause petition against the said Frederick Newe, William Sullivan, and Eliza his wife, and W. Morgan, who claimed title as mortgagees by virtue of a mortgage executed by the said W. Spread in his lifetime, and against other formal parties, praying a declaration that the said W. Spread did in his lifetime elect, by his acts and conduct, to confirm the settlement of 1794, or if the Court should be of opinion that no such election was made, then that the parties claiming under him might be ordered to make their election; and, in case they should elect to take against the settlement, then that the lands of Ballynoran and Springfield, and other real and personal estate of the said W. Spread, might be declared liable to compensate to the appellant and to the representatives of Palmes Spread all the benefit which the said W. Spread took in the settled lands, exclusive of the Ballynoran and Springfield estates. The said Frederick Newe, Mr. and Mrs. Sullivan, and W. Morgan, filed affidavits in answer to the said petition, thereby insisting in substance that the said William Spread, deceased, had not made any election, and that he was not bound to elect, and further that the proceedings in the suit of *Newe v. Spread* were a bar to the relief sought against them. Further affidavits having been filed, the cause came on to be heard by

Lord Chancellor Napier, who by his decretal order, dated the 7th of February, 1859, declared that the said W. Spread, deceased, in his lifetime, elected to confirm the settlement of 1794, and to take Ballynoran and Springfield thereunder, and that the appellant, the only son of Thomas, the fourth son of Richard, was entitled in equity to those lands, and proper conveyances of the said lands were ordered to be made to the appellants by all necessary parties. The respondents, considering themselves aggrieved by this order, appealed to the Court of Appeal, and that Court, without going into the question of election, held that the appellant was concluded by the decree in *Newe v. Spread*, which they held to present an insuperable bar to the relief sought by him in his cause petition. They, therefore, reversed the order of Lord Chancellor Napier, and dismissed the appellant's cause petition with costs. Against this order appellant appealed to this House. The appeal was heard at the latter part of the last session, and it now remains for the House to pronounce its decision. In the first place, it is necessary to dispose of the question arising out of the prior decree in *Newe v. Spread*, for if the Lords Justices were right in treating that as a bar to any relief whatever instituted by the appellant, it is unnecessary to consider whether the relief given by Lord Chancellor Napier in that suit was or was not warranted. But I cannot concur with the Court of Appeal in the view which they took of the case. Where a question has once been decided by a Court of competent jurisdiction, the same question cannot be again raised between the same parties in the same way, or indeed in any other Court, unless by way of appeal. The Court of Appeal in Ireland thought that this principle precluded them from looking into the question raised by the appellant in his cause petition. But this, I think, was a mistake. The question raised by the appellant in his cause petition was, whether W. Spread, his uncle, was not bound to elect between his title as heir in tail male under the will of 1745, to the lands of Ballynoran and Springfield, and his title as tenant for life of these same lands, with several other estates under the settlement of 1794, and further whether, being bound to elect, he had not in his lifetime elected to take under the latter title? It surely cannot be contended that these questions were concluded or even affected by the decree in *Newe v. Spread*. By that decree the appellant is certainly bound, for he was a consenting party to it; but all which it decided was that the trusts of the will of W. Spread should be performed, and that, with that view, the necessary accounts should be taken, and that the Master should inquire and state out of what estates of the testator the debts, legacies, and annuities of the testator ought to be raised. On that reference it was open to appellants to show before the Master that no debts, legacies, or annuities ought to be raised or paid out of the estates of Ballynoran and Springfield, which Richard Spread included, or purported to include, in his settlement of 1794, on the ground that the testator had no power so to charge these lands. The Court below seems to have proceeded on the ground that the appellant must be taken, by consenting to the decree, to have admitted that the testator had power

to dispose of the lands of Ballynoran and Springfield, which were included in the settlement of 1794, inasmuch as there were no other lands on which his will could operate. But there was judicial *constat* that the testator had no other lands of Ballynoran and Springfield besides those included in the settlement of 1794, and the language of the decree is properly and cautiously worded according to the form in ordinary use, so as to bind no one to anything except the validity of the will and of the trust, so far as there might exist property by means of which those trusts could be carried into execution. To this extent the appellant was bound when he filed his cause petition, but he was bound no further, and therefore he was at full liberty to raise a question not touched by what alone had been decided. I may remark, though that is hardly material, that the Master had not made his report when the appellant instituted his proceedings, and the decree founded on that report, and for the first time declaring that the debts and legacies under the will of the testator were validly charged on the lands in question, was not made till four months after the decree of the Court of Appeal dismissing the appellant's suit, and considerably more than a year after the decree of Lord Chancellor Napier. Being thus of opinion that the decree of the Court of Appeal cannot be supported, I will next consider whether the decree of Lord Chancellor Napier was correct. Two questions were raised before him: first, whether the facts were such as to raise against the said W. Spread, deceased, a case of election; and, secondly, if they were, then whether he did elect to take under the settlement. We are relieved from any difficulty as to the first point, for at the hearing at the bar it was admitted that a case of election was raised, and the only question, therefore is whether Spread did in fact make his election to take under the settlement. Lord Chancellor Napier decided that he did. In order to determine whether that decision was right we must look to all the facts of the case with reference to the acts and deeds of the party bound to elect. The obligation to elect arose on the death of Richard Spread in May, 1831, when W. Spread became entitled in possession to Ballynoran and Springfield as tenant in tail male if he claimed under the will in 1845, or to those lands with Ballycannon and the others as tenant for life if he claimed under the settlement of 1794. Immediately on the death of Richard, William entered into possession of the whole of the lands which Richard his father settled or purported to settle, in 1794, believing that he was seised in fee of the whole. William, however, did not long retain possession, for in 1832 a creditor who had obtained a judgment against him issued writs of *elegit*, and thereby obtained possession of certain parts of the settled lands, of which the sheriff put him in possession as being one-half of lands to which William was entitled, and about the same time the Court of Chancery by the receiver took possession of the rest of the lands in the cause which had been instituted in February, 1832, for raising the sums charged on the settled estates, including Ballynoran and Springfield. So matters continued till the sale, which, as I have stated, was made pursuant to the decree of the 11th June, 1836. That sale included a part of the lands

held by the *elegit* creditor, whose demand was finally satisfied. It did not not include Ballynoran or Springfield, nor did it include Ballycannon, which was part of the lands of which Richard was seised in fee when he made the settlement of November, 1794. From the time when the sale was completed, William Spread remained in possession, till his death, as well as of Ballynoran and Springfield, as also of Ballycannon. He also obtained an order dated the 30th November, 1843, for payment to him of the dividends to accrue due on a sum of £507 11s. 2d., Three-and-a-Half per Cent. Stock, standing in Court to the credit of the cause in which the sale was made, being the balance of the purchase-money which remained after satisfying all charges and costs. The true state of the title had been ascertained by the opinion of Serjeant Warren, given on investigating the abstract of title prepared with a view to the sale under the decree of the 4th June, 1836. That opinion bears date the 17th July, 1837, and on the 2nd Jan. 1839, William Spread, acting, no doubt, on that opinion, executed, as I have already stated, a disentailing deed of Ballynoran and Springfield, declaring the uses to himself in fee. The result of all these facts is, that from the time when Serjeant Warren gave his opinion in July, 1837, William Spread was certainly aware of his title, and with full knowledge of it he claimed to retain and did during the whole of his life retain, all the benefits created in his favour by the settlement of 1794. If, therefore, this is sufficient to enable the Court to declare that he made his election to accept the settlement in lieu of his title under the whole entail, the decree of Lord Chancellor Napier was right; but the circumstances seem to me to show that W. Spread acted in ignorance of the law which bound him to elect. He thought he had a right to claim, and he intended to claim both estates; and the question is, whether in these circumstances the Court can say that it will understand him to have made any election at all. The ground on which the Court holds a person in the position of W. Spread bound to make his election is, that he reads the settlement as if it contained a condition that all persons taking benefits under it should give effect to its provisions as to the whole of the property over which the settlor purported to exercise dominion. If such a condition is expressed, then no injustice can be done by holding that a person taking the benefits of the settlements shall not set up a title to any part of the settled property adverse to the title of the settlor. He knows the conditions on which alone he can enjoy the settled property, and knowing them he chooses to enjoy it. He is therefore, plainly bound by the conditions. But when no such condition is expressed, if, in fact, he is ignorant of the rule of equity which implies it, can the Court treat him as if he had known it, and say that he has made an election which he did not intend to make? I think not. It is true that he knows, or may know, the state of his title, and that title may be such as imposes on him the duty of electing. But unless he is acquainted with the rule of law which obliges him to elect, I do not see how it is possible to say with truth that he has made an election. He cannot have done that, if he was unaware that he was under any obligation to make

it. The injustice of holding a party to have made an election in such a case might be extreme in cases where the difference in value between the two properties is very great. That W. Spread did not intend to elect to take the benefits conferred on him by the settlement, and to give up his title as tenant in tail afterwards converted into a fee-simple in Ballynoran and Springfield, seems to me clear, not only from the mortgage he made to Heney and afterwards to Morgan, in which he expressly asserts his title in fee-simple to those lands, and deals with them accordingly, but also from his will, whereby he treats himself as absolute owner of them, and devises them as being the owner. It is, however, certainly true that he remained in possession of the unsold settled lands up to the time of his death, as well as of the dividend arising from the small balance produced on the sale beyond what was required for satisfying its objects, and it was argued that on the authorities this must be taken as conclusively showing that he had made his election, it being certain that for the last twelve years of his life and upwards, while he was thus in possession, he had become aware, from Serjeant Warren's opinion, that he had a title under the will of 1745, to Ballynoran and Springfield, paramount to that under the settlement of 1704. I do not, however, think that the authorities establish any such general proposition. There are undoubtedly many cases in which, from the circumstance that the person bound to elect has for a long series of years taken that to which he was only entitled if he claimed under the will or settlement in question, he has been held to have made his election. These decisions may have been quite correct, for the Court may have properly inferred from the facts of these cases that the person bound to elect knew the obligation which the doctrine of equity cast upon him, and then his conduct might show conclusively that he intended to make an election. On no other principle can they be supported. This was, as I understand the case, the ground on which the Master of the Rolls founded his decision in *Worthington v. Wigginton* (20 Beav. 67), on which so much stress was laid in the argument at your Lordships' bar. It was merely that the widow accepted the benefits given to her by the will of her husband, but that she did so knowing that she could not consistently with that enjoyment set up her own adverse title to the stock. His Honor took pains to show that the widow had not by the mode in which she dealt with the stock intended to assert any title to it adverse to her husband's will. The true doctrine is very correctly stated by Lord Cottenham in *Padbury v. Clark* (2 Mac. & Gor. 306). His Lordship there says—"If a party being bound to elect between two properties, not being called upon so to elect, continues in the receipt of the rents and profits of both, such receipt affording no proof of preference cannot be an election to take the one and reject the other." That was exactly what was done by W. Spread in this case, and I am unable, therefore, to concur with Lord Chancellor Napier in his view of this case. I concur, therefore, with my noble and learned friend on the woolsack in thinking that the decree of Lord Chancellor Napier and that of the Court of Appeal must both be reversed, and that the case must be re-

mitted back to the Court of Chancery in Ireland, with a declaration to the effect that has been stated by the Lord Chancellor.

LORD CHELMSFORD.—My Lords, my noble and learned friend on the woolsack has so fully stated the facts and circumstances of this case, that, agreeing with him and my noble and learned friend (Lord Cranworth) as I do, it will be necessary to make only a few additional observations. It being admitted that William Spread was put to his election to take under or against the deed of 26th November, 1794, the material question to be determined is, whether he did in fact make such election? Lord Chancellor Napier, by his decretal order upon the cause petition filed by the appellant, declared that William Spread in his lifetime elected to confirm the indenture of settlement of the 26th November, 1794, and to take the lands of Ballynoran and Springfield; that the appellant was entitled in equity to those lands, and that such of the respondents as were necessary parties should execute proper conveyances of the same. Upon an appeal from this order the Court of Appeal, without touching the question of election, held that the decree in the case of *Neuve v. Spread* was a conclusive bar to the relief sought by the appellant in his cause petition, which they dismissed with costs. With great respect to the learned judges of the Court of Appeal, I see no ground for this summary mode of disposing of the case. The decree in *Neuve v. Spread*, according to the opinion of Lord Cottenham in *Bainbrigg v. Baddeley*, would only be a bar to the appellant's claim in his cause petition if the subject-matter adjudicated upon were the same in both proceedings. But the decree in the former case was merely that the trusts of William Spread's will be performed, and that it be referred to the Master to inquire and report on what estates the legacies, annuities, and debts of the testator were charged, and out of which they ought to be raised and paid. It is true that the prayer of the bill in this suit prayed that such of the debts, legacies, and annuities as the lands of Springfield and Ballynoran should appear to be subject to might be paid thereout in such manner as to the said Court should seem fit. But how, even, with this proof, that, upon the reference to the Master, he would have to consider whether amongst the estates to be charged with the debts and legacies Springfield and Ballynoran were to be included, it could be said that the decree adjudicated upon the question of election under the deed of the 26th November, 1794, I am at a loss to understand. In the words of Lord Cottenham in *Bainbrigg v. Baddeley*, "The question to be considered is, whether the former proceedings could have been pleaded in bar to the present bill. For this purpose the plea must have averred that the former suit was for the same matter." The Court of Appeal, therefore, ought not to have held the appellant to be concluded by the decree in *Neuve v. Spread*, but ought to have considered and determined the question whether Lord Chancellor Napier was right in holding W. Spread had, with full knowledge of the state of the title, elected to take under the settlement of 1794. In order that a person who is put to his election should be concluded by it, two things are necessary, first, a full knowledge of

the nature of the inconsistent rights, and of the necessity of electing between them: second, an intention to elect manifested either expressly or by acts which imply choice and acquiescence. In this case William Spread was ignorant of his title to the lands of Ballynoran and Springfield till after Serjeant Warren's opinion in 1837; therefore any proof of acquiescence in the settlement of 1794 which could amount to election must be sought for subsequently. But I do not find any unequivocal act done by William Spread after that period which indicates his intention to claim under the settlement, instead of insisting upon his paramount title to the lands of Ballynoran and Springfield. On the contrary, everything done by him afterwards appears to show that he considered himself entitled to have the benefit both of the settlement and of his own entailed lands. The language of Sir Thomas Plumer in the case of *Dillon v. Parker* (1 Swanst. 359) may with some slight alteration be applied to this case: "Taking both estates, enjoying that which was his own, and also that given to him by his son, how can it be said that he relinquishes one and elects to take the other? Has he not rather elected to take both?" And again: "With reference to intention, therefore, the evidence contained in these transactions of his intention to retain his own estate is at least as strong as the evidence of his intention to accept the property given to him by his son, derived from the mortgage and other acts of ownership exercised over it. How then can the Court declare that he elected to take the one and renounce the other?" The doctrine on the subject is very clearly and correctly stated by Lord Cottenham in the passage cited from his judgment in *Padbury v. Clark* by my noble and learned friend, Lord Cranworth. There are two minor points which were raised in the argument for the respondents which, as the case is to be remitted back to the Court of Chancery in Ireland, may be shortly noticed. It was insisted that the appellant was prevented by his laches from now insisting upon an election. No authority was produced for the position that a party having an equity to compel an election forfeited that equity by delay in enforcing it. The cases which were cited upon this point applied to the person who has the right of election losing it by acquiescence, and not to the person who has a right to compel an election. Again it was said that the right of the appellant at the utmost was to receive compensation; that this was a simple contract debt, and that therefore the Statute of Limitations had run against it. To which it was answered that the right to compensation was a charge upon the real estate, and therefore the Statute of Limitations was out of the question. But even supposing the compensation to be in the nature of a simple contract-debt, the claim to it can only arise where an election is made, and the statute can only begin to run from that time. No election has hitherto been made, and therefore no debt at present exists upon which the statute can attach. I agree that the decrees of Lord Chancellor Napier and of the Court of Appeal ought to be reversed, and the case remitted back to the Court of Chancery in Ireland, with the declaration suggested by my noble and learned friend on the woolsack.

*The Attorney-General.*—Before your Lordship puts

the question, will your Lordships allow me to mention two points? First, that under the decree of the Lords Justices which your Lordships reversed when the cause petition of the appellants was dismissed with costs, the payment of these costs has been exacted. Of course your Lordships will direct the costs which have been paid under that reversed decree to be repaid. The other point is this: the respondents presented a joint supplemental appendix in this case in addition to the original joint appendix, in which they printed various documents, some of which were of a subsequent date to the institution of this suit, and which, therefore, were not properly evidence in the case. A petition was presented to your Lordships to expunge those alleged immaterial documents so improperly introduced from the supplemental appendix, and your Lordships ordered those costs to be reserved until the decision upon this appeal, and of course we now ask for those costs to be repaid.

*THE LORD CHANCELLOR.*—Your Lordships, I think, will agree with me, that it is extremely desirable that questions such as that which has now been raised with regard to the costs of this supplemental appendix should not be brought before your Lordships. I may state, however, that it was almost impossible to determine that question in the appeal committee without hearing the appeal. It was then stated that many documents were included in the supplemental appendix which were irrelevant and unnecessary. To determine whether they were relevant or necessary would have been beyond the usual scope of the inquiry of the appeal committee. Therefore they had hardly any other course to adopt than that which has been adopted. But I think it is a matter of regret that as the principal part of the appeal was of the nature of a reference, this point, with respect to the relevancy of the documents printed in the supplemental appendix, should not have been brought to your Lordships' attention during the argument at the bar. And I think that your Lordships will agree with me that we cannot now have a supplemental argument upon this matter. Upon these grounds, therefore, your Lordships will make no order as to the subject of costs upon that point. With regard to the other point mentioned by the Attorney-General, namely, as to the costs of the appellants on their petition of appeal, as we have reversed the order, I take it that it follows as a matter of course that the repayment of those costs would be directed in the usual way; but the order as to the costs is always left to be made by the Court below, following the declaration of your Lordships. With regard to a third point, namely, the costs of the mortgagee, I think it must be left to him, when the respondent makes his election to apply to the Court below. I would therefore submit to your Lordships that beyond the order which I have proposed, there should be a declaration that any costs which have been paid under the order which is now reversed ought to be repaid.

*Decrees and costs remitted.*

*Solicitor for Appellant*—C. O. Hoare.

*Solicitors for respondents*—Dyson and Co.; Ewbank and Partington.

## Court of Appeal in Chancery.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

IN RE THE ESTATE OF MATHEW CASSAN, OWNER;  
JAMES TYRRELL, PETITIONER.—June 29.

*Tenant for life — Right to redeem charges on the fee — Creditor on life estate — Paramount right to redeem charges on the fee.*

*A judgment creditor on the life estate having procured an assignment of certain incumbrances on the fee, the tenant for life sought to enforce his right to redeem the fee, as against said creditor. Held, affirming the order of Judge Hargreave, that the right of the creditor in this respect was paramount to that of the tenant for life.*

THIS case came before the court on appeal taken by the owner, who was tenant for life of the lands ordered to be sold in this matter, against an order made by Judge Hargreave refusing, with costs, an application of said owner that further proceedings under an order for sale of the fee simple of the lands might be stayed, the owner undertaking to pay the full amount of the petitioner's charges thereon, upon the petitioner's executing an assignment of those charges, and also of a policy of insurance collateral thereto. The facts of the case are shortly as follows:—On the 18th of March 1863, the petitioner obtained an absolute order for the sale of the life interest of the owner upon foot of a certain judgment for £300, bearing date the 23rd of August 1849, affecting said interest. After said order for the sale of the life interest, petitioner did on 2nd June 1864, obtain an order for the sale of the fee simple of the lands upon foot of another judgment for £700, which affected the fee, and of which petitioner had in the meantime procured an assignment, for the purpose of enhancing, as was alleged, the value of the life interest so ordered to be sold, and also to secure a fund sufficient to discharge the sum so charged as aforesaid on said life estate; there was also another judgment which affected the fee, and of this also petitioner had for the same purpose obtained an assignment. In addition to the securities afforded by those two charges, an insurance had also been effected on the life of the owner, who was tenant for life of the lands, and the application to Judge Hargreave was made by the said owner, that the petitioner might be ordered, upon payment to him of the charges on the fee, to execute an assignment of the policy of insurance and of the last-mentioned judgments; and the appellant further sought to discontinue all proceedings under the order made for the sale of the fee simple. This application Judge Hargreave refused with costs—and from this decision the present appeal was brought.

Warren Q.C., with *R. W. Gamble*, appeared in support of the appeal.—Judge Hargreave was clearly wrong in refusing this application, because a tenant for life has no doubt a right to redeem the incumbrance affecting the fee; here the application is on behalf of the owner to stay the sale of the fee on the judgment creditor being paid off his charges, which affect the

fee, and those two charges were the judgments for £300 and £700. Clearly the owner of the life estate has the power of redeeming the mortgages and judgments which affect the fee.

*Flanagan, Q.C.*, with *Chaworth Ferguson*, contra. Judge Hargreave was perfectly correct in refusing this application. Here a judgment creditor on the life estate procured an assignment of these several incumbrances on the fee, and the tenant for life seeks to enforce his right to redeem the fee as against his creditor. We submit that the right of the creditor on the life interest to procure an assignment of incumbrances on the fee, is paramount to that of the tenant for life. Here an order has been made for the sale of the fee simple, and that order should be carried out. *In re the Earl of Limerick's estate; ex parte Turner* (7 Ir. Jur. N.S., 65.)

THE LORD CHANCELLOR.—The court is of opinion, that the order of Judge Hargreave must be affirmed with costs. This is an application on behalf of the owner, in the terms of the notice, to stay proceedings to sell the fee on being paid off his charges, which affect the fee. Beyond a doubt, the owner of the life estate had the power of redeeming the mortgages and judgments which affect the fee. But how can it be contended that he is entitled to use that power so as to prejudice an incumbrancer who has a charge also on that life estate as well as on the fee? He is not entitled to use that power to prejudice one whose charge is on the very interest which gives the owner the power of redemption. There cannot be a shadow of a doubt that the owner before he is at liberty to cause those charges to be redeemed, must himself first pay off the charge on the life estate, because as long as that charge remains, the owner of it has a prior right to take an assignment of the charges on the fee. Now the petitioner in this case has a charge affecting the owner's life estate, and upon these grounds he objects to the proceedings being stayed. I am then of opinion that the petitioner is entitled to go on with the sale, as between the tenant for life and the petitioner who is an incumbrancer on the life estate. The petitioner has a paramount right to redeem the charges on the fee. The order of the court below must be affirmed.

THE LORD JUSTICE OF APPEAL concurred.

## Court of Chancery.

Reported by Oliver J. Burke, Esq., Barrister-at-Law.

SHERLOCK v. BLAKE.—June 15, 16, 17.

*Will—Bequest of moneys charged on lands for charitable uses—7 & 8 Vict. c. 97, s. 16.*

*Testator, who died 18th July, 1864, by his will made within three months previous to his death, having acknowledged that he held in trust a sum of £7,650 for the convent of Glasnevin, charged his Gort estate therewith, which estate he directed to be sold, and the money to be raised out of the produce thereof, as also out of certain other funds. Held, that inasmuch as the testator was a debtor to said convent, such*

*a bequest was not within the meaning of the 7 & 8 Vict., c. 97, s. 16.*

*Testator by his said will directed his Rockfield property to be sold, and gave out of the produce of his Fountain Hill and Rockfield properties a sum of £2,000 for certain charitable purposes. He also directed his Fountain Hill property to be subject to a perpetual annuity of £100, which, with two acres of land, he bequeathed for other charitable purposes, viz, for the support of certain Roman Catholic Schools. He also gave £1,000, part of the produce of his estates, to a Roman Catholic school at Dalkey. Held, that these bequests were bad within the meaning of the 16th section of said Act, the will being made within three months previous to testator's decease.*

THIS was a cause petition presented by David Sherlock, Esq., Q.C., against Edward Blake, Eliza Blake, Jane McDowell, the Right Honourable James A. Lawson, the Attorney-General for Ireland, and Julia Scully, respondents. The petition stated that Patrick Blake, of Mount Alverno, Dalkey, in the county of Dublin, being seised and possessed of considerable fee-simple and freehold estates and chattels real in the counties of Dublin, Roscommon, Galway, and Mayo, and possessed of and entitled to considerable personal property, made and published his last will and testament in writing duly attested, and he thereby appointed said David Sherlock the sole trustee and executor of his last will and testament. This will was as follows—"This is my last will and testament. I hold in trust for the Glasnevin Convent the sum of £7,000 sterling, which I direct shall be paid over to the superioress of the Sacred Heart Convent, Glasnevin. I hold also in trust the sum of £650 for the Infant School which the said community are about to establish. I hold also for charitable purposes the sums which I am about to receive in the cause of *Hynes v. Redington*, *Hynes v. Commins*," and several other causes in said will mentioned, "and over which I have an absolute power of disposing. I therefore charge that part of my property called the Gort estate with the sum of £7,650, and I direct same to be raised by my trustee and executor by sale of a competent portion of the said estate, and after deducting costs and expenses of such sale, I direct him to pay the sum of £7,650 to the superioress of the said Convent of the Sacred Heart, Glasnevin. I direct my trustee and executor to apply all the monies to be received out of said causes of.....after deducting the necessary costs and expenses, for such charitable purposes as he shall think proper. I direct the purchase of the Kilmacduagh property, and the release of the Dowell estate, to be completed. I devise the Kilmacduagh property to my sister for life, with remainder to my brother and his heirs for ever. And I devise the property called the Gort estate to Jane Dowell for life, the rents and profits thereof, after the costs and expenses of collecting, to be paid for her benefit during her life by my trustee and executor, with remainder to my sister and brother, share and share alike in fee. And as to Rockfield and my other property in Galway, I direct same to be sold by my trustee as soon as he conveniently can,

and the proceeds to be applied for the purposes hereinafter mentioned. I direct the property of Fountain Hill to be sold by my trustee, subject to a perpetual annuity of £100, and subject to a reservation of the two acres of land already pointed out by Mr. Carson for a poor school for Roman Catholic children, and I charge said property with said annuity of £100 for the said school, the parish priest for the time being to be patron thereof, and I direct the £2,000, part of the produce of Fountain Hill and Rockfield, shall be expended in the establishment of said school-house, and the balance of the produce of said sales to be paid to my sister. I direct all my property at Dalkey to be sold by my trustee and executor, and £1,000, part of the purchase-money thereof to be laid out by my said trustee for the poor at Dalkey of the Roman Catholic religion. I direct that the balance of the purchase money of my Dalkey property and effects to be retained by my trustee and applied as I shall direct by a paper to be hereafter signed by me; and if no such paper be signed, I leave the balance to him absolutely.....I bequeath to the Rev. Mr. Duggan, P.P. of Cumner, £100, free from legacy duty. I give my executor £500 to be laid out in Masses for the repose of my soul. I give the Rev. John O'Boyle of Kilmaine, £100 for the like purposes, and also £200 to be applied by him in completion of the Roman Catholic chapel at Kilmaine.....I appoint David Sherlock, Esq., Q.C., my sole trustee and executor, to whom I bequeath absolutely a sum of £300, and I devise to him, upon the trusts aforesaid all my real estates, and I appoint my sister to be my residuary legatee.—Dated 17th July, 1864.—Patrick John Blake."

The petition then stated that testator died on the 18th July, 1864. That at the time of the death of the said testator his only next of kin were his said brother, Edward Blake, who was also his heir-at-law, and Eliza Blake, spinster, his only sister. That Edward Blake, the heir-at-law of the deceased, disputed the direction in the aforesaid will, whereby the testator charged that part of the property called the Gort estate with the sum of £7,650 so far as relates to £7,000, portion of the said sum, on the ground that the nuns of the convent of Glasnevin have no valid demand against the said testator's estates capable of being enforced, and that said sum of £7,000 was a mere gift, and, so far as it affected lands, not capable of being enforced. Said Edward Blake also disputed the validity of the charge of a perpetual annuity of £100 on the lands of Fountain Hill; and said heir-at-law likewise disputed the reservation of said lands for a poor school for the Roman Catholic children, and the direction to apply £2,000, part of the produce of the said Fountain Hill and Rockfield, in the establishment of said schools, and also the direction to apply £1,000 part of the purchase money of the testator's property at Dalkey in poor schools at Dalkey to Roman Catholic children, and the said Edward Blake also claimed as heir-at-law of the testator, to be entitled to the lands out of which the said several bequests purported to be made, or so much interest therein as should be equivalent to them, or to the bequests themselves. The petition then stated that said Julia Scully, the superioress of the convent of Glasnevin on behalf of



the said convent was interested in opposing the claims of said Edward Blake in reference to said sum of £7,000, and also that her Majesty's Attorney-General was interested in the charitable bequests and charges, the validity of which was disputed by said Edward Blake. That said Edward Blake claimed the several lands out of which said charges and bequests (if the same were void) were proposed to be raised, or so much interest in the said lands as should be equivalent to said charges and bequests. The several parties to whom said lands, or the produce thereof respectively, subject to said charges and bequests, were devised and bequeathed, were interested in opposing the claims made by the said Edward Blake.

It appeared also that the testator had deposited the title deeds of his property at Dalkey with the Provincial Bank, by way of equitable mortgage, to secure a sum of £1,700 advanced to him by that bank, and he, by his will, devised that property to certain persons; and the question now arose as to whether the personal estate was liable to discharge the equitable mortgage for £1,704 to the Provincial Bank, or whether the devisees of the Dalkey property did not take that property subject to the £1,700, and without any charge on the personalty to discharge same.

The petition then prayed that an account might be taken of the real and personal estate of said testator, and that the property might be applied in due course of administration according to the trusts in said will.

*The Attorney-General (Lawson), with Flanagan, Q.C., and Edward Beytagh, appeared for the petitioner.*

*The Solicitor-General (Sullivan), Ball, Q.C., Bourke, Q.C., and Walter R. Butler, were for Edward Blake, the heir-at-law, to whom, as tenant in common with his sister, a remainder after a life estate to Miss Jane Dowel, in the Gort estate was devised. The bequest of £7,650 to the Glasnevin nuns is clearly void, because to stand, it should have been made three months before the death of the testator. By the 7 & 8 Vict. c. 97, s. 16, it is enacted "that after the commencement of this Act no donation, devise, or bequest for pious or charitable uses in Ireland shall be valid, to create or convey any estate in lands, tenements, or hereditaments, for such uses, unless the deed, will, or other instrument containing the same shall be duly executed three calendar months at the least before the death of the survivor executing the same, and unless every such deed or instrument not being a will, shall be duly registered in the office for registering deeds in the city of Dublin within three calendar months after the execution thereof." The bequest is void. The money, namely, the £7,650 which the testator has attempted to charge on the Gort estate (and to which estate we are entitled in remainder after the death of Jane Dowel), is in truth under the Charitable Bequests Act no charge whatever on the lands. It may be and is a charge on the personalty, but it being for charitable uses, beyond a doubt this bequest *quoad* the lands is void. [*The Lord Chancellor.*—Suppose he owed this money secured by a promissory note, could he not have charged his lands therewith? Here is a man plainly a debtor to a large amount to a charitable institution; the nuns here entrusted him with their*

money, and must not he pay it the best way he can, which way is out of his lands? Paying a debt is one thing, and bequeathing in charity is quite another thing.] *Jeffreys v. Alexander* (8 H. L. C. 595.)

*Barry, Q. C., John O'Hagan, Q. C., and P. White, appeared for the nuns of the convent of Glasnevin.*—It is submitted that this bequest to the nuns is not a charitable bequest, in fact it is not a bequest at all; it is merely a declaration by the deceased testator that he holds, that he has in his possession, as their trustee, a sum of £7,000, and he directs their money, not his, to be paid to them, and so also with the sum of £650 of their money, which he held in trust for that convent's infant school, and having those sums, lest there be any deficiency or otherwise in his assets (personal) he charges those several two sums, making together £7,650, on that part of his real estate called the Gort estate, which estate he, in a subsequent portion of his will, devised to Jane Dowel, &c., but supposing it is an absolute bequest, yet even so, in *Pollock v. Day* (14 Ir. Ch. 297, a.c. and affirmed on appeal, 14 Ir. Ch. 371) it was held that a bequest of money for the purpose of building a church in Ireland is not within the 7 & 8 Vict. c. 97, s. 16, and therefore was valid, though the will be made within three months of the testator's death. The Charitable Bequests Acts, 7th & 8th Vict. cap. 97, section 16, relied upon by Mr. Warren, Q.C., the counsel for Miss Dowel, does not apply here, inasmuch as no estate was to be created in lands, but merely a sum of money was charged upon lands for the purposes mentioned in the will. *The Incorporated Society v. Richards* (1 Drury & Warren, 320), was where a bequest for erecting a building for charitable purposes was held valid in Ireland.—*Philpot v. St. George's Hospital* (6 H. D. C. 338); 1 Jarman on Wills (3rd ed. 221.)

*Owen, Q.C. (with Mills) appeared for the Attorney-General.*—Having regard to the Irish Act (Charitable Bequests Act), the £2,000 which was to be raised out of the produce of the Fountain Hill property, and also the perpetual annuity of £100 a year charged on Fountain Hill, is not void. Had this bequest been made before the 7 & 8 Vict., c. 97, it would be clearly good, and the 16th section is the only one that apparently renders these bequests void. It is perfectly true that *Jeffreys v. Alexander*, (8 House of Lords Cases, page 595,) relied upon by the counsel for heir-at-law is against us, that is, if this were an English case, and argued in Westminster Hall, because it would be within the purview of the Mortmain Act, 9 Geo. 2, ch. 36 (English), but the 7 & 8 Vict. is not analogous to that Act. The English Act contains expressions not used in the Irish Act, the 16th section of which latter Act does not contain the words in the English, namely, "any sum or sums of money, &c., to be laid out or disposed of in the purchase of lands, tenements, and hereditaments," and your Lordship, in *Pollock v. Day* (14 Ir. Ch. 373) held that a bequest of £12,000 to build churches was good, although the churches could not be built without getting land to build them upon. It is absurd to say that the 16th section renders void the annuity or the charges on the lands. Could it be said that if we have £500 charged upon lands, we have an estate in the lands. What

is an estate? An estate in lands is thus defined by Co. Litt. 345, a.—“An estate signifieth such inheritance, freehold, terme for yeares, tenancie by statute, merchant, staple, *eligit*, or the like, as any man hath in lands or tenements, &c. And by grant of his estate, &c., as much as he can grant shall passe.” The word “estate,” then, in the 16th sect. cannot control those bequests to charitable purposes, having regard to the meaning of the word “estate” as just laid down in Co. Litt. *Myers v. Perigal* (2 De Gex, M’N. & Gord. 599) is in point to shew that a bequest in a joint stock bank, whose property consisted of freehold estates and money due upon mortgage, was held not to be within the Statute of Mortmain. Lastly, the giving the £2,000, and also the £1,000 proceeds of an estate to be sold was not even under the Statute of Mortmain in England, which Act did not apply here, but which was much more stringent, a gift void under that statute.—*Marsh v. The Attorney-General* (7 Jurist, N. S., 184). There the marginal note is as follows: “An interest in the proceeds of lands directed to be sold is not an interest within the Mortmain Act, 9 Geo. 2, c. 36, even though the land be in fact unconverted by reason of a preceding tenant for life, entitled to enjoy it as land, being still living.”

Warren, Q.C., and Jackson appeared for Miss Dowel.—

THE LORD CHANCELLOR.—This was a suit filed by the petitioner, as trustee and executor of the late Patrick John Blake, of Mount Alverno, Dalkey, and Rockfield, county Galway, to administer the trusts of that will, and take an account of his real and personal property. By the will which was dated the 17th July, 1864, the testator acknowledged that he held in trust for the Convent of the Sacred Heart at Glasnevin, the sum of £7,000, which he directed his executor to pay over to the superioress of that convent; and also a further sum of £650 for the infant schools which that convent was about to establish; and he charged his Gort estate with the full sum of £7,650, which estate he directed to be sold, and the money to be raised out of the produce, as also out of certain funds realized in the Court of Chancery in certain causes. He also directed a property at Kilmacduagh to be purchased, and he gave same to his sister for life, remainder to his brother and his heirs for ever. He then directed his Rockfield property to be sold, and gave out of the produce of his Fountain Hill property a sum of £2,000 for certain charitable purposes. He also directed his Fountain Hill property to be subject to a perpetual annuity of £100, which, with two acres of land, he bequeathed for other charitable purposes, viz., for the support of certain Roman Catholic schools. He also gave £1000, part of the produce of his estates to a Roman Catholic school at Dalkey. It appeared, also, that the testator had deposited the title-deeds of his property at Dalkey with the Provincial Bank, by way of equitable mortgage, to secure a sum of £1,700, advanced to him by that bank, and he by his will, devised that property to certain persons. Mr. Blake died on the 18th of July, 1864, the day after the date of his will, and that will was disputed by Mr. Edward Blake, who was his eldest brother and heir-at-law, and who with

his sister, was next of kin. The questions that now arose were—1st. whether the bequests of £7,000 and £650 to the convent of the Sacred Heart and schools at Glasnevin were valid, having regard to the provisions of the Charitable Bequests Act, the will having been made within three months of the testator’s decease. 2ndly.—Whether the annuity of £100 a-year charged on land, and the bequests of £2,000 and other sums out of the produce of the Fountain Hill property, were valid, or whether they were not also within the meaning of the Charitable Bequests Act, as the produce of land; and, if same were void, to whom the money went, whether to the heir-at-law, the devisee of Fountain Hill, or the residuary legatee as converted personalty; as also whether the personal estate was liable to discharge the equitable mortgage for £1,700 to the Provincial Bank, or whether the devisees of the Dalkey property did not take that property subject to the £1,700, and without any claim on the personalty to discharge same. Now as to the first question, inasmuch as the testator was a trustee for, or a debtor to the Convent of the Sacred Heart, in the amount of the gifts to that convent, such gifts were not bequests within the meaning of the Charitable Bequests Act, and were therefore good. And as to the second question, with reference to the bequests of the various sums, portions of the produce of the estates directed to be sold, and given to the charities in the will mentioned, as also the gift to charity of the annuity of £100 a-year, they were clearly bad within the meaning of that Act, for I do not see any distinction between charges on land, and lands themselves. Now an annuity is clearly an estate in lands; the question in fact is whether those bequests are within the Acts 7 & 8 Vict. chap. 97, sec. 16. Now, it is manifest that those bequests were for charitable purposes, and that this Act was designed for the purpose of the recital, and that recital recites that the object of the Act was for the management of such charitable donations and bequests, as might be thereafter made; and as to the equitable mortgage for £1,700, I am inclined to think, that it was primarily chargeable on the real estate, but I do not decide that matter at present, and refer the matter to the Master to report on the questions involved.

LANAUZE v. REYNOLDS—June 19, 20.

Deed—Construction of—Attornment—7 & 8 Vict., c. 90—13 & 14 Vict. ch. 29, sec. 3.

*J. P. was entitled under a sub-lease of certain lands for the lives of himself and wife, the reversion of which sub-lease was in C., and C. was entitled under a lease in quasi fee, the reversion of which lease was in J. P. J. P. by indenture of mortgage, bearing date 30 Sept. 1844, conveyed the lands in fee with all his “estate and interest therein” to the mortgagees, the petitioners. Petitioners insisted that a general grant of this kind will carry every interest of the grantor, and consequently that the sub-lease was conveyed and granted by said deed of*

*mortgage. Held, that the general words of a deed will pass the entire estate of the grantor, unless it shall appear by other parts of said deed that it was the intention of the parties that same should not pass.*

*The fee of the lands of which said J. P. was seised, having been set up and sold in the Landed Estates Court to one J. Reynolds, and the said C. refusing to attorn, an injunction was granted by the said Court to put J. Reynolds into possession.*

*Held, following the case of Fitzpatrick v. Hughes (12 L. C. L. 488) that the injunction against the tenant for not attorning did not cause said tenant to lose his said lease.*

*In 1844, before the passing of the Judgment Act, 13 & 14 Vict. ch. 29, sec. 3, a judgment was entered up as a security collateral with said mortgage, against J. P. whose interest in the said sub-lease J. R. had purchased prior to the passing of said Act.*

*Held, applying Hickson v. Colles (10 I. E. R. 447), that J. R. had no protection against said judgment, though not registered within five years from 1850.*

THIS was a cause petition presented by Robert Lanauze, Arthur Moneypenny, and Richard Lanauze against John Reynolds and John Prendergast. The facts of this case as stated in the cause petition were these: The Rev. Charles Kelly being seised in fee of the lands of Kiltormer, by an indenture of lease bearing date the 4th of May, 1832, demised said lands unto James Costello his heirs and assigns in *quasi fee*. By indenture of sub lease bearing date the 9th of August, 1832, the said James Costello granted and demised unto John Prendergast, his heirs and assigns for the life and lives of said John Prendergast and Alicia his wife, all the said lands comprised in the said lease of the 4th May, 1832, which lands contained merely 3 roods and 29 perches, subject to the yearly rent of £3; the said lease was still subsisting. The fee of the lands afterwards, and before the mortgage, hereinafter-mentioned, of the 30th September, 1844, became vested in said John Prendergast. The petition then stated that by an indenture of mortgage of the 6th of June, 1844, (reciting a certain indenture of mortgage of the 9th of October, 1835, whereby certain lands and premises were granted on mortgage for the sum of £1000 by said John Prendergast unto one Andrew Blake, and reciting an agreement by petitioners, Richard Lanauze and Sarah Lanauze, to lend a sum of £1600 for the purpose among other things of paying off said sum of £1000) the representative of the said Andrew Blake thereby granted, assigned, and made over all said mortgage for £1000, and said mortgaged premises unto said Richard Lanauze and Sarah H. Lanauze, and also said John Prendergast, and the representative of said Andrew Blake thereby granted and released the said lands of Kiltormer, and all the estate right, title, and interest of the representative of the said Andrew Blake and John Prendergast unto the said Richard Lanauze and Sarah H. Lanauze, their heirs and assigns for ever, subject to redemption as therein mentioned. That the said

sum of £1600 so agreed to be lent upon said last-mentioned mortgage, had previously thereto been put in settlement upon the marriage of the petitioner Richard Lanauze with said Sarah, and was then vested in the trustees of said settlement—Robert Lanauze and Arthur Moneypenny. That by an indenture of mortgage, bearing date the 30th of September, 1844, Prendergast for the like sum, and for carrying out the mortgage in a more formal manner, mortgaged the lands, "and all his estate and interest therein" to the trustees of Mrs. Lanauze's said marriage settlement; and he then also gave a judgment as a collateral security therewith. This mortgage of September, 1844, recited the intention of John Prendergast to mortgage only his equity of redemption in the lands, this being an equity of redemption in the fee only, but by the operative part of the deed he conveyed the lands by name, and all equity of redemption in the lands to the mortgagees. The fee simple of the lands, subject to the indenture of lease of the 4th May, 1832, was set up and sold in the Incumbered Estates Court, and after the produce thereof being distributed, there still remained due to the petitioners, a sum of 1000. Mr. Reynolds became the purchaser of the fee in the Incumbered Estates Court, and the owner of the lease of 1832, having refused to attorn, Mr. Reynolds obtained an injunction from the Incumbered Estates Court to put him into possession. On the part of the mortgagees, the trustees of Mrs. Lanauze's settlement, it was contended that upon the true construction of the deed of mortgage of September, 1844, the interest of John Prendergast in the lease of August, 1832, was made subject to the mortgage, and at all events that it was liable to the judgment. On the part of the respondents it was contended that the mortgage of September, 1844, should be construed along with the prior mortgages, and that from the recital above-mentioned contained in the mortgage of September, 1844, it was plain that John Prendergast never intended to mortgage his interest in the lease of August, 1832, but only his equity of redemption in the fee of the lands, and this having been sold in the Landed Estates Court, that all claim thereon was gone, and having been purchased by Mr. Reynolds, he Mr. Reynolds claimed to hold the lands discharged from the mortgage. Mr. Reynolds was also the assignee of said sub-lease prior to 1850. Said judgment of 1844 was registered in 1860, under the Redocking Act of 1828.

*John Edward Walsh, Q.C.* was heard in support of the petitioner.

*Brewster, Q.C.*, with whom was *J. S. Townsend*, submitted that the fair meaning of the mortgage deed was that the parties only intended to mortgage the fee—*Fawcett v. Carpenter* (2 Dow. & Cl. H. L. C., 232); *Doe v. Meyrick* (2 Crompton & Jervia, 223); *Roche v. Lord Kensington* (2 K. & John, 753); that the injunction order of the Landed Estates Court destroyed Costello's lease, and consequently the sublease, and that the judgment did not affect the lands, not having been registered within five years from the passing of the 13 & 14 Vict. c. 29.

*Gamble* in reply.—The cases relied on at the other side are nearly all cases respecting personal estate, where there are doubtful words of description, and

do not apply to this case where there is no question as to the lands, but only as to the estate in the lands which the grantor intended to convey. The conveyance of the "lands" and "all the estate," &c. by the mortgage of September, 1844, is sufficient to carry both the equity of redemption in the fee and the sub-interest under the lease of August, 1832. The effect of these words cannot be controlled by the other parts of the deed—*Walsh v. Irevenion* (15 Q.B. 734); nor cut down by the recitals—*Holiday v. Overton* (14 Beav. 467). Even though the deed recite an intention not to convey certain lands, if they are conveyed by the operative part of the deed they pass—*Alexander v. Crosbie* (L. & G. 145); and so if the recital omit part of the lands conveyed.—*Ex parte Glynn* (1. M. D. & De G. 29). The operative words in the mortgage deed of September, 1844, therefore did pass the leasehold interest, and the mortgage is well charged thereon. But if there was anything doubtful in the deed, the Court may look at the surrounding circumstances—*Attorney General v. Drummond* (Con. & L. 210); and if a party by his own acts has put a construction on the deed, he cannot afterwards dispute it—*Cholmondely v. Clinton* (4 Bl. 1); and in such case the best way is to refer to the acts of the parties.—*Bayle v. Lynch* (1 Ridg. P. C. 384); *Atkinson v. Pilsworth* (1 Ridg. P. C. 449). Here the mortgagor allowed the agent of the mortgagee to receive the rents of the leasehold premises for two years and appropriate them to the payment of the interest, thus admitting that the mortgage was charged on the leasehold. The leasehold interest is at all events affected by the judgment which was entered up in 1844, and registered in 1860, under the Redocketing Act, 1828 (9 Geo. 4, c. 35.) Judgments not revived or redocketed within twenty years from entry, were made void against purchasers for value; and this has been construed to mean purchasers becoming such, after the twenty years from entry of judgment. *Hickson v. Collis* (10 L. E. R., 447); by the 7 & 8 Vict., c. 90, s. 1, registry within the same period of twenty years is substituted for redocketing, and by the 13 & 14 Vict. cap. 29, sec. 3, judgments entered up before the Act are rendered void against purchasers, unless registered within five years from the passing of the Act. This only applies to purchasers becoming such, after the five years (after 1855); *Hickson v. Collis* (ante,) and does not apply here.

The facts of this case, also the arguments, are more fully considered in the following judgment:—

**THE LORD CHANCELLOR.**—The question to be decided here is one of considerable importance. The Now the first question we have to consider is this—whether on the true construction of the deed of Sept., 1844, the partial interest passed to the mortgagee? Now it does appear that at the date of that deed, John Prendergast was seised in fee, subject to a mortgage of the 9th of October, 1835; and he had also a lease for lives under Costello, namely, the lease of August, 1832. And then the question remains whether the petitioners are entitled to claim a charge upon that sub-interest by virtue of a judgment given by John Prendergast, collateral with the mortgage. At to the first question which turns upon the

construction of the mortgage deed of September, 1844, it appears that at the date of that deed, John Prendergast was seised in fee of the lands of Kiltormer, subject to a mortgage of £1000 of October, 1832. Mr. Prendergast's legal position then was, that he was entitled under the sub-lease for the lives of himself and wife, under that lease the reversion of which was in Costello, and the reversion of Costello's lease was in John Prendergast in fee. The proper conveyance by him in those interests would have been a conveyance of his life estate, and of his remainder in the lands, and that, whether the deed recited the prior interest in the lands or not. The frame of the deed is to hold the lands in fee with all the estate and interest therein; and it was contended by the petitioner that under these words the lessees interest also passed. The question of how far a general grant of this kind will carry every interest of the grantor in the lands, was discussed in the case of *Fawcett v. Carpenter* (2 Dow. & Clarke, H. L. C. 232); it that case the House of Lords, confirming the decision of the Court of Exchequer Chamber in Ireland, as reported in 5 Bligh, 14; held, that when a person having a legal estate in certain premises, as trustee, and an equitable and beneficial interest in the same estate, executes a deed which might be construed either as purporting to pass both estates, or only the equitable estate, which alone he had a right to convey; it was held, that the instrument should be construed as intending to pass only the estate which he had a right to convey; for a party shall be presumed to have intended to do only that which he had a right to do, *provided* the instrument be fairly and reasonably capable of that construction. That case has been dissented from by Lord St. Leonards in his book on Vendors and Purchasers, 14th ed. p. 743. His Lordship there says that it was intended to bring in an Act of Parliament, to repeal that judgment of the House of Lords. Well that Act was never passed. I was referred in the argument to a case in which one of the judges found fault with this case of *Fawcett v. Carpenter*; be that as it may, this case is law—*Walsh v. Trevanion* (15 Ad. & Ell. N.S. 733)—was a case sent by the Vice Chancellor of England (Sir L. Shalldwell) for the opinion of the Court of Queen's Bench. In that case the marginal note is as follows:—"A and his eldest son B, had a general power of appointment over estates lying in eight parishes, and, subject thereto, had between them the whole interest. By deeds of appointment and release, dated the 19th of July, 1824, they appointed and conveyed to the Bank of England, by way of mortgage in fee, premises described in the deeds as "all the lands" of A and B, in the eight parishes (naming them) "which were specified and described in a schedule" to said deeds; well the schedule specified a part only of the first mentioned estates. Subject to this charge on part, A and B retained the entire interest in the whole estates. By deed of appointment and release of the 13th of June, 1827, being the marriage settlement of B, after reciting the creation of the power, as extending to the lands thereafter settled, amongst other hereditaments, and reciting the mortgage of the 19th of July, 1824, and that on the treaty for the marriage it was agreed that *such hereditaments,*

subject to the power as were comprised in the mortgage, and the whole of the lady's fortune should be settled to certain uses, A and B appointed that the lands thereafter released or expressed so to be, should (but subject to the charge thereinbefore mentioned), go to certain uses; and A and B also by the same deed, conveyed and released to the same uses lands described as *all the lands of them, A and B situate in the eight parishes* (naming them), and *which are intended to be specific*, and described in the schedule hereunder written, but *which schedule* is not intended to abridge or affect the generality of the description hereinbefore expressed and contained. The uses were these amongst others, to the use of the sons of the marriage in tail male. The schedule there was a precise copy of that annexed to the mortgage deed of 1824. . . . . The first tenant in tail, under the deed, claimed the lands not comprised in the mortgage deed, and the question was whether those lands passed by the indenture of the 13th of July, 1827. Held, that no other lands than those comprised in the mortgage passed by that indenture." Now all the cases decide this, that the recitals and other parts of the deed may be used as a test to discover the intention of the parties, and to fix the true meaning of the words of the operative part of the deed — *Doe v. Meyrick* (2 Crompt. and Jarv. 223) and many other cases — *Roche v. Lord Kensington* (2 Kay & Johns. 753). The case of *ex parte Glynn* (1 Montag. Deacon, and De G., 29) was referred to by Mr. Gamble. There it was held that the recital in the agreement did not restrain the general words in the operative parts thereof, and that the security extends to a property which was not subject to any previous charge. In *Gray v. The Earl of Limerick*, an assignment of one equal part or share, parts or shares, to which the assignor, became entitled; upon the construction of the recitals, and of the whole instrument was held to pass only one eighth, although the assignor was entitled to a larger share. The proper way then to put the rule of law, appears to me to be this, that the general words of the deed should pass the entire estate of the grantor unless it appears by the other parts of the deed that it was the intention of the parties that it should not pass. Now, as to the question whether, in this deed of September, 1841, it does or does not appear that there was an intention expressed upon the face of the deed, not to convey anything to the mortgagor except the fee of the lands; the former dealing with the property must be taken into consideration. The mortgage of October, 1835, by the former owner to Blake, was only a mortgage of the fee. Then the deed of June, 1844, is a conveyance by the representative of Blake, with the consent of, though there is no direct conveyance by Prendergast himself. Well, the deed of September, 1844, recites an agreement for a loan, as mentioned in the deed of June, 1844, and states it as an agreement only to mortgage the equity of redemption in the lands of Kiltormer, together with other land, and all the estate therein: and from the rest of the instrument it appears there never was any intention to pass the sub-interest. The mortgagors covenant to convey the equity of redemption in the lands, and not the lands themselves. Again, there is a covenant that the trustees may enter

into possession and keep down the head rents, payable out of the other lands, but there is no mention of the head rents, payable out of Kiltormer, which should have been if same was subject to the mortgage. Again, Prendergast covenants for title, save as to tenants leases, mentioning the lease to Costello, but not alluding to the under lease to Prendergast. I am thereof of opinion that the mortgage did not charge the sub-lease.

It is alleged for the petitioners, that at the time of the sale in the Incumbered Estates Court there was no power to sell for two lives; but a question might arise as to the effect of a conveyance from the Incumbered Estates Court upon the sub-interest purporting to convey the estate of Prendergast in the lands, it was then contended by the respondents that the injunction obtained by Mr. Reynolds from the Incumbered Estates Court to put him into possession of the lands upon the owners of Costello's lease, and the person then in possession of that part of the lands refusing to attorn, that that refusing to attorn had the effect of destroying Costello's lease and consequently the sub-lease of August, 1832. Attornment is now almost unknown to the law: tenants had formerly to attorn to the receiver. The 29th section of the Incumbered Estates Act, 12 & 13 Vict., ch. 77, gave the commissioners power to deliver possession to the purchaser, and the Court required tenants to attorn, and in the event of their not attorning, gave an injunction for a possession. But it never was intended that when an injunction was granted to put a purchaser into possession that the tenant should lose his lease because he does not attorn. That question was decided by the Court of Common Pleas in the case of *Fitzpatrick v. Hughes* (12 I. C. L. 488) and I am bound by the judgment in that case.

It remains now to consider the effect of the judgment, which was given collateral with the mortgage. This turns upon the construction of the 7 & 8 Vic. c. 29, by the third section of the latter Act; judgments entered up *after* the passing of that Act are rendered void as against purchasers, unless registered within five years from the passing of the Act; the Act was in 1850, and the purchase here was within five years after the passing of the Act; and the petitioner contends that such a purchaser does not come within the protection of the Act; with regard to judgments entered up *before* the Act, and not registered within five years after the Act. I think the principle decided in the case of *Hickson v. Collis* (10 I. E. R. 447) applies to the 13 & 14 Vic. c. 29, and that therefore, the judgment is charged upon the sub-lease of August, 1832; and that Mr. Reynolds as a purchaser of that sub-lease, has no protection against the judgment as not being registered within the five years.

## Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

SMITH v. DELACHEROIS.—May 4.

Pleading—Amendments—Costs.

*In an action brought for injury to the wall of a dwelling-house, and for the erection of a nuisance; the plaintiff's counsel, after notice of trial had been served, deemed it necessary to have the summons and plaint amended, by adding to it several counts; and a notice was served on the defendant's attorney, requesting him to sign a consent to have such counts added, and undertaking to pay the costs incurred by such amendments, and requesting him, if he required any other terms, to state them, in order to avoid the necessity of an application to the Court. The defendant's attorney replied that he could not advise his client to sign the consent. Upon motion by the plaintiff to amend the summons and plaint, the Court made the order and refused to give the defendant the costs of appearing upon the motion (Christian, J., dissentiente.)*

THIS was a motion that the summons and plaint in this case might be amended by adding counts. The action was brought for an injury to the wall of a dwelling-house in Harcourt-street. The senior counsel for the plaintiff believed it would be perilous to trust to the allegation that the wall was the plaintiff's wall; and he recommended that it should be described as a party wall. It was also proposed to add a count for the nuisance. A notice had been served on the defendant's attorney, asking him to sign a consent authorizing these amendments, and offering to pay all costs incident to them, which the latter refused to do.

Serjeant Armstrong (with him Monahan) in support of the motion.

Exham, Q.C., and Cusack Smith for the defendant.—There were originally five counts in the summons and plaint. There were defences pleaded to these and fifteen issues, and notice of trial was served. The plaintiff now proposes to file seven new counts. As the plaint stood, the first count stated that we pulled down and damaged the wall; it complained of a common trespass. We pleaded a traverse; and that the wall was a party wall; and that we inserted a joist into our half. The second count stated that the defendant was possessed of the adjoining house, &c. The third count was the same as the first, except that in it the plaintiff was stated to be the executor of Smith. The fourth count was the same as the second, except that in it the plaintiff was stated to be the executor of Smith. [Keogh, J.—What is to prevent the plaintiff from discontinuing the action and commencing a new one with what counts he thinks fit?] One of the counts is bad. [Christian, J.—Have you a motion to that effect?] No, but if we consented now it would be said afterwards that we admitted the counts. [Keogh, J., Certainly not.] Where a count was sought to be added the Court looked into the count. [Monahan, C.J.—You are entitled to all the costs properly in-

curred by this, and to the costs of the pleas rendered abortive by these amendments.] As to the costs of this motion, the consent was served at nine o'clock on Wednesday, asking us to consent by twelve o'clock on Friday. The Court will give us liberty to demur and plead. [Monahan, C.J.—As a matter of course you would get that by coming in.] Here the costs of a second motion to set aside counts as embarrassing, will be incurred; then of another to demur and plead. [Christian, J.—When a party at a late stage of the action comes to the Court to remodel his case the other party, I think, has a right to be present at the motion, to watch the proceedings, and is entitled to the costs of that motion.] If this were an application to add a simple count with a simple issue, it would be a different thing, but we come forward to help the opposite party to remodel the case. [Monahan, C.J.—Assuming you cannot successfully oppose the motion, and that you are offered all the terms you have been offered, still it is a question, whether, notwithstanding that, you have a right to appear in Court on the motion. I am not sure that it is settled one way or the other.] We might not be entitled to the costs if this were a trifling difference. We thought we could not safely sign the consent.

Monahan in reply.—The form of the notice we served stated—"I hereby personally undertake to pay the costs, and if you require any other terms I request you to state them, to see if they should be complied with, to avoid the necessity of an application to the Court." The answer we received was—"I cannot advise the defendant to consent, &c." This motion would have been avoided if the defendant's advisers had shown what further they wanted. If this will not do, there will be an end to amendments. It would be better to abandon the action. The amendments are reasonable. The same question is only put in a different point of view.

MONAHAN, C.J.—I think the order should be made. The question here is if the defendant is to get the costs of this motion, he having been offered all the terms. We have not been referred to any case. In this Court it does not seem to have been settled one way or the other. Having regard to the general rule, I am of opinion that it is better we should make litigation as little expensive to the parties as possible. The majority here think that where there is no reasonable doubt but that the motion will be carried, the party cannot come in to look for the costs, *i.e.* when so far as the Court are concerned they cannot see any other reason for coming in. The parties will abide their own costs of the motion.

CHRISTIAN, J.—I think the order should be made; but I think the plaintiff should pay the costs. Where a party at a late stage of the case thinks he is under the necessity of remodelling it, and where instead of discontinuing he comes to the Court to remodel it by adding seven or eight new counts, *prima facie* it is the right of his adversary to have that done upon payment of costs, including the costs of his presence in the Court to see that all proper terms are imposed, and no unreasonable terms are added. That *prima facie* right, I do not think is gone because the plaintiff tenders a consent which proposes not liberty to add counts generally, but to file certain pleadings,

sent ready made,—objectionable on the face of them, whether or not it should turn out that they were not objectionable. If nothing is sought to be imposed which might turn out prejudicial, I do not say the party has a right to come into Court; but if there be, I do not think he loses his ordinary *prima facie* right to appear in Court. That being the consent sought to be imposed with pleadings ready made, the opposite party says "I will not sign it," and instead of asking to amend merely under the consent, the plaintiff goes on and asks the Court to have these counts inserted, which totally remodel the entire of his case. I think the defendant has a right not only to all the costs incurred, but to the costs of appearing; and without laying down any general rule, I think this motion should be granted on the ordinary terms, the plaintiff paying the costs.

KEOGH, J.—I concur with the majority of the Court; but I wish to say a few words. This privilege strikes me as the key of this Act of Parliament, the most valuable provision contained in it. If there be oppositions to motions of this kind, let us see if it will not tend to take away the benefit. I concur with Serjeant Armstrong in thinking that if oppositions are encouraged it will make parties discontinue, and I join with him in hoping a public opinion will grow up better than any rule. I do not think it advisable to make a general rule. Let us see what has been done. The motion is carried in this particular case. The plaintiff carries his motion *in omnibus*. How did he act when he saw it would be advisable to amend? Never was there a notice which in my judgment was more calculated to elicit the manifestation of a liberal spirit on the part of the practitioner. It is this—"I request you to inform me whether you will sign a consent in these words; and I undertake to pay the costs when taxed, and if you will require any other terms, I request that you will state them, that if reasonable they may be complied with." The consent itself says that the party shall be at liberty to add the costs, including fees to be paid to counsel for considering the counts. Does the defendant suggest any alteration in the counts? Not a word. He returns the general issue: he is advised—he cannot sign the consent. The whole is a question of costs. It has come round to be that and nothing else. I agree with Serjeant Armstrong that there should grow up a friendly feeling between the two branches of the profession; and that one should not be quick to discover a flaw in the other.

O'HAGAN, J.—I am of opinion with the Chief Justice and Keogh, J. I do not think there is any rule, and I think what is done in this case will not be taken as stringently governing any other case. The plaintiff has carried his motion in everything, and offered to pay all the costs.

CHRISTIAN, J.—I may state what I omitted to state, that the order made by the Court is not what the plaintiff sought for, that certain counts should be added to the summons and plaint, but that the plaintiff be permitted at his own risk to amend the summons and plaint.

*Motion granted.*

## Landed Estates Court

Reported by C. J. Manning, Esq.

[JUDGE HARGREAVE.]

JOHN F. JOHNSTON, OWNER; JANE L. JOHNSTON, PETITIONER.—10th February.

*The words of a bequest were as follows—"I leave severally to my four daughters—Mary Eleanor Plummer, Jane Lucretia Johnston, Elizabeth Frances Johnston, and Catherine Sarah Johnston, and unto their lawful children, the sum of £800 sterling each; which four portions, amounting together to £3200, I hereby direct to be a first charge upon my said townland of Corkeeran, and my portion of Tamlet, purchased by me under the Encumbered Estates Court. And I direct interest at the rate of £5 per cent on the said sums, that is to say, an annual sum of £40, to be paid in two equal half-yearly payments, severally unto each of my four daughters aforesaid, as a first charge out of the rents and profits of the said lands." The question was whether each £800 was to be considered as belonging to the daughter and her children, living at testator's death, as joint tenants, or whether each £800 was to be considered as settled on the daughter for life, with remainder to all her children. Held—that the testator's four daughters took life interests in the respective legacies with remainder to their children.*

THE argument arose upon the disposal of the residue of the purchase money.

LAW, Q.C., for petitioner, contended that three sums of £800, vested absolutely in three of the daughters, who had no children; and as to the other £800, in the parent and children as joint tenants.

WARREN, Q.C., contra, contended for a life interest, there being an indication of intention; charging the interest showed that testator never contemplated the principal sums being paid to his daughters.

JUDGE HARGREAVE gave judgment as follows:—The question in this case arises on the will of Mr. Johnston, by which he bequeathed four sums of £800 to his four daughters respectively (naming them), and unto their lawful children. These sums were charged by the will on the lands which have been sold in this matter; and the will contained a direction that interest at £5 per cent. per annum, amounting to £40 a year, should be paid to each of the said four daughters, out of the rents of the lands. There are other bequests to these daughters on the death of the testator's wife, which I think not material, as they are bequests to the daughters simply, and not to them and their children. None of the daughters had a child at the date of the will. In fact only one of them was then married. A child of hers was living at the death of testator. Two others of the daughters have since married. In this state of facts the question is whether each £800 is to be considered as belonging to the daughter and her children, living at testator's death, as joint tenants, or whether each £800 is to be considered as settled on the daughter for life, with remainder to all her children. The cases on this subject are numerous and conflicting;



but they appear to result in this doctrine, that a simple bequest of money to A and her children, constitutes A and her children, if any living at testator's death, joint tenants; but if the bequest is accompanied by anything which indicates that the testator did not contemplate payment and distribution immediately after his death; the Court will regard this circumstance as letting in all the children, and therefore pointing to a gift for life, with remainder to children. This principle is laid down in *Morse v. Morse* (2 Sim. 485); and in *Audsley v. Horn* (26 Beav. 195.) Sir John Romilly stated that the tendency of modern decisions was in favour of adopting this latter view. In this case the testator does not appear to have contemplated an immediate raising and payment of the legacies, for he provides for the payment of interest, so long as the money should remain charged on the land. This circumstance of itself is a slight one, and not very decisive, because he did not prohibit the legatees from proceeding alone to raise their legacies by sale of the estate; but the clause contains an incidental expression, which appears to be conclusive as to the testator's meaning in a case like this, in which a very small circumstance will turn the balance in one direction. The testator directs that the interest on each legacy, viz. four sums of £40 a year, should be paid to his four daughters respectively. This is conclusive against a joint tenancy, for if there was a joint tenancy, the interest of each sum ought to be paid equally to the daughter and her children. The testator shows by this expression, that whilst the mother was living she was to receive the whole interest, and that the children were not to compete with her. If the money had remained on the estate, the children would have no rights concurrent with their respective mothers, so that if the children are to take at all they must take in remainder, for the raising of the money makes no difference. I think, therefore, there is sufficient in this case to enable me to arrive at a satisfactory conclusion, without further considering the numerous authorities more in detail. I must declare that the testator's four daughters take life interests in the respective legacies, with remainder to their children.

#### [JUDGE HARGREAVE.]

ESTATE OF JOHN PYNE PENNEFATHER.—April 27.

*Statute of Limitations*—3 & 4 Wm. IV. c. 27—  
*Welsh Mortgage.*

*A Welsh mortgage is within the meaning of the Statute of Limitations, 3 & 4 Wm. 4, c. 27.*

THE petition in this case was filed by John Pyne Pennefather claiming to be the owner of portions of the lands of Rathkenry, Co. Tipperary, which formed the subject of a deed of 27th Sept. 1810. The petition was in the nature of a redemption suit; and came was shown on behalf of the Pynes (minors), who contended that the equity of redemption was barred by the Statute of Limitations. The deed of 1810

was a security given by the claimant's grandfather to Arthur Pyne, charging certain monies on these parts of Rathkenry. Under this deed, Arthur Pyne at some period not stated, but very long ago, entered into receipt of the rents, and that receipt was continued down to the present time. In the year 1832, the representative of Arthur Pyne wrote to the claimant's uncle, who was then the owner of the lands in terms which would be sufficient to constitute an acknowledgment of the right of redemption being subsisting within the statute. Since that date there was no evidence of any acknowledgment in writing having been made to any person claiming the equity of redemption. It appeared indeed that the name of the owner's uncle, Richard Pennefather, was used in an ejectment against a tenant. Assuming that the name of the mortgagor or his representative was used at the instance of the mortgagee, such a circumstance did not seem to be of the nature of an acknowledgment, that any beneficial title existed in Richard Pennefather; and even if it did, it was not such an acknowledgment as the statute required, viz: one in writing signed by the one party and addressed to the other. The real question in the case was, whether the deed of 1810 was a mortgage within the meaning of the Act. The deed was made between William Pennefather, 1st part; Arthur Pyne, 2nd part; William Bradshaw, John Corbett, E. Kelly, and T. Kelly (tenants on the lands), 3rd part; and witnessed that in consideration of £400 due by William Pennefather to A. Pyne, he, William Pennefather, granted to A. Pyne, his executors, &c. an annuity or yearly rent charge of £100, payable half-yearly, chargeable upon (*inter alia*) Rathkenry: to hold the same for and until the said principal sum of £400 with interest, should be paid off. The said deed contained clauses of entry and distress, and covenants by the tenants, with the assent of Pennefather, to pay their rents to A. Pyne.

*Sherlock, Q.C., and Ferguson* appeared for the petitioners. *Campion* contra for the Pynes.

JUDGE HARGREAVE gave judgment as follows:—In order to constitute a mortgage there must be a debt charged on land, a right to the creditor to enter into the possession or receipt of the rent, and a right in the owner of the land to redeem, and for that purpose to call for an account. When these circumstances exist, the statute says that the right to redeem shall not be exercised but within twenty years after the mortgagee takes possession. It is contended that the statute does not apply to mortgages where it is part of the arrangement that the mortgagee is to get into possession and pay himself by receipt of the rents, inasmuch as the possession of the mortgagee and the ownership of the mortgagor are not inconsistent; the mortgagee being a sort of agent of the mortgagor, applying the rents for his benefit by paying off his debt. The Act however applies to all mortgages, and makes no exceptions. It does not proceed upon any theory that the possession of a mortgagee is adverse to the title of the mortgagor, and that the statute only runs when it begins to be adverse. It operates by determining not when the mortgagor's right to the possession accrues by the debt having been paid off; but by determining when the mortgagor first acquires the right to call on the mortgagee to account, and to sub-

mit to be paid off his balance. In the authorities on this subject prior to the statute, a distinction is drawn between an ordinary mortgagee in possession, and a mortgagee going into possession by an arrangement with the debtor in order to pay himself off out of the rents. Before the statute there was no fixed period within which a redemption suit must have been brought. In each case it was left to the judgment of the Court to decide whether the *laches* of the owner or any demerits of the mortgagee were such as to induce the Court to refuse or to grant relief. It being a question to be considered by the Court, having regard to all the attendant circumstances, it might be very important to consider whether the mortgagee entered into possession, meaning to take the estate for the debt, or whether he merely entered by arrangement with the debtor, to pay himself off by instalments. The Court might consider that in the former case time would run against the debtors immediately; and that in the other case it would not run until the debtor might reasonably suppose that the debt would have been discharged. The object of the statute was to abolish this class of questions, which made titles very uncertain, and to fix for all cases one uniform period of limitation; and it was accordingly enacted in effect, that an owner should be barred if he did not bring his redemption suit within twenty years after he should have become entitled to file a bill for an account of the rents received by the mortgagee in possession, and for redemption. In the present case the deed is not in the ordinary form of a mortgage. It is a grant of a rent-charge of £100 a year; and certain tenants of the owner are made parties to the deed and covenant, to pay the rents to Arthur Pyne, the creditor, so as to secure the payment of the debt, by instalments of £100 a year. It appears to me that this is a mortgage within the Act. The creditor is entitled to enter into receipt of the rents; and so soon as he does so the debtor is entitled to call for an account, and to redeem, on payment, the balance due. This right has been foregone for more than twenty years, and is therefore barred by the statute. It appears, moreover, in the present case, that Pyne had a prior mortgage, in the usual form, dated, I believe, in 1796. Even if Mr. Pennefather were to be considered entitled to redeem the mortgage of 1810, it would still require to be considered whether the possession under the previous mortgage would not have completely barred the equity of redemption. I decide the case however on this broad principle, that the statute applies to all kinds of mortgages; and that to hold otherwise would involve titles in all difficulties which existed before there was a fixed period of limitation.

*Case allowed with costs.*

## Court of Bankruptcy & Insolvency

[Reported by John Levy, Esq., Barrister-at-Law.]

[BEFORE BEEWICK, J.]

RE MARY JOSEPHINE TRAVERS.

*Bringing an unsuccessful action where the plaintiff is unable to pay costs—Opinion of counsel.*

*Where a plaintiff brings an action for an alleged libel with a view to vindicate her character against an imputation of perjury, and where, before bringing the action, she submits a case to counsel, who says that "the article in question unmistakably imputes the commission of perjury, and that such imputation is a gross libel," still if, in the opinion of the judge of the Insolvency Court, the action was not brought bona fide with the legitimate object of protecting her character, but that the opportunity was snatched at for other and not legitimate ends, the Court will give a short remand in order to mark its sense of the impropriety of such action where the plaintiff is wholly unable to pay costs.*

In this case the insolvent was charged in execution at the suit of Messrs. Potts, proprietors of *Saunders's News-Letter*, for the costs of an unsuccessful action against them for an alleged libel which appeared in their paper. The libel complained of was an extract from the *Caledonian Mercury*, wherein it commented upon a trial in which the insolvent was plaintiff, and Sir William Wilde and wife were defendants, and in that article imputed to the insolvent perjury. Before she commenced the action she submitted a case to Mr. Serjeant Armstrong, who had been her leading counsel in her action against Sir William Wilde, as well as in the action against Messrs. Potts. Mr. Armstrong, in his opinion, stated that the article in question was a gross libel, and that any jury having a due regard for their oaths should find it so, but added that she and her friends ought to consider the wisdom and prudence of bringing an action. The action, however, was proceeded with, and the jury found for the defendants.

Kernan, Q.C., appeared for the Messrs. Potts to oppose.—He said the Messrs. Potts were the creditors of this lady for £136, on account of an unfounded action which Miss Travers brought against them. He had not seen any advice of counsel to justify that action; all he knew was, that according to the reports the jury at once found for the defendants. This lady embarked in litigation knowing that she had no property to pay costs in case the result should be against her. She alleged that she had been injured, and a special jury found that no injury had been done to her at all. Under such circumstances the law might become a very serious engine of oppression. It was a most serious thing for gentlemen in the position of the Messrs. Potts, who published these matters, as had been found by the jury, without malice, without the intention of doing any harm, and merely in the course of business as public journalists, that they should have been subjected to an action by a person not inexperienced in litigation, for it appeared that she had previously got a farthing damages from

a special jury. Costs followed the result of that former action, and, in all probability, the second action was owing to the success of the first. Whether that were so or not, a grave injustice had been done to the Messrs. Potts. The insolvent was a lady, and no doubt in administering the law there they should consider her condition and sex; still it should also be considered that the person with whom his clients had had to deal was not inexperienced in the world. He would ask the Court, as a matter of justice to the Messrs. Potts to give a remand; and if his clients should afterwards think that they could give her a discharge it would be for them to do so. He was instructed to press upon the Court the hardships which they had sustained in being subjected not merely to the costs of the action in question, but also to those of this litigation.

*Levy*, for the insolvent, asked for a free discharge founded on the opinion of Serjeant Armstrong, which, he submitted, was correct upon the matter referred to him; but even suppose he were mistaken, the insolvent would be equally entitled to her discharge. He thought a remand under such circumstances would be without precedent.

JUDGE BIRWICK.—The only question in this case appears to be whether the action brought by Miss Travers against the Messrs. Potts, as proprietors of the *Saunders' News-Letter*, for a libel contained in an extract from a Scotch newspaper, for the costs of which she is now in custody, was a fair and proper proceeding on her part, bearing in mind that when she instituted the suit she was not worth a single farthing to meet this or any other demand. Miss Travers produces the opinion of eminent counsel, in which he says that the publication "unmistakeably imputes to Miss Travers the commission of perjury, and that such imputation is a gross libel;" but then he expresses "the greatest doubts as to the wisdom or prudence of Miss Travers further inviting public attention to her case," and adds, that she and her friends must consider and decide on the course she should adopt for this charge on her character. I have myself read the article complained of with care, and with the light thrown on it by an extract from Miss Travers' evidence in the action against Sir William and Lady Wilde, and in my judgment the article not only does not impute perjury to Miss Travers, but seems calculated to absolve her from such a charge. However, if her counsel was mistaken, Miss Travers should not be prejudiced thereby. Forthwith, after receiving this opinion, an action for libel is instituted against the proprietors of *Saunders' News-Letter*, to which, after denying in substance the allegations of the charge of perjury, they pleaded that the article in question was a fair and *bona fide* comment on the trial of *Travers v. Wilde*, which was a subject of public interest, and in which, after a lengthened and expensive investigation before a special jury, the action resulted in a verdict for the defendant. Miss Travers being now charged in execution for the costs, and seeking her discharge from this Court, I am to consider whether this action was, as Miss Travers alleges, instituted *bona fide* for the object of relieving her character from a slanderous imputation, or, as the Messrs. Potts insist, really for the purpose of re-trying the

former case, and with the hopes of obtaining damages against the newspaper proprietor which she failed to obtain against the real parties. Now, in the first place, it is admitted that the article in question was one of several extracts from different newspapers, commenting on the action of *Travers v. Wilde*, which were inserted in *Saunders' News-Letter* without a word of comment or observation of their own, and further, that the *Saunders' News-Letter* contained not merely "a full, complete, and unimpeachable account of Miss Travers' case without note or comment," but, by the admission of her own counsel, "such a marvellous specimen of skill in reporting as would have done credit to the first journal in the world." In the second place, I have listened to all that was urged by Miss Travers's counsel in this case, and I have read through the whole report of the trial, with a view to discover whether Miss Travers had, before instituting the action, made any application to the newspaper to explain or withdraw the obnoxious extract, which, if her object had been such as is now suggested, she was bound, I think, to have done, bearing in mind that the obnoxious article was a mere extract from another paper, probably cut out and inserted by an editor without any great deliberation; and also that (if I have read the account of the trial correctly) the *Saunders' News-Letter* had inserted articles from other papers favourable to Miss Travers. I have further the acknowledgment that the *Saunders' News-Letter* is not only one of the most respectable papers in this country, but an admission from Miss Travers's counsel that it is conducted "with good sense and moderation, and the proprietors gentlemen entitled to every respect and every consideration at the hands of any tribunal." I have further the statement of the Chief Justice in his charge, that it appeared to him "to be rather a case by which an attempt was made to have a re-hearing of a former case, in which the same party was plaintiff, but not against the same defendant, who is the responsible party; but now to re-hear the merits of a former case against a perfectly innocent party;" and this is followed by a verdict of a jury unimpeached, establishing the defence of the Messrs. Potts. I have, therefore, I conceive, abundant grounds for believing that the action was not *bona fide* for the legitimate object of protecting her character, but that the opportunity was snatched at for other and not legitimate ends. I conceive that a party who institutes an action without the means of paying costs, if unsuccessful, should be prepared to show to this Court, when seeking a discharge from the costs, that the proceeding was perfectly *bona fide*, instituted for a fair and honest purpose, and without any sinister or malicious object. I do not think the action brought in this case was of that character. I think it was as unfair as it proved to be unfounded, and therefore that the Messrs. Potts have a right to oppose Miss Travers's discharge. But as I understand that they do not from any vindictive feeling towards this lady, but for the purpose of having the expression of the Court on the case, and as I am very much disinclined to remand any person, much less a female, to incarceration in the Marshalsea, I think I shall have done sufficient to order that the insolvent shall be dis-

charged at the end of nine weeks from the date of the arrest, which will only leave this lady in actual custody for little more than one fortnight. When I do so, I think the probability is that the Messrs. Potts, having had the expression of my opinion upon the case, and, probably, bearing in mind that this is a lady, and the circumstance of her being incarcerated without any chance of benefit derived from the investigation that has been made as to her property, will take these circumstances into consideration, and not make it necessary to have her incarcerated at all. However, I leave that entirely in their hands. I have thought it right to state what I have done with respect to the publication, because this is a case which, on principle, may be important hereafter.

Attorney for the opposing creditor.—Todd.

Attorney for the insolvent.—M'Nulty.

## Court of Chancery.

Reported by Oliver J. Burke, Esq., Barrister-at-Law

### NOTE.

#### SHERLOCK v. BLAKE.

In the report of this case, *supra*, p. 351, the names of Messrs. Brewster, Q.C., P. Blake, Q.C., and Charles Maldon, who appeared as counsel for Eliza Blake, were accidentally omitted.

#### DARLEY v. GIBBONS.—June 16.

*Vendor and purchaser—Constructive notice—Gross negligence.*

*Lessor, by indenture of lease of the 22nd of July, 1836, demised certain premises for thirty-one years to his lessee. In 1860 said lessee deposited said lease by way of equitable mortgage with D. to secure unto D. a sum of £96 10s. 1d. On the 24th of July, 1863, and previous to the expiration of said lease of 1836, lessor demised said premises to lessee for 31 years, in consideration of the surrender of the former lease. Said lessee, after the obtaining of the last-mentioned lease, assigned same to K. for value. K. had no notice of the equitable mortgage of said first lease. D. now sought to establish that said second lease was a graft upon the first, and that K. must be held to have constructive notice of the equitable mortgage. Held, that a case of gross negligence not having been established, the purchaser was protected against said equitable mortgage.*

THIS was a cause petition presented by Joseph Farran Darley, trading under the style and firm of Joseph Watkins & Company against Patrick Oliver Gibbons and Jane Teresa, his wife, and Eugene Kelly, the respondents. The petition prayed for a declaration that a certain lease of the 24th July, 1863, was a renewal or graft upon a certain original lease of the 22nd of July, 1836; and also that the petitioner was entitled, by virtue of the deposit of the title deeds, to an equitable mortgage upon the dwelling-house and premises in said mortgage mentioned, for

securing to the petitioner's said firm, the repayment of the principal sum of £96 10s. 1d., and the interest due thereon, and that an account be taken of what was due for principal, interest, and costs on foot of said equitable mortgage, and that the respondents, or some one of them, be ordered to pay petitioner such sum as might be found due to them, &c. The facts of this case as disclosed in the cause petition were shortly as follows—That by indenture of lease bearing date the 22nd July, 1836, the Rev. Frederick Augustus Trotter, in consideration of the yearly rent of £20, and of the covenants in said leases contained, demised a certain house in Poolbeg-street to Michael Clarke, his executors, administrators, and assigns, from the 1st July, 1836, for the term of thirty-one years, that this interest was assigned to one Thomas Magrath, who vested the lease in trustees on the occasion of his marriage, upon trust, amongst other things, for the sole use of his wife. Magrath having died without issue, his widow married the respondent (Patrick Oliver Gibbons), and in August, 1860, they deposited the lease with the petitioner, trading as "Messrs. Watkins and Co." as an equitable mortgage to secure £96 10s. 1d., the value of porter supplied. In Dec. 1860, the petitioner obtained a judgment against the respondent for £96 10s. 1d. for debt and costs. Gibbons subsequently became insolvent, and the lessor's interest became vested in William H. Jackson, who, on the 24th July, 1863, demised the premises to said Patrick O. Gibbons for 35 years, in consideration of the surrender of the old lease, and Gibbons subsequently assigned it for value to John Eugene Kelly, who was also a respondent, and who, by his answer, insisted that he was a purchaser for value without notice of the petitioner's equitable mortgage, and that therefore his interest could not be affected.

The petitioner alleged that by reason of the premises he had a valid equitable mortgage for the sum of £96 10s. 1d. upon the said dwelling-house and premises comprised in said indentures of lease of the 22nd of July, 1836, and 24th of July, 1863; and petitioner submitted that the said lease of 24th day of July, 1863, was a graft upon said original lease of the 22nd of July, 1836, and that John Eugene Kelly, at the time he purchased said lease of the 24th of July, 1863, was a purchaser, and that if he had not absolute notice, this Court would hold that he had constructive notice of his assignor's, Patrick O. Gibbons's, title. That Kelly did not make any inquiries as to where the original lease was; and it was insisted at the bar, by the petitioner, that such an omission was gross negligence.

The respondents, the Gibbons, did not appear in this suit.

*The Solicitor-General (Sullivan)*, with *Darley*, Q.C., and *Seeds*, were for the petitioner.—We submit that the petitioner has a valid equitable mortgage for the sum of £96 10s. 1d. upon the dwelling-house and premises comprised in the two indentures of lease of 22nd July 1836, and 24th of July, 1863; and further, that the lease of 24th of July, 1863, is a graft upon the original lease of 22nd July, 1836, which lease being for thirty-one years would not expire until the year 1867, and therefore the lease of 1863 in equity becomes burthened with the payment of the

£96 10s. 1d., which the original lease had to bear. The second lease being assigned for value to an assignee (Kelly), it became incumbent upon Kelly to inquire as to his assignor's title.—*Attorney v. Hall* (16 Beav. 388); and it will be presumed that the assignee had constructive notice of the assignor's title.—*Coppin v. Fernyhough* (2 B. C. C. 291). That case was not dissimilar to the present; there a mortgagee of a lease which recited the surrender of a former lease, and which lease was in consideration of the surrender of a former lease, was held to have constructive notice thereof.—*Hewitt v. Loosemore* (9 Hare, 449). In that case the Court held that the assignee of a lease who had omitted, as in the present case, all inquiry, was guilty of gross negligence. Kelly was bound to ask where the original lease was.—*Worthington v. Morgan* (16 Sim. 547). There the marginal note is as follows: "A. agreed to sell an estate to B. for £1,400, of which, £400 was to be paid on the execution of the conveyance, and £1,000 was to be secured on mortgage of the estate. B. paid A. the £400, and A. conveyed the estate to him, but kept possession of the conveyance and of the title deeds. Some time afterwards, B. mortgaged the estate to A. for the £1000; but in the interim he had, unknown to A., mortgaged the estate to C., but C. did not investigate title to the estate, or make any enquiry relative to the title deeds. Held, that A. was entitled to priority over C."—*Tyles v. Webb* (6 Beav. 552). As to the doctrine of graft, vid. *Smith v. Chichester* (1 Connor & Lawson, 486).

*Brewster, Q.C.*, with *Warren, Q.C.*, and *John M'Mahon*, were heard for the respondents.—It is conceded here that Kelly was an honest purchaser for value—notice he had none, actual or constructive. *Hewitt v. Loosemore*, cited on the other side, is not applicable, it being a question of negligence as to solicitor and client; and there is no negligence averred in the pleadings here. "If, then, there be no negligence attributed, the purchaser, Kelly, is protected, and the petition must be dismissed as against him.

THE LORD CHANCELLOR.—The object of this suit was to establish a graft on the lease of 1836. None of the cases cited for the petitioner on the question of notice can be said to be much in point. In all of those cases, there was something to excite suspicion. Here there is no such element to be taken into account, but on the contrary we see that Kelly without suspicion, became the purchaser of the interest of the former tenant. In *Hewitt v. Loosemore* (9 Hare, 449) gross negligence was attributed to a solicitor: well we have nothing now to do with that class of cases. The question when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained the knowledge required, but whether the not obtaining it was an act of gross or culpable negligence.—*Ware v. Lord Egmont* (4 De Gex, M'N. & G. 460). I think, then, that the purchaser in this case is protected, and that no case of fraud or gross negligence has been established against him. I shall, therefore, dismiss this petition with costs.

## Court of Exchequer Chamber.

[Reported by William Woodcock, Esq., Barrister-at-Law

[BEFORE LEFROY, C. J., MONAHAN, C. J., KEOGH, CHRISTIAN, O'BRIEN, HAYES, FITZGERALD, AND OHAGAN, JJ.]

BUSTED V. CHUTE.—April 27, 28; June 26.

St. 23 & 24 Vict. c. 154—*Fee farm grant—Retrospective operation of statute.*

*A., as assignee of the original grantor of a fee-farm grant, sued B., the assignee of the original grantee, for a breach of covenant to repair committed before the passing of the Landlord and Tenant Law Amendment Act, 1860. The defendant having demurred to the summons and plaint, the Court of Exchequer (Pigot, C.B. dissentiente) held that the action lay. On a writ of error the Court of Exchequer Chamber reversed this decision, holding that the action did not lie.*

ERROR from the Court of Exchequer. The summons and plaint, as amended at the suggestion of the Court, complained that by a certain indenture bearing date the 1st of May, 1826, and made between Robert Pierce Chute, Esq., of the one part, and John M'Carthy of the other part, and under the hands and seals of the said parties respectively, the said Robert Pierce Chute, for the considerations therein mentioned, demised unto the said John M'Carthy All That and Those the mill, dwelling house, and piece of land surrounding the said mill and dwelling-house, being part of the lands of Tonereigh in the said indenture described, together with all machinery in the said mill in manner therein described, to have and to hold the said demised premises, with the rights, members, and appurtenances thereunto belonging, or in anywise appertaining, unto the said John M'Carthy, his heirs and assigns for ever, subject to the rents, covenants, and conditions by and in the said indenture reserved and contained, and the said John M'Carthy thereby, amongst other things, for himself, his heirs, executors, administrators, and assigns, covenanted with the said Robert Pierce Chute, his heirs and assigns, that he the said John M'Carthy, his heirs, executors, administrators, and assigns, should and would from time to time, and at all times thereafter, during the continuance of the said demise, preserve, uphold, support, maintain, and keep the said demised premises, and all improvements made and to be made thereon, in good and sufficient order, repair, and condition, and at the end, surrender, or other sooner determination of that demise, should and would so leave and yield up the same unto the said Robert Pierce Chute, his heirs, executors, administrators, and assigns; and the plaintiff averred that before the breaches of covenant after-mentioned, or any of them, were committed, and before the passing of a certain Act passed in the 24th year of her present Majesty, entitled "The Landlord and Tenant Law Amendment Act, Ireland, 1860," all the estate of the said Robert Pierce Chute in the premises in the said indenture mentioned became, and at the time of the committing

of the said breaches was and still continued to be duly vested in the plaintiff; and one moiety of all the estate and interest of the said John M'Carthy in the premises had become and was, and continued to be, duly vested in the defendant, yet the defendant, during the continuance of the said lease, and while he was such assignee as aforesaid, broke the said covenant, in this, that he did not, during the continuance of the said lease, and whilst he was such assignee as aforesaid, preserve, uphold, support, maintain, and keep the said moiety of the premises and the improvements made thereon, in good and sufficient order, repair, and condition; but that on the contrary whilst the plaintiff and defendant were such assignees as aforesaid, and during the said term, and before the passing of the before-mentioned Act, the entire of the said mill, dwelling-house, and premises, became and were, and from thence hitherto continued to be and now were burnt down, dilapidated and destroyed, to the plaintiff's damage in respect of his estate in the said moiety of £3,000. To this the defendant demurred on the grounds, first, because the summons and plaint said that but one moiety of the estate and interest of John M'Carthy in the premises therein mentioned, became and continued to be vested in said defendant, John Busteed, yet it did not make the person in whom the other moiety of the estate and interest in said premises was vested a party defendant, or shew any cause why the other party should not be made a party defendant thereto; secondly, although it sufficiently appeared by said summons and plaint that there was another person in existence jointly liable with said defendant, John Busteed, for the alleged breach of contract therein complained of, yet such person was not named in or made a party to said proceedings; thirdly, that said writ of summons and plaint which sought damages for the alleged breach of contract as to the entire of the premises therein named was defective in not joining as a defendant the party in whom the remaining moiety of the interest in all the premises was vested; fourthly, because no privity of contract was thereby shewn between the plaintiff and defendant, and because it did not thereby appear that the defendant was liable on the contracts or covenants entered into by John M'Carthy in the summons and plaint named. The Court of Exchequer (Pigot, C.B., dissenting) gave judgment for the plaintiff, whereupon the defendant Busteed brought his writ of error.

*Barry, Q.C.*, and *Robert Ferguson*, for the plaintiff in error.—The other side, in order to make out that the 12th section of the Landlord and Tenant Act is retrospective, refer to the 3rd and 4th sections. They contend that the 3rd section embraces fee-farm grants. According to the general rule of construction, if there is any doubt or ambiguity, the Court must hold a statute to be prospective only. In sect. 16 the words "shall be deemed" are used prospectively only. It lies on the party seeking to put a retrospective operation on a statute to shew beyond a reasonable doubt that it must have it.—*Moon v. Darden* (2 Exch. 22); *Williams v. Smith* (4 H. & N. 559); *Jackson v. Woolley* (8 Ell. & Bl. 784). Such being the case, is there anything on the face of section 12 to make it incumbent on the Court to hold

that it must operate on fee-farm grants which existed previous to the Act? It is said that this is a consolidation Act, intended to apply to all relations between landlord and tenant, whether created before or after the Act. There is no foundation for that doctrine. The schedule of Acts repealed, and s. 104 relating to that section show that all old statutes not repealed are retained. Section 11 illustrates this. That section applies expressly to future cases; all old ones are governed by the old sub-letting Act. Whether the statute is properly to be called a code, or not, it deals with a variety of topics which were formerly the subject-matter of particular statutes. Looking through the statute we will find no case of retrospective legislation unless where there is express language, or what is equivalent to express language. Sections 4, 5, and 6, are retrospective. Section 8 contains the words "any lease made before or after the passing of this Act." What is the use of those words if the statute is retrospective without them? The sections immediately antecedent to section 12 are principally and expressly prospective. In s. 26 the word "holden" is made expressly prospective. Even granting that fee-farm grants executed before the passing of the Act may be within its purview, yet as to assignees before the Act it cannot have that operation. Taking the sections dealing with assignment, they are all plainly prospective only, unless they are made expressly retrospective. But it may be doubted whether fee-farm grants are within the Act. Section 3 will be relied upon; but in the case of a fee farm grant there is no relation of landlord and tenant. It is a grant of the fee under the statute of *Quia emptores*, which is not repealed by this Act. If it was intended that the relation of landlord and tenant should exist in such a case, why is not the statute of *Quia emptores* repealed? The word "freehold" which is found in the 4th section, is generally used in modern times to signify something less than an estate in fee.—*Watkins on Conveyancing*, by White, p. 64; *Shelford's Real Property Statutes*, p. 126. The first time that fee-farm grants are dealt with in the Act is in section 25. Statutes 11 Anne, c. 2, & 7, 13 Vict. c. 105, 14 & 15 Vict. c. 20, are left unrepealed. Why should that be unless the Legislature intended that this Act should not apply to fee farm grants? Section 18 of the Act applies to sub-letting. That also shews that the Act does not contemplate its embracing fee-farm grants, as it was decided in *Re Quin* (8 Ir. Ch. R. 578) that a covenant against sub-letting in a fee-farm grant is void. The only way in which fee-farm grants are affected by the Act is by s. 52, which gives the grantor a right of proceeding by ejectment. Why should fee-farm grants be mentioned expressly in this section, and in s. 25, if they otherwise come within the Act?—*M'Areavy v. Hannen* (13 Ir. C. L. R. 70); *Mercer v. O'Reilly* (13 Ir. C. L. Rep. 153). We say then, first, that fee-farm grants are not within the operation of s. 3, and therefore not within that of s. 12; secondly, that supposing they are within the operation of s. 3, yet that does not extend to fee-farm grants executed before the passing of the Act; thirdly, that even if it does, yet s. 12 does not apply to assignees who became so before the passing of the Act.—*Lessee Porter v. French* (9 Ir. L. Rep. 514);

*Marsh v. Higgins* (9 C. B. 551); *Thompson v. Lack* (3 C. B. 540) *Musgrave v. M'Cullagh* (14 Ir. Ch. Rep. 496); *Thompson v. Walthman* (3 Dr. 628).

*The Solicitor General (Sullivan) and Neligan* (with them *Jellett Q.C.*) for the defendant in error.—An action of covenant will lie by a lessee against a lessor on the word "demise," which implies title.—*Burnett v. Lynch* (5 B. & Cr. 609). Suppose Chute had agreed with the other tenant that he should hold for ever, and that he contracted for good title, can it be said that that is not a contract of tenancy within the Landlord and Tenant Act. It cannot be argued that the action of ejectment for non-payment of rent was not given as well in the case of fee-farm grants executed before as after the Act. The Act calls the grantor a landlord, and the grantee a tenant. "Fee-farm grant" throughout the Act is synonymous with "contract of tenancy"—ss. 64, 70, 71. What has been the course of legislation with reference to fee-farm grants? There was a tenure known as leases for lives renewable for ever. The Renewable Leasehold Conversion Act was passed to enable persons holding those leases to convert them into fee-farm grants, and the anomaly was fastened upon that, that though it was a grant in fee, the tenant was to be as much bound by the doctrine of rent service, as if his tenure was by a mere lease. Stat. 14 & 15 Vict. c. 20, was passed for the purpose of putting all fee-farm grants, whether executed before or since the Act, upon the same footing as to rent.—*Major v. Barton* (9 Ir. C. L. Rep. 28) decides that that Act is retrospective, and applies to replevin proceedings pending at the time the Act was passed. When the Act passed, all the common law notions on the subject of fee-farm rent were abolished, and the Act created a new personal liability on the covenant. What was the state of things when the Landlord and Tenant Act came to be passed? It was a reproach to the law that feudal notions should remain to prevent a man having a plain right from having an easy remedy. Fee farm grants had, by stat. 14 & 15 Vict., c. 20, been put on the same footing as leases, except as to ejectment for non-payment of rent. Then the 52nd section of the Landlord and Tenant Act was passed to fill up the gap that was left by the 14 & 15 Vict. c. 20, and to give the remedy by ejectment. Does that section apply to ordinary leases made before the Act? It does, for otherwise there would be no mode of ejecting for non-payment of rent. If it does, why should we make the section prospective only as to fee-farm grants, and retrospective as to other tenures. The same argument may be founded upon s. 55.—*Towler v. Chatterton* (6 Bingham 258) is an example of retrospective operation of statutes. The most recent case in which the subject has been discussed is *The Ironsides* (31 L. J. N. S., Pr. & Adm. 129). *Bradshaw v. Tasker* (2 M. & K. 221); *Williams v. Smith* (4 H. & N. 559). The word "freehold" includes estates in fee-simple. Sections 10, 11, 17, and 19, deal with two classes of cases, which have been the constant subject of litigation and legislation in this country. Is there anything in the Act of Parliament shewing that it is not to be retrospective unless there are distinct expressions making it so? On the contrary it is plain that when the Legislature intended

the Act to be purely prospective they expressed that intention. Sections 11, 16, 25, 26, 27, 28, 29, 31, 38, 41, 42, 43, 44, all show this. Is the 48th section, as to set off, to be prospective only, and to exclude all leases made before the Act? Sec. 44 is retrospective.—*Mercer v. O'Reilly*. This was intended to be a general Act of Parliament dealing with all the relations between landlord and tenant in all cases except where it is expressly stated to be prospective only.

*Barry, Q.C.*, replied.

*Our. adv. vult.*

June 26.—O'HAGAN, J., having stated the case, proceeded.—It is apparent that the grant relied on was a fee-farm grant, that the covenant was to keep in repair, that there was an assignment before the Landlord and Tenant Act; that the covenant was broken before the Act, though it is a continuing breach. It is clear that before the passing of the Act this action could not be sustained. The question is whether the Act is retrospective. It is insisted on the part of the plaintiff that the twelfth section of the Act with the third, has this effect. The twelfth section provides as follows—"Every landlord of any lands holden under any lease or other contract of tenancy, shall have the same action and remedy against the tenant, and the assignee of his estate or interest, or their respective heirs, executors, or administrators, in respect of the agreements contained or implied in such lease or contract as the original landlord might have had against the original tenant, or his heir or personal representative respectively; and the heir or personal representative of such landlord on whom his estate or interest under any such lease or contract shall devolve, or should have devolved, shall have the like action and remedy against the tenant, and the assignee of his estate or interest, and their respective heirs or personal representatives for any damage done to the said estate or interest of such landlord by reason of the breach of any agreement contained or implied in the lease or other contract of tenancy in the lifetime of the landlord, as such landlord himself might have had." For the purpose of maintaining the case of the plaintiff we must hold that this section is retrospective, that it applies to fee-farm grants and also that the third section is the same, though such a relation was never contemplated by the parties. It is difficult to exaggerate the importance of our decision to the proprietors of land. I proceed to consider the grounds of the judgment. The Landlord and Tenant Act is a very ponderous piece of legislation. Many of the sections are expressly prospective or retrospective, and many are not expressed to be either one or the other. I shall not go through them in detail. Six sections are expressly both retrospective and prospective, twenty-five expressly prospective only, and seventy-four not expressly either one or the other. Section 12 ranges itself under the last of these classes. We have had much learned criticism upon it. I think that this section may be held in a certain sense to be retrospective. In *Mercer v. O'Reilly* it was held that the 44th section of the Act is retrospective. I think that that decision goes far to establish that as to ordinary contracts the twelfth section may have a retrospective operation.



But that does not conclude the question here. There seems to be a distinction between acts which meddle with rights, and acts which give remedies for the infringement of those rights. Acts which give remedies apply to cases occurring before or after the statute.—*Freeman v. Moyes* (1 A. & E. 338); *Pickup v. Whorton* (2 C. & M. 405; 6 H. & N. 297). Upon this principle it will be possible to hold many of the sections in the Landlord and Tenant Act retrospective, and consistently with it we might hold section 44 retrospective if necessary. But that becomes unnecessary in the view which I take of the case. The 12th section can only have that operation if the 3rd extends to fee-farm grants. I think it is not retrospective, and does not affect fee-farm grants made before the passing of the Act. We are asked to place the parties in a new position, and *ex post facto* to lay upon them a liability which they never contemplated. If that is to be done it must be on the clearest construction.—*Moon v. Durden* (2 Exch. 22). Erle, C. J., in 10 C. B., N. S., 198. Looking at the language of the third section I cannot discover anything compelling us to put on it a construction which will shock our sense of justice. There are no expressly retrospective words. This being so, is it not fair to assume that the Legislature omitted such express words because it did not intend to produce the wrongful result which would have to follow? Section 3 enacts that "the relation of landlord and tenant shall be deemed to be founded on the express or implied contract of the parties, and not upon tenure or service, and a reversion shall not be necessary to such relation, which shall be deemed to subsist in all cases in which there shall be an agreement by one party to hold land from or under another in consideration of any rent." The words "shall not be necessary" taken in connection with the words which follow seem to be more prospective than retrospective. I am therefore of opinion that whether the section has or has not reference to fee-farm grants generally, it ought not to have the effect of applying to fee-farm grants made before the Act.

FITZGERALD, J.—I also am of opinion with my brother O'Hagan, and I form my opinion on two grounds—first, that section 3 does not apply to a grant in fee-farm; and secondly, that it and sec. 12 are not retrospective in their operation. I do not know how the rule of the injustice of holding statutes to have a retrospective operation can be better shewn than in the present case. Everything took place before the Act, and yet the Court of Exchequer holds that a party may become liable to the extent perhaps of thousands.

HAYES, J.—We must see if the words of the statute apply to contracts or cases arising out of the contracts. *Mercer v. O'Reilly*, and almost every case, shows that contracts of tenancy entered into before the statute are within its operation. But taking it that the contracts are within its operation, the next question is whether cases on such contracts that have arisen before the Act are within it. This contract was before the Act, and afterwards, and also before the Act, the interest of the grantor became vested in the plaintiff, and that of the grantee in the defendant. The preliminary question is, whether a fee-farm grant

is at all within the 12th section of the Act. In my opinion it is. The Act purports to consolidate and amend the law. The word "landlord" is interpreted to 'include the person for the time being entitled in possession to the estate or interest of the original landlord under any lease or other contract of tenancy, whether the interest of such landlord shall have been acquired by lawful assignment, devise, bequest, or act and operation of law, and whether he has a reversion or not.' And a lease or other contract of tenancy, by a 3, is deemed to subsist in all cases where there is an agreement by one party to hold land from or under another in consideration of any rent. The expression "perpetual interest" is interpreted to comprehend "in addition to any greater interest, any lease or grant for one or more than one life, with or without a term of years, or for years, whether absolute, or determinable on one or more than one life, with a covenant or agreement by a party competent thereto, in any of such cases, whether contained in the instrument by which such lease or contract is made, or in any separate instrument, for the perpetual renewal of such lease or grant." From the language of the interpretation clause, the Legislature intended to include fee-farm grants, and that the word "landlord" is to include the person entitled to the estate of the original grantor, and "tenant" the person entitled to the estate of the grantee. Section 25 is plainly conversant with fee-farm grants. So also sec. 22 gives a remedy by ejectment in cases of fee-farm grants. Upon the whole, then, I am of opinion that the sections of the Act embrace the case of fee-farm grants. It has been urged that as the statute of *quia emptores* is not repealed, it cannot be said that fee-farm grants are within the Acts. This might be a serious objection so long as the law was regulated by tenure: but now that the holding is by contract, it is no longer so. To a plaintiff setting forth the facts which have been stated, the defendant has demurred, and he insists that he is not liable for breaches of the covenant entered into by M'Carthy. Until sec. 12 of this statute became law, it is clear that no person being only an assignee would incur liability, and this exemption from liability would no doubt lead persons to negotiate for such assignments. In *Mercer v. O'Reilly* it has been held by this Court that such remedy did not apply to cases which had occurred before the Act, and on that ground I am of opinion that the plaintiff is not justified in his claim.

O'BRIEN, J.—I concur with O'Hagan, J., to this extent that the third section does not apply to fee-farm grants executed before the Act.

CHRISTIAN, J., held that the statute could not impose a liability on the defendant which he was not subject to before the statute.

KEOGH, J.—I concur with the judgment of the Court. I think that the 3rd section of the Act is not retrospective, so far as to include fee-farm grants made before the statute. The statute may be retrospective so far as to give a remedy, but not to give rights. These are two very different things. I therefore am of opinion that the judgment of the Court of Exchequer should be reversed.

MONAHAN, C. J.—I think also that the majority of the Court of Exchequer Chamber took an erroneous view of the matter. There is nothing in the third or

twelfth section to lead one to the conclusion that fee-farm grants, which at the time of the passing of the Act conferred only certain rights, were completely altered by this Act of Parliament.

LEFROY, C. J.—I concur with the view taken by my brothers. It appears to me that the presumption is against implying the retrospective operation of statutes. There is in the present case strong reason to support that presumption as having been that on which the Legislature have acted, for they have stated expressly in the different sections where they meant the statute to be prospective or retrospective; they have expressly said so, "from and after such a time" or "hereafter." They have used express words where they meant that the statute should be retrospective; why should we then give to the statute an effect by implication which is rebutted as to the intention of the Legislature by the express words of the statute itself. I must say besides, that some of the views which have been taken of this statute go to shake the very foundation of the real property of the country. To do as the plaintiff asks us, would be what Lord Coke objected to, *quiescere* without any reason or advantage.

*Judgment reversed.*

## Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

IRISH SOCIETY v. TYRRELL.—Nov. 3. 7, 1864; Jan. May 11, 1865.

DOMVILLE v. WARD.—May 4, 5, 11.

*Ejectment—Estoppel—Eviction by title paramount—Apportionment—Doctrine of Neale v. Mackenzie (1 M. & W. 747), and of M'Loughlin v. Craig (8 Ir. Jur. 328; s.c. 7 Ir. C. L. R. 117); L. & T. Act, s. 44; C. L. P. Act, 1853, s. 81.*

In an ejectment for non-payment of rent brought to recover the slob of Lough Foyle, the defendant pleaded that before and at the time of the making of the lease in the summons and plaint mentioned to the lessees, whose assignee the defendant was, divers persons, to wit, T. S., D. K., and others, were and from thence hitherto had been seised in their demesne as of fee, and in the lawful possession and enjoyment of divers, to wit, several thousand acres, parcel of the demised premises, whereby the lessees or the defendant did not and could not enter into possession of the said parcel or any part thereof, but from the same had been kept wholly excluded from the time of the said demise. The plaintiff replied that the defendant ought not to be admitted to plead this defence, because the lease in question was a lease by indenture. Upon demurrer by the defendant—Held, that the indenture constituted an estoppel (Christian, J., dissentiente).

Held, that the being kept out of possession, though not eviction by title paramount, was equivalent to it, and

must be attended with the same results (Christian, J., dissentiente).

Held, that the ejectment was maintainable under the 44th sect. of the Landlord and Tenant Law Amendment Act (Christian, J., dissentiente).

Held, that this was a case in which, under the 81st sect. of the C. L. P. Act, 1853, the Court had power to give judgment according to the very right, and would do so by declaring the plaintiff entitled to an apportioned rent, and desiring a jury to ascertain the amount of it (Christian, J., dissentiente).

And (per Christian, J.) that to constitute estoppel, possession of the thing demised was essential, and that, though *nil habuit in tenementis* be a bad plea, coupled with a negation of possession, it is a good plea.

And, that eviction by title paramount was entirely out of the case.

And, that there being no estoppel, the case was governed by *Neale v. Mackenzie*, (1 M. & W. 747), and the rent suspended.

And, that though otherwise the case were a fit one for apportionment, the facts in the plea applied to the plaint showed a fatal misdescription of the tenancy, and rendered the ejectment unsustainable.

In an ejectment for non payment of rent brought to recover part of the lands of Ballyfermott, the annual rent of which was £61 15s., the defendant pleaded as to £1 14s., portion of this sum, that at and before the making of the indenture which had been assigned to him, a portion of the premises amounting to two roods and twenty six perches, or thereabouts, was and thence hitherto had remained the absolute property in fee of the G. C. Company, and neither the lessor nor the plaintiff had, at the time of the making of the demise, or thence hitherto, any right or interest in said portion of the premises, and neither the lessee nor the defendant had ever obtained possession or enjoyment of said premises, but same had always, since the making of said demise, remained in the exclusive possession of said G. C. Company, and that said portion was worth annually the sum of £1 14s., and as to the residue the defendant pleaded a previous tender and payment into Court. Upon demurrer by the plaintiff—Held, that the indenture operated to estop the defendant from denying the title of the lessor, but that the inability to get possession was equivalent to eviction by title paramount; that the case was governed by *M'Loughlin v. Craig* (8 Ir. Jur., 328), and that the demurrer ought to be overruled.

And (per Christian, J.) that the demurrer ought to be overruled, for reasons different from those given by the majority of the Court, and to be found in the judgment in *The Irish Society v. Tyrrell*.

THE first of these cases was an ejectment for non-payment of rent, brought by the Society of the Governor and Assistants, London, of the new plantation in Ulster, within the realm of Ireland, commonly called the Irish Society, to recover all the waste

lands, mud banks, or slobes of the lough called Lough Foyle, on the south side of the said lough from opposite Culmore Fort down to the River Roe, and also from the River Roe to Magilligan Point, so far as the same may be embanked without injury to the navigation of the lake and river of Lough Foyle, and upon the north side of Lough Foyle from Culmore Fort down to Greencastle such slobes as may not be detrimental to the fisheries, and all and singular other the waste lands, mud banks, and slobes (if any) comprised in a certain agreement of the 21st May, 1838, between the said plaintiffs and Thomas Isaac Dimsdale and John Robertson, and thereby agreed to be demised to the said Thomas Isaac Dimsdale and John Robertson, part of which said waste lands, mud banks, and slobes had been since reclaimed together with all houses and buildings thereon, and all ways, watercourses, commons, profits, commodities, advantages, and appurtenances whatever to the said waste lands, mud banks, or slobes belonging or in anywise appertaining, situate in the city and county of Londonderry and county of Donegal, held by the defendant as tenant to the plaintiffs under a lease, at the yearly rent of £800, the summons and plaint stating that the sum of £1,200 for one year and a half of such rent, ending on the 31st of December, 1863, was due to the plaintiffs. The defendant Tyrrell pleaded to this that the rent of the said premises, or any part of said rent, was not due in arrear, because that although the said plaintiffs, by the lease in the said plaint mentioned, demised to the lessees therein mentioned, whose assignee the said defendant, Timothy Tyrrell now is, all the waste lands, mud banks, or slobes of the lough called Lough Foyle, on the south side of said lough from opposite Culmore Fort down to the River Roe, and also from the River Roe to Magilligan Point, so far as the same might be embanked without injury to the navigation of the lake and river of Lough Foyle, and upon the north side of the Lough Foyle, from Culmore down to Green Castle, such slobes as might not be detrimental to the fisheries, and all and singular other the waste lands, mud banks, and slobes, with the appurtenances as in said plaint mentioned, yet that before and at the time of the making of the said lease, the Wardens and Commonalty of the mystery of Fishmongers of the city of London, and the Wardens and Commonalty of the mystery of the Grocers of the city of London, and divers other persons, to wit, one Thomas Scott, David Kirkpatrick, Samuel Elder, James Galbraith, and others, vere and each of them was, and from thence hitherto have and has been, and still are and is seised in their and his demesne as of fee, and in the lawful possession, use, occupation, seisin, and enjoyment of divers, to wit, 100,000 acres parcel of the said demised premises in the plaint mentioned, whereby the said lessees, or any of them, or the said defendant or any other person claiming under or by reason of the said demise, or through or under the plaintiffs or said lessees, did not and could not enter into possession of or hold or enjoy the said last-mentioned parcel of the said demised premises or any part thereof, but from the same have and each of them hath been kept wholly excluded from the time of the said demise through the default of the plaintiffs in that be-

half; and though the defendant and all those claiming under the said demise have always been ready and willing and desirous of entering into the possession and occupation and enjoyment of the said last-mentioned parcel of the said demised premises, whereof the plaintiffs had notice, yet from the time of making the said demise hitherto the defendant and all other persons claiming under the said demise or through or under the said plaintiffs or lessees, have, and has been, and still are and is, kept out of the possession, use, occupation, seisin, and enjoyment of the said last-mentioned parcel of the said demised premises, and of every part thereof, and of all rent and profit from the same by the said persons herein-before mentioned, whereby the defendant and all other persons claiming under the said demise as aforesaid have and has been wholly hindered and prevented from entering into or holding or enjoying the same, and from having or receiving any benefit, profit, or advantage whatsoever which might and otherwise would have arisen therefrom. To this the plaintiffs filed the following replication—That the defendant ought not to be permitted to plead the said defence, because the lease in the summons and plaint mentioned, under which the defendant holds the said lands and premises as tenant to the plaintiffs, is a lease by indenture bearing date on the 7th day of June 1845, and still subsisting, whereby the plaintiffs demised the said lands and premises to the lessees therein mentioned, and whose assignee the said Timothy Tyrrell was at the time of pleading his said defence; and this the plaintiffs are ready to verify. Therefore they pray judgment if the said Timothy Tyrrell ought to be admitted against the said deed to which he is privy as aforesaid to plead the said defence.

The defendant demurred to this replication, for that the same is not a sufficient answer in law to the defence by him above pleaded, because the said indenture of lease does not constitute an estoppel to the said defendant by reason of anything therein contained, and because it is not averred in the said replication that the said lease contained any averment of the seisin or title of the plaintiffs, nor does the said lease contain any such averment, and because the said supposed estoppel is not certain to every intent, and because it is admitted by the said defence that an interest did pass by virtue of the said lease, and because an interest did pass thereunder, and because the said lease is void as to that portion of the premises in the said defence mentioned, of which the lessees did not obtain possession.

The following were the points of demurrer:—

1. That the lease relied on therein does not constitute an estoppel by reason of anything contained therein.
2. That it is not averred therein that the said lease contains any averment of the seisin or title of the plaintiffs.
3. That the said lease does not contain any such averment.
4. That the said estoppel is not certain to every intent.
5. That it is admitted by the defence that an interest did pass by virtue of the lease.

6. That such interest did in fact pass by virtue of the said lease.

7. That the said lease is void as to that portion of the premises of which the lessees did not obtain possession.

*James Hamilton* (with him *Dowse, Q.C.*), in support of the demurrer.—The argument on the other side will mainly rest on some decisions as to estoppel. Modern authorities will be found to modify them. According to these the tenant is equally estopped from denying the lessor's title, whether the lease be by deed or not, provided he has possession of the premises. In *Co. Litt.* 43, b, the words "when the lessee entereth" are to be carried through the whole of the passage. We are not estopped by the grant in this lease nor by mere matters of description. A covenant to pay the rent does not create an estoppel. The assignee never executed the deed. The tendency of decisions in later years is to narrow estoppels by deed, and to enlarge them *in pais*. There can be no distinction in reason between the case of eviction by title paramount, and the case of exclusion by title paramount. This lease is void as to the portion of which we did not get possession, and that it should be void, and at the same time create an estoppel, seems to be a contradiction in words. If estoppel be out of the way, the case is undistinguishable from *Neale v. Mackenzie* (1 M. & W. 747). *Burton on Real Property*; *Cole on Ejectment*, 213; *Cuthbertson v. Irving* (4 H. & N. 742) *Right dem. Jefferys v. Bucknell* (2 B. & Ad. 278); *Doe d. Strode v. Seaton* (2 Cr. M. & R. 728); *Newton v. Alin* (1 Q. B. 518); *Hayne v. Malby* (3 T. R. 438); *Co. Litt.*, 352, b.; *Taylor on Evidence*, sec. 83; *Skipworth v. Green* (8 Mod. 311); *Ecclesiastical Commissioners v. O'Connor* (9 Ir. C. L. Rep. 242).

*Brewster Q. C.*, and *Byrne contra*.—The replication is good. The plea is bad. As to its being said the lessees did not enter, the word "hold" *prima facie* implies tenure, and that implies estate. The estate passed by entry. The words "by the lease demised" are in the defence. Eviction by title paramount means something subsequent to the demise. Estoppel by deed indented is a rule of the merest positive law. By the old books the doctrine of estoppel does not apply to a deed poll, because a deed poll is only the act of the grantor. If a man takes a lease of his own estate by indenture, he is estopped from denying the lessor's title, and he must pay the rent. There was no indenture in *Neale v. Mackenzie*. The counsel who argued that case insisted that what happened was tantamount to eviction after the lease. Lord Denman expressly guards himself against being supposed to pronounce the same judgment in the case of an indenture. Contracts must be distinguished from estates. If rent had been paid, an opposite decision might have been come to in that case. It was as if a contract had been made for the sale of a table which was delivered wanting three of the legs. A landlord cannot distrain except for a fixed rent. No rent was paid, and the landlord was a trespasser. Suppose the defendant is not estopped, yet in no form of action, if the tenant be evicted only from a portion of the premises, unless it be by the tortious act of the landlord, is he discharged altogether

from the rent. The lessee cannot in that case be sued in covenant, but that does not apply to the assignee of the lessee.—*Stevenson v. Lambard* (2 East. 575). To sustain the plea the defendant must show that the plaintiffs are not entitled to any part of the rent claimed. An apportioned rent is recoverable. The landlord cannot make the apportionment for himself. It is matter of defence, and not for allegation by the landlord, who may contest it, and go to a jury. If what was laid down in *O'Reilly v. Mercer* be true, it must have effected a total revolution in the law of pleading. This lease is the result of an Act of Parliament.—*Co. Litt.* 47, b.; *Bayley v. Bradley* (5 C. B. 396); *James v. Landon* (Cro. Eliz. 36); *Palmer v. Ekins* (2 Lord Raym. 1550); *Kempe v. Goodall* (2 Lord Raym. 1154); *Taylor v. Needham* (2 Taunt. 278); *Parker v. Manning* (7 T. R. 537); *Walton v. Waterhouse* (2 Wms. Saunders, 418, note); *Duke v. Ashby* (7 H. & N. 600); *Co. Litt.* 148, b.; *Warburton v. Ivie*, cited in note to *Spencer's case* (1 Smith's L. C. 36); *M'Loughlin v. Craig* (8 Ir. Jur. 328; 7 Ir. C. L. R. 117).

*Dowse, Q.C.*, in reply.—The replication is bad. The defendant is not estopped. Whether the plea be a good defence or not, is another matter. The replication should state that the indenture was executed by both parties. In order to be estopped, the party must have entered into possession. *M'Loughlin v. Craig*, if it shows anything, shows that what occurred in this case is equivalent to eviction by title paramount, and if so, that the doctrine of estoppel does not apply. *M'Loughlin v. Craig* does not apply, because there the pleader was content to base his case on an apportionment. The plea is good, whether it be taken as a plea of suspension or a plea of apportionment. Taken as a plea of apportionment, it is a good plea, because it states the facts, and shows the summons and plaint is wrong. *Neale v. Mackenzie* is startling law, but it binds this case unless it be distinguishable. The form of action cannot make a difference. The fact of there being an indenture cannot make a difference, as soon as we get rid of the estoppel. There is neither resumption, surrender, nor eviction here under the 44th section of the Landlord and Tenant Act, if *Neale v. Mackenzie* be law. Eviction must mean an act done on a man after he has got possession.—*Upton v. Townend* (17 C. B. 75).

*Cur. adv. vult.*

The pleadings were subsequently amended by stating that the lease in question was executed by both the parties to it.

In the Hilary Term following the case was re-argued.

*Cur. adv. vult.*

#### DOMVILLE v. WARD.

THE summons and plaint in this case stated that the defendant held part of the lands of Ballyfermott, containing 24 acres and 7 perches as tenant to the plaintiff under a lease at the yearly rent of £61 15s., and that the sum of £61 15s. being for one year of such rent due and ending on the 25th of March last was

due to the plaintiff, and therefore the plaintiff prayed judgment against the said defendant to recover the possession of said lands and premises, &c. The defence was as follows:—That as to the sum of £2 8s. 1½d., portion of the sum of £61 15s. being the year's rent mentioned in the summons and plaint, the said plaintiff is indebted to the defendant in the said sum of £2 8s. 1½d. for money paid by the defendant for the use of the plaintiff at his request, that is to say, for poor rate and rentcharge to which the said Sir Charles C. W. Domville, the plaintiff, was liable as landlord in respect of said premises, and the said defendant is willing to set off said last-mentioned sum against an equal amount of said rent, and as to the sum of £1 14s. being further portion of the said sum of £65 15s., the defendant says that by indenture bearing date the 28th of April, 1836, Sir Compton Domville, the father of the plaintiff, now deceased, demised the premises in the summons and plaint mentioned to one John Verschoyle for a term still unexpired, at the yearly rent of £61 15s., and that said lease was duly assigned to the defendant by indenture bearing date the 9th day of November, 1861, and defendant now holds under the said lease; and that at and before the making of said indenture of the 28th of April, 1836, a portion of said premises amounting to two roods and twenty-six perches or thereabouts, was and thence hitherto hath remained the absolute property in fee of the Grand Canal Company, and neither the said Sir Compton Domville, nor the plaintiff, had at the time of the making of the said demise, or thence hitherto, any right or interest in said portion of said premises, and neither the said John Verschoyle, nor the defendant, nor any other person holding under the said demise, has ever obtained any use, possession, or enjoyment of said premises, or any benefit or advantage therefrom, but same has always since the making of said demise remained in the exclusive possession of said Grand Canal Company and their servants; and defendant avers that said portion is worth annually the sum of £1 14s., and as to the residue of the said sum of £61 15s. being the sum of £57 12s. 10½d., the defendant says that before the commencement of this action on the 1st day of September, 1864, he tendered said sum to the plaintiff, who through his agents duly authorized in that behalf refused to accept same, and the defendant has been at all times ready and willing to pay said sum, and now brings the same into Court. To this defence the plaintiff demurred.

The following points were noted for argument:—That it appears from the said defence that the said Sir Compton Domville in the said defence mentioned, by indenture demised the premises in the said summons and plaint, and the said defence mentioned to the said John Verschoyle in the said defence mentioned, and that the said premises were afterwards assigned by the said John Verschoyle by indenture to the said James Ward, and that the said James Ward holds the same under and by virtue of the said indentures, and therefore that the said James Ward is by law precluded and estopped from averring, &c. [The demurrer then set out the averments in the defence *seriatim*.] That the defence is doubly repugnant and self-contradictory in admitting that the said

Sir Compton Domville had a sufficient title in law to make the said demise, and then in stating facts which contravene such title and are inconsistent with it.

*O'Connor Morris* (with him *The Solicitor-General*) in support of the demurrer.—1. This is an attempt by a tenant to dispute the title of his lessor, that lessor having demised by indenture. 2. This is the case of a tenant who admits he holds lands under a lessor, attempting to dispute that the possession passed. 3. At all events this record is so informally framed, that the plea cannot stand, because it is repugnant and self-contradictory. It admits all that the plaintiff wants, and then by *ex post facto* matter seeks to avoid it. There is no exception to the rule that a tenant cannot question the title of the lessor as stated at the making of the demise. There are variations of it. The foundation of that rule is to be found in the very elements of the law. In the old feudal investiture the tenant was bound to render homage in respect to the whole of the premises. If he controverted the title he was liable to a forfeiture. Can there be any distinction between disputing it to the entirety and as to a part. Where is the Court to draw the line? Is it to allow the tenant to controvert the title as to a ninety-ninth part, or a half or a fourth? If the defendant cannot plead *nil habuit in tenementis*, he cannot plead *nil habuit in parte*. Until that extraordinary case in the Irish Law Reports, there were only two variations of this—1. A tenant, though he cannot controvert the title at the time, can show it is extinguished by efflux of time. 2. It is competent for a tenant, though he holds by indenture, if he admits the title of the lessor at the time of making the demise, when actually and literally evicted by a third person having title paramount to put a plea of this kind—"True it is I do not controvert your title; I have done everything to protect your possession, but a third person by title of law has entered and evicted me." In *M'Loughlin v. Craig* (7 Ir. C. L. R. 117), Crampton, J., all but dissented from the opinion of the majority of the Court. The defendant's plea in that case might, by extreme wire-drawing, be taken as a plea of eviction, but the principle laid down by Lefroy, C. J., which no one can controvert was wrongly applied in that case. *Neale v. Mackenzie* (1 M. & W. 747), is by implication a strong authority in the plaintiff's favour. The judgment would have been otherwise if the demise had been by indenture. The second lease would have worked by estoppel, supposing it had passed anything. The defendant's remedy is in equity.—*Palmer v. Ekins* (2 Lord Raymond, 1550); *Parker v. Manning* (7 T. R. 537); *Cuthbertson v. Irving* (4 H. & N. 742); *Salmon v. Smith* (1 Wms. Saunders, 204); Co. Lit. 148, b.; *Doe d. Bullen v. Mills* (4 Nev. & Man. 25); *Taylor v. Zamira* (6 Taunton, 524) *Stevenson v. Lambard* (2 East. 575); Coke on Littleton, 43, b.; Furlong's Landlord and Tenant, p. 446; L. & T. Law Amendment Act, ss. 44, 51, 52, 53.

*M. Morris, Q.C.*, and *Dillon contra*.—This plea amounts to a defence of eviction by title paramount. This is the first case of the kind where an honest defence has been made. There is no estoppel. There are *dicta*, no doubt, as to the distinction between the

case of a tenant holding under an indenture and not, but there is no decision giving an indenture a greater effect to create an estoppel than any other deed. The essence of estoppel as between landlord and tenant is this, that the tenant goes in under the landlord, and remains or might remain in possession till he is evicted by somebody else. The lease might estop the party as to facts stated in it, but the estoppel meant here must arise from possession. The tenant is estopped, not because he signed the parchment, but because he accepted the interest, and that was the old doctrine of the feudal law. The plea here is paramount to a plea of eviction. The third section of the Landlord and Tenant Law Amendment Act put an end to the feudal relation between landlord and tenant. *M'Loughlin v. Craig*, which is better reported in the *IRISH JURIST*, governs this case. No distinction can be taken between it and the present case, but one which goes to support this case.—*Lessee of Swift v. Allanson* (Batty's Rep. 326); *Hayne v. Maliby* (3 T. R., 438); *Ecclesiastical Commissioners v. O'Connor* (9 Ir. C. L. R. 242). [The pleadings were here directed to be amended by stating that the indenture was executed by both parties in order not to have the record in *The Irish Society v. Tyrrell* and this record in a different condition.]

*The Solicitor-General* in reply.—If this defence is good, every tenant who has taken a lease by indenture may abstain from taking possession of a part of the premises demised, and then leave it to the landlord to prove his title. He need only set up a title in a third person. In *M'Loughlin v. Craig* the doctrine of estoppel was not merely overlooked, but ignored. What does eviction by title paramount mean? Can a man be evicted out of that which he never had? Can title paramount be compared with no title? Can there be title paramount to nothing? How is an ouster *ex post facto* the lease established by showing an ouster anterior to the lease? How is it an ouster at all? As to estoppel, how is it that if an owner in fee takes a lease from another person by deed indented of his own land, he cannot set up his own ownership in answer to a claim for the rent under the lease? According to the argument on the other side, though he cannot set up his own, he may set up the ownership of another person. The cases upon estoppel have gone to a tremendous length. A bond between two persons wrongly recited a rent reserved in a lease, and the parties were held to be bound by it to the end of time in a Court of Law. What is the meaning of reforming deeds? In *Neale v. Mackenzie*, over and over again the alternative case is put of a lease under seal.—*Smith v. Stapleton* (Plowden, 434, a.); *Com. Dig. Estoppel*, 192; *Viner's Abridgment Estoppel*, N.; *Walton v. Waterhouse* (2 Wms. Saunders, 418, note); *Duchess of Kingston's case* (2 Smith's L. C. 642); 9 *Jarman's Conveyancing*, by Sweet. 366; *De Medina v. Norman* (9 M. & W., 820); *Lainson v. Tremere* (1 A. & E. 792).

*O'Connor Morris* cited *Hunt v. Cope* (Cowper's Rep. 242).

*Cur. adv. vult.*

May 11.—*O'Hagan, J.*—There is some difference as to the grounds of the judgment, and it has been

thought proper that the members of the Court should state their reasons. [His Lordship stated the facts and the pleadings.] The plaintiff has demurred on the ground that on the state of facts disclosed, the defendant is estopped from saying that this portion of the premises was the property of the Grand Canal Company, and on another ground which has been properly abandoned at the Bar. The case is one of some nicety and importance, and we have been pressed as to the hardship, &c. The Solicitor-General argues that we shall make it competent for a litigious tenant to abstain from taking possession of a part of what is demised to him; and for the defendant Mr. Dillon still more strongly says it would be a hardship to claim the rent for that in which the lessee has had nothing. It is the office of the Courts to administer, not to make the law. We have only to do with a small sum in dispute. On the first point argued by the defendant my opinion is with the plaintiff. If there were nothing else in the case, the indenture with the amendments authorized by the Court would create an estoppel. It is laid down in *Sheppard's Touchstone*, 52, "If a lease be by indenture, both parties are concluded to say that the lessor had nothing in the land at the time of the lease made." So *Coke Litt.* 43, b.; 2nd *Lord Raym.*; *Walton v. Waterhouse* (2 Saunders, 418). I do not think it necessary to occupy time by going through these. Upon these authorities I am of opinion with the plaintiff. I do not think the argument of the plaintiff has been answered at the Bar, and any doubt I might have is because of another case in which doubts are entertained from arguments which I have not heard. Is there anything amounting to eviction by title paramount? In *Neale v. Mackenzie* (2 Cr. M. & R. 100), Lord Abinger says, "The principle upon which eviction is a defence is this, that rent issues out of the land, and is to be paid out of the profits, and if the land be taken away, the rent is discharged.—*Slade v. Thompson* (1 Rolle's Rep. 198)," and then he says, "If the lessee had entered into the whole, and been evicted the instant after by the tortious act of the lessor or by an elder title from part and kept out till the rent was due, the rent would have been either entirely suspended or proportionably diminished, and we cannot see that there is any difference between such a case and one in which the lessee never did get possession of the whole, but was kept out of part from the very commencement of the lease until the rent day. In each case the lessee has been deprived of the profits, and therefore in each he should be exonerated either altogether or in part from the payment of the rent." This seems consistent with common sense and common honesty. *M'Loughlin v. Craig*, like this, came on upon demurrer. It was an action for rent, not an ejectment, but that cannot affect the result of the decision. The summons and plaint claimed a sum of £150 for one and a half year's rent due out of premises demised by the plaintiffs and others to one W. B. which premises had vested in the defendant by assignment. The defendant pleaded as to £75, part of said sum that before and at the time of making the said indenture, one Matilda M'Loughlin was and still is in possession of a portion of said premises, that the plaintiffs and W. B. instituted proceedings in ejectment against the said Matilda M'Loughlin for recovery of said portion,

and that Matilda M'Loughlin had recovered judgment in said ejectment before any portion of said sum of £75 became due, and has since retained and continued in possession of the said portion, and that by reason thereof the said W. B. in his lifetime, and the defendant since his death, and from thence and before the time of the accruing of said sum of £75 were kept out of the possession and enjoyment of said portion, and neither he nor the said W. B. had, since making said indenture, or since said judgment in ejectment, any use, possession, or enjoyment of the said portion. The Chief Justice put it thus: Are these matters equivalent to eviction by title paramount? The decision was in the affirmative. The defence was held good, and the rent was apportioned. Between that and this case there are only two differences. It was argued strongly in that case, in which I was counsel, that consistently with the defence she might have a mere possessory title. There is no such difficulty here, for it is admitted that the Grand Canal Company had the absolute property in fee in the premises. That was the ground of the doubt of Crampton, J. This is a *fortiori*. The second difference is, that in that case an ejectment had been unsuccessfully brought. None is alleged here. But it does not occur to me that this difference substantially affects the argument. It must be taken that the Grand Canal Company had and have irrefragable title. I adopt the reasoning of the defendant's counsel. That is quite as good as if he had commenced an ejectment. *M'Loughlin v. Craig* is therefore an authority. If I saw reason to question the soundness of that decision, I should not be disposed to join in overruling it. But though lightly spoken of at the Bar, I think it is not without authority, as *Doe v. Meyler* (2 M. & S. 276) is in point. [His Lordship stated what was held there.] In the same way the principles of *M'Loughlin v. Craig* enable us to do right, and I do not think we should be astute to question them. In overruling the plaintiff's demurrer we deny him that to which he has no equitable title, and I adopt the words of the Lord Chief Justice in *M'Loughlin v. Craig*—"That is the justice of the case, and it is always gratifying to find that the justice of the case can be wrought out consistently with an adherence to the principles of law, for it would be monstrous to say that the landlord should get the whole rent, when by his default the tenant only enjoys a part, and on the other hand it is but justice to the landlord that the tenant should say, 'I will pay you an equivalent for the quantity I actually hold.'"

CHRISTIAN, J.—I am of opinion also that this demurrer should be overruled, but my reasons are different from those which have been stated with such clearness by O'Hagan, J. The Bar are aware that the questions which he has discussed are substantially raised on another case. The connection is so complete between the questions which are common to both, and those which are peculiar to the *Irish Society v. Tyrrell* that I should have to be repeating what I have to say if I went into them now.

KEOGH, J.—I concur with O'Hagan, J., and shall not attempt to add anything to what he has said. I should only weaken it.

MONAHAN, C. J.—I am prepared to deliver my

judgment in this case, but the most prominent part has been clearly anticipated by O'Hagan, J. I am of opinion that there was estoppel; that the indenture created an estoppel. The question is whether the plaintiff can rely on that estoppel to recover the entire rent. I am of opinion he cannot, because the inability to get possession is equivalent to eviction by title paramount, and the only difficulty I have entertained in this particular case, and which did not arise in the other case, is whether any active measure ought to have been taken to obtain possession. However, I concur in the judgment of O'Hagan, J., and Keogh, J., that where it is admitted the fee-simple existed and possession continued uniformly—I adopt the reasoning of these two members of the Court that it was unnecessary to make an abortive attempt.

*Judgment for the defendant.*

The Court then proceeded to deliver judgment in the *Irish Society v. Tyrrell*.

CHRISTIAN, J.—This was an ejectment for non-payment of rent. [His Lordship stated the defence and replication.] To this replication the defendant demurred. It will be seen that the point in which this case differs from *Domville v. Ward* is substantially this—The plaintiffs in both cases concurred in claiming the entire rent. The defendant in the *Irish Society v. Tyrrell* denies that he is liable to pay any rent, while in *Domville v. Ward* the defendant with more moderation admits that he is liable for a portion of the rent claimed. The defences are substantially met by the landlords in the same way. The first point to be considered is that raised by the demurrer to the replication, for unless the replication is bad, none of the other questions arise. What are the facts averred in the plea? The substance of the defence is that the rent or any part of it is not due, because though the plaintiff demised all these premises certain persons were seized of certain portions, whereby, *i.e.*, by reason of the estate in possession the lessees did not and could not enter into possession, or hold or enjoy the said portion, but from the same have and each of them hath been kept wholly excluded from the time of the said demise, and though the defendant and those claiming under the said demise have been willing and desirous of entering into possession of the said portion, yet from the time of making the said demise the defendant and all other persons, &c., have and has been and still are and is kept out of possession (*i.e.*, a repetition of the averment that they were kept out of possession), whereby the defendant and all other persons, &c., have been hindered from entering into the same, &c. I fix attention on the fact that there is no averment that any act was done after the making of the lease. So far as regards the lessees and assignees, the averment is, that they were willing and desirous of entering, but were kept out, &c. As regards the persons having title, the averment merely is that they remained so, and their possession kept out and hindered the lessees. There is no averment that the desires of the lessees were ever manifested by act or word. The meaning of the defence is simply this, that the possession and enjoyment of those parties excluded the lessees, &c. From which it follows that



it must be taken in the absence of any averment to the contrary that no act was done by anybody to alter the situation of things from the time of making the lease. The plaintiff's counsel will see that by this I state it as favourably as possible for him, but that the defendant is not estopped from stating these facts. There were two questions argued—1. Could the lessee have pleaded this? 2. Is the assignee in a better position? I answer the first in the affirmative. I did not go with that portion of the defendant's counsel's argument upon estoppel relative to the estate passing in part. This again is putting it most favourably for the plaintiff. The rule regarding *nil habuit in tenementis* is a maxim about which a certain amount of reverence has gathered, and runs the risk of being applied where it does not apply, and such would follow here if it prevented this plea from being pleaded. I refer for two purposes to *Gravenor v. Woodhouse* (1 Bing. 38). The question was if the tenant was estopped from pleading his plea. Park, J. says, "Of the general rule of law that a tenant shall not be allowed to question the title of his landlord, where he has originally received possession from him, and has paid him rent, there is no doubt since the case of *Sullivan v. Stradling*. It always furnishes a strong *prima facie* case; but to the generality of this rule there are exceptions, for although on the one hand the general rule is most wise and politic in not allowing a tenant lightly to use to his landlord's detriment that title the possession of which he has entrusted to him, so on the other it is most just so far to guard the tenant that he may not be carelessly put into the hazardous situation of paying his rent twice over, and being put to the trouble and expense of an action to recover that which he may have been compelled to pay. The supposed generality of the rule has been departed from in many cases." He goes through several cases and resumes—"A variety of cases might be put in which a tenant would be excused from payment of rent to a person not really entitled to it, but I forbear to trouble the Court with any more. The question then is, whether in this case there is any reason for an exception to the admitted general rule." He then goes on to show what I lay no stress on, because I admit the grounds would not be good grounds in this case. But I ask, as there was asked, whether there is any reason for an exception to the admitted rule, or, to speak more correctly, whether this is within the rule at all? Vary the defence by putting an averment that they entered under the lease, and afterwards were evicted, and you have a plea perfectly good. The maxim in question means nothing in the estate; it does not assert anything as to possession. The moment the possession is withdrawn, the estoppel is at an end, and the defendant may assert, not prospectively, but retrospectively, that the lessor, at the time of making the lease, had nothing in the premises. Is there anything which obliges us to hold that the lessee who never got anything has his mouth stopped? Suppose an extreme case. Suppose I induced a person to accept of premises in Dublin, of which he was totally ignorant, at a rent of £1,000. He comes over, and finds that a considerable portion constituted Her Majesty's palace of the Viceregal

Lodge. This is the true and reasonable rule to be extracted. *Nil habuit in tenementis* simply is a bad plea, but coupled with a negation of possession is a good plea. During the argument in *Domville v. Ward* many passages and cases were cited (especially in the reply,) on the binding nature of estoppels, the sanctity of statements made under seal, and the inexorable silence which the law imposes. The defendants admit all that, but asserts that in all these authorities it was an essential term, tacit or expressed, that the lessee was enjoying or could have been enjoying the lands demised. Mr. O'Connor Morris touched the root of the matter when he came to feudal tenures, but that was putting the tenant into possession, which constituted tenure. What would a feudal lawyer have thought of tenure where there was no land at all? For if the deed alone constituted estoppel the only thing the Court would ever refer to would be the execution of the deed. So far from this, I go to show from cases taken almost at random that whether there be an indenture or not, the tenant will not be allowed to question the title of the lessor under which he enjoys and is in possession.—Littleton, s. 58; Coke's Commentary—"It is a good plea for the lessee to say that the lessor had nothing in the tenements at the time of the lease, except the lease be made by deed indented, in which case such plea lieth not for the lessee to plead." And Lord Coke says, "If by deed indented, then are both parties concluded, but if it be by deed poll, the lessee is not estopped to say that the lessor had nothing at the time of the lease made." That is the same as in Sheppard, referred to by O'Hagan, J., and in the authorities referred to by the Solicitor-General. But to see to what Littleton and Coke were applying this, I will read the whole section—"Tenant for term of years is where a man letteth lands or tenements to another for term of certain years after the number of years that is awarded between the lessor and the lessee; and when the lessee entereth by force of the lease, then is he tenant for term of years." That is the state of things to which these passages apply. *Parker v. Manning* (7 T. R. 639) was a case of a lease by indenture under seal. It was an action of covenant. Ashurst, J., says, "The general rule is, that a tenant cannot be permitted to controvert the title of his landlord, and it is founded on good sense; (is it because it is a lease under seal which estops him, hand and foot, possession or no possession? not at all,) for so long as the lessee continues to enjoy the land demised, it would be unjust that he should be permitted to deny the title under which he holds the possession." I have mentioned the similar terms in which Park, J. lays down the rule in *Gravenor v. Woodhouse*—"Of the general rule of law that a tenant shall not be allowed," &c. In *Hayne v. Malby* (3 T. R. 441) Lord Kenyon says, "The tenant is not at all events estopped to deny the landlord's title. The estoppel only exists during the continuance of his occupation." Ashurst, J. says, "As long as the latter enjoys the estate, he shall not be permitted to deny his landlord's title, for he has a meritorious consideration." Buller, J., says, "As long as the tenant holds under the lease, he is estopped from denying his landlord's title." And in *Cuthbertson v.*

*Iring* (4 H. & N. 742), Martin, B., formally lays down the propositions at p. 758, "So long as the lessee continues in possession under the lease, the law will not permit him to set up any defence founded upon the fact that the lessor *nil habuit in tenementis*." This state of law in reality tends to maintain right and justice, and the enforcement of the contracts which men enter into with each other (one of the great objects of all law), for so long as a lessee enjoys everything which his lease purports to grant, how does it concern him what the title of the lessor, or the heir or assignee of his lessor really is. All that is required of him is, that having received the full consideration for the contract he has entered into, he should on his part perform it." In a still more modern case, *Duke v. Ashby* (7 H. & N. 600), which was also a case of indenture, the same learned judge says (and I request particular attention to this)—"The doctrine of estoppel between landlord and tenant is of a different kind from estoppel properly so called; its object is to create a sort of specific performance." What he means is this, where the possession is involved, where the lessee has got the possession, there by means of that, and by means of the execution of the lease, the two things conjoined constitute a specific performance. In the same case Baron Wilde says, "Those facts taken together constitute an estoppel," &c. He actually undertakes to define what constitutes the estoppel. One of the circumstances is the indenture under seal, and he treats it as so irrelevant as not to mention it, but says it is the taking of possession from the landlord.—By this simple test let us test the proposition pressed on us by the Solicitor-General in *Domville v. Ward*. He said that a man takes a lease of his own estate; he is estopped: of course he is, he goes into possession. It is the same as if he had conveyed it, and it was leased to him. Then he mentioned the bond which had a condition to pay rent. The defendant pleaded that the rent reserved was not the amount in the bond, and it was held he was estopped. But there the possession was involved too. It was upon the common principle applicable to bonds. The Solicitor-General says it will be in the power of every lessee, by designedly abstaining from taking possession, to put the landlord on proof of his title. The answer is, it is a necessary part of the defendant's plea in a case of this kind to assert the lessor had not possession, and the lessee could not get possession. If he likes, the lessor can take issue on the bare fact of taking possession. This shows how easy it is to make strong arguments which have no real influence, because they tacitly assume the question at issue. The authorities are abundantly satisfactory to show that in this estoppel possession of the thing demised is essential. If the lessor be a stranger, then the demise is a scrawl, and the law is not so unjust as to treat the rent as a reality when the demise is a fiction. Is the estoppel by the possession alone? No; but by the possession and the indenture. The section of Littleton I have referred to says, "It is a good plea for the lessee to say," &c.; and in Coke's Commentary he says, "The reason of this is, for that in every contract there must be *quid pro quo*, for *contractus est quasi actus contra actum*, and therefore if the lessor hath nothing in the land the

lessee hath not *quid pro quo*," &c. "If the lease be made by deed indented then are both parties concluded." In *Sullivan v. Stradling* (2 Wilson, 208), the question arose whether or not the statute giving the general avowry to the landlord took away the right which the tenant previously had to plead *nil habuit* where the lease was by deed poll or by parol. They were all agreed as to what the rule of law was. The Chief Justice says, "If the landlord has no title to demise, the tenant hath not *quid pro quo*, and must pay the rent to the true owner of the land. If the lease be by indenture the lessee is concluded, and his mouth is stopped to say the lessor *nil habuit*," &c. These authorities show that to estoppel properly so called the indenture was necessary, as the previous cases show that to the estoppel properly so called the passing of the possession was necessary. When the estate is acquired, the possession becomes at once available for the purpose of the lease, and I can understand how it could be held that estoppel springs up and attaches to the new acquisition; but that does not show that before the possession is acquired, or if never acquired, estoppel attaches. I am not however at all sure that if a man by instrument assumes to demise the land of another in which he has nothing, that anything which happened afterwards would give life to that which was void in its inception. I am of opinion that it would be void if the lessee were the defendant, but it is *a fortiori* that he is an assignee. Estoppel binds privies as well as parties. It runs with the land, but how can it run with the land if there be no land to run with? You are estopped because you are assignee, and you are assignee because you are estopped. I do not rely on *M'Loughlin v. Craig*. It did not occur to anybody to assume that there was estoppel. As to *Neale v. Mackenzie* it belongs to the second branch of the case. Unless the case can be sustained on the ground that there never was any estoppel for a moment, I am of opinion that the plea cannot be sustained. My understanding is baffled when I endeavour to grasp the proposition that the facts make eviction by title paramount. Eviction means the taking away the possession from one who has it. Title paramount means one title which is better than another title. The party who has possession has *prima facie* title, but the other who has the rightful title has title paramount. I have a right to put the case of a mere impostor who deals with land to which he is an absolute stranger. Suppose an indenture under seal of Buckingham Palace. Would it occur to anybody to say the lessee was evicted by title paramount—the Queen's title, paramount to my title? Nothing which happened after could make any change: nothing which the party who has the title could do could make the lessee's position worse than it is, nothing which the lessee could do would make it better. What is eviction by title paramount properly so called? The moment the right owner takes away the right possession, it is not that now the lessor has no title, or henceforward will have no title, not that, as Baron Martin says, "specific performance," not that that has ceased, but the moment the possession is taken away, the tenant can plead that from the very commencement the lessor had no title in the

premises. We are all agreed on this, that at the moment of pleading this defence there was no title in the lessor, and the lessee is not estopped from pleading *nil habuit*. I asked the counsel here, "Can there be an eviction from that of which the party never was in possession?" It is said there are these averments of hindrance and disturbances. Suppose issues in fact on this plea in the *Irish Society v. Tyrrell* would any judge tell the jury there is not enough to prove hindrance, the tenant must show he did an illegal act by attempting to get possession? This is not a plea of eviction by title paramount, if there were even any value in these averments. The case of *Hunt v. Cope*, cited by Mr. O'Connor Morris from Cowper is an authority for that. Aston, J., says, "All the cases in the books suppose the lessee to be put out of possession; therefore merely saying that he was deprived of the enjoyment of the premises is not sufficient, but he must plead that he was evicted." And Lord Mansfield says, "The defendant certainly should have pleaded eviction, and then the facts that are now stated might have been sufficient for the jury to have found a verdict in his favour." In short, this idea of eviction by title paramount is shut out. 1. It is not pleaded. 2. The facts would not prove it. 3. From the essence and nature of things it is simply impossible that there could be an eviction by title paramount. He never had the slightest particle of estate in him. The question is one of estoppel or no estoppel. If there be an estoppel, *cadit questio*—the defendant is remediless; if there be not, it is vain to say anything could happen to effect it in the interval between execution and the pleading. That question is common to the two cases. Disregarding the replication and turning to the plaint and defence, there are three questions to be considered: 1. The effect of the recitals in the Act of Parliament. 2. If the whole rent be not enforceable, is any part—is it a case for suspension or apportionment? 3. If the true case be apportionment, what is the effect of that as applied to this summons and plaint? Is it that the plea is bad *in toto*, or, as the defendant says, is the plaint bad? As to the first question, argument has not satisfied me that there is anything so special in this case which can take it out of the rule? The second question is the most important. In dealing with this, I shall confine myself to the consideration whether this is within *Neale v. Mackenzie*. If it be, I hold myself bound to submit to it. It has never been overruled, nor so far as I know, questioned, and I agree with the counsel that the difference should not be one of words only. What is the principle of *Neale v. Mackenzie*? It was an action of trespass. The defendant defended himself on the ground that the plaintiff held certain lands as his tenant, and that the taking was a distress. The plaintiff replied that Charlton was tenant of eight acres. The extent of Charlton's term is not stated, but that his possession continued down the whole period: that the tenant never obtained possession. To that there was a rejoinder that the plaintiff had notice that Charlton was in possession of the eight acres. The case was that the defendant had made a demise, having the reversion in him of the eight acres and possession of the whole of the remainder. There was an appeal to the Court of Exchequer Chamber, and the

view taken was this: they dissented from the conclusion that the lease could take effect by passing an *interesse termini*, and came to the conclusion that the lease was void as to the eight acres. Lord Denman says, "But it has been supposed that notwithstanding the demise to Adam Charlton, by which the defendant had parted with his right of possession in the eight acres, the plaintiff, by his subsequent lease, took an *interesse termini* in these eight acres for the period of his own lease, viz. one year, so as to give him a right to a term for all that period, and to the possession on the determination of the prior lease," &c. "It appears to us, however, upon authority which we do not feel ourselves at liberty to dispute, that the demise to the plaintiff of the eight acres in question was wholly void." Lord Denman then goes through the authorities that show that the lease could not take effect as an *interesse termini*, and adds, "We are not aware of any case where an entire rent reserved has been held to be apportionable, in which the tenant has not been at some period subject to the entire rent by virtue of the demise. Here the right of apportionment is not founded upon any eviction or other matter occurring subsequently to the demise, but upon an original defect in the demise itself, by which the entire rent was reserved." The defence here is the very defence in *Neale v. Mackenzie*—advisedly a defence of an original nullity. That is the very thing Lord Denman says it was; that the party never having been under the whole rent he never was under any portion of the rent. The principle to be extracted is this, that where a lease at one entire rent is in its inception void as to a portion of the premises that is not a case for apportionment, but suspension. With the facts now before us, no answer to that can be rationally given but one. The difference between this case and *Neale v. Mackenzie* is, that the facts common to both are arrived at by a different process. It was necessary there to say the lease was by parol; it was necessary to show an *interesse termini* did not pass, but in the present case we are carried high and clear of this. This is a plainer case. One ground only was established of a difference between the two cases, that of estoppel. It is going back on the replication. If it be bad, if there be no estoppel, the true facts are before the Court, and it can and must allow them their natural operation, and that cannot be other than to make of this lease a mere nullity as to part. One of the counsel being asked if he could distinguish the case from *Neale v. Mackenzie* if the replication was bad, said, what it became him to say, that he could not. That answer was as sound as it was candid. Lord Denman says at p. 763, "In the case before the Court, which is not the case of a demise by indenture, the rent is reserved in respect of all the land professed to be demised, &c., and as the plaintiff as to a portion of the land comprised in the demise has taken no interest, and had no enjoyment, and is not bound by any estoppel," &c. What is the meaning of that? Like to what Lord Denman says before referring to a case which stated "if a man lets lands, parcel of which he is seised of by disseisin, then the rent is issuing out of all the land, and by the entry of the disseisee the rent shall be apportioned, because the lease of this was not void, but voidable"—

"In the case before the Court, which is not the case of a demise by indenture, the rent is reserved in respect of all the land, &c., and as the plaintiff as to a portion of the land has taken no interest and had no enjoyment, and is not bound by any estoppel" (for the reason just mentioned, because he had no enjoyment) we are of opinion that the distress is not justifiable," &c. That must refer to the principle he laid down that where there is an original nullity there the rent reserved never arose at all. It is not a case of part eviction, but of original failure. There was a species of argument in this case employed at both sides. The plaintiff said the slob would be held for the remainder of three hundred years without rent, if judgment were given for the defendant. The defendant said on the other hand that if judgment were given for the plaintiff he would have to pay for what he did not get. It would be too much perhaps to ask the counsel to abstain from arguments of this kind. They have to speak to their clients as well as to the Court, but it is uncomplimentary to the Court. If law is to make any pretension to the character of a science, or of a uniform rule, it is fit that such topics should not be mentioned. For if made, the notion may be encouraged that judges might be caught by topics which are more fit for a jury box. Therefore I think the defendant entitled to judgment on the whole. But on the third question I will state my views. Assume that I am wrong on the second question, and that the rent is not to be suspended, but apportioned. Would the ejectment be sustainable? I think not. The facts show only a right to an unascertained portion. This ejectment in that state would not have been maintainable before the recent Landlord and Tenant Act. The plaintiff admits that, but relies on that Act. [His Lordship read the sect.] I am disposed to think it the better mode of administering that enactment to make it include what the party is entitled to, and that what is held the residue should not include what he is not entitled to. The facts in the plea applied to this plaint show fatal error in the description of the tenancy. *Stevenson v. Lambard* (2 East. 575) is entirely different. The lease was described quite correctly. There was not any misdescription. Here the plaint describes not the lease, but the tenancy, when no such tenancy existed. 1. The replication is bad. 2. The rent is suspended. 3. Even if it be not, the ejectment is not maintainable.

KROGH, J.—I think the judgment should be for the plaintiff, and to direct an inquiry for apportionment by a jury. For purposes of convenience a member of the Court delivered his judgment now, but it would have been equally applicable to *Domville v. Ward*. This case, I think, is governed by that; and the question here is as to the sections of the Landlord and Tenant Act. It only remains to refer to the Common Law Procedure Act, s. 81. [His Lordship read the section.] Judgment ought to be given according to the very right of the case; and that would be to direct a jury to ascertain the amount, so as the plaintiff will not get a rent for what he never gave, and the defendant, who has got a considerable portion will not be allowed to retain it for ever for nothing, because the plaintiff purported to give something else.

CHRISTIAN, J.—I have been mistaken. I did not concur in the decision in *Domville v. Ward* on the ground that there was an eviction by title paramount.

KROGH, J.—I did not mean the judgment of my brother Christian, but that of the Court.

MONAHAN, C. J.—I do not undertake to overrule any well-considered or well-decided case. It is necessary just to refer to the facts of the present case. A lease was made reserving a rent of £800 a year. It is conceded the party has had possession of portion of the premises so demised. It is averred as to another portion that he has never got possession, that he has been willing and ready to take possession, but has been unable to do so by reason of a third party. In the case of a lease by indenture executed by lessor and lessee, what is its legal effect at the time of execution? Without going into what has been considered law from the time of the Year Books, it has been held that as to part it operates by way of interest, as to part it operates by way of estoppel, that the moment the lessor acquires an interest in the premises it is transformed from an estate in estoppel into an estate in interest. In *Cuthbertson v. Irving* (4 H. & N. 752), a party not having any legal estate made a demise. The lease did not disclose any infirmity. It was one in the ordinary form. By deed showing he had merely an equitable title, he conveyed his reversion to a third party. The argument was that the plaintiff, not having in fact a reversion, could not maintain an action. The judgment was that there being a reversion created by estoppel, the deed would be equally good to convey the imaginary reversion, and it was laid down that it is only carrying out the doctrine which nobody questioned, that the assignee of a lease which is by estoppel will be equally bound with the lessee himself. The first question is, is the defendant liable in this case to the rent of the entire? That is the contention here by the plaintiff. The tenant says he is not liable to pay any rent at all. Which is right? I have no doubt neither is right, because I am of opinion that the fact of the inability to get possession, the fact of being kept out of possession is—not eviction, because there must be a possession for that, but the keeping out of possession, I think, was equivalent to it, and must be attended with the same results. I do not think it was ever decided that if a lessor includes in his lease half an acre to which he is not entitled, and the tenant enjoys ninety-nine hundredths of what he purported to demise, that he is to hold the remainder for the whole term without paying rent. In *Tomlinson v. Day* (5 Moore, 558), an action was brought, The plaintiff had demised to the defendant a farm, also glebe land. It turned out that the tenant never got the glebe land; that the party had no right or title to demise to him the right to shoot. The Court held that it was equivalent to eviction of portion, and it never occurred to anybody to say that therefore he was never to pay any rent. In *Stokes v. Cooper* (3 Campbell, 514, note), it is clearly laid down that in case a tenant gets a parcel demised of that to some of which he is entitled, and to some more of which he is not entitled, he is liable for the part he so enjoys. In *Neale v. Mackennis* there is a reference to *Gardiner v. Williamson*, which was a parcel demise of tithes and a homestead. The

party distrained for the rent. It was held that he could not recover. As the lease did not convey the whole thing demised, the whole rent never for a moment once had a legal existence. The Court decided that you cannot distrain for an unascertained rent, and because there was nothing to show what rent was reserved for the homestead, the Court decided, not that there was no other remedy to recover the rent, but that the party could not distrain. What is the decision in *Neale v. Mackenzie*? The facts are these: There was a parol demise. It appeared the party was unable to get possession of eight acres, and he pleaded that he was unable to get possession of a part, Charlton having been in possession by reason of a prior demise. The Court of Exchequer held that the action was maintainable for an apportioned rent. They never held it was eviction by title paramount, but that it was equivalent to one; therefore there should be an apportionment. What were the grounds of Lord Denman's decision? He distinguishes *Gardiner v. Williamson* and *Tomlinson v. Day*, on the ground that you cannot distrain for an unascertained amount, save where the rent is an apportioned rent, in which you might go for a larger rent than you are entitled to, and the jury, under the direction of the Court, will find the portion you are entitled to. Lord Denman goes on to show that in point of fact in the present case the lease was void. The lease was a lease by parol, and could not create an estoppel, but he says, "If the second lease be by fine or deed indented then it may work by way of estoppel." The true reading of *Neale v. Mackenzie* is that from the facts there having been no estoppel, not that no rent was payable, but that the whole rent never was payable, and therefore there was nothing to create an apportionment out of. If the whole rent was at any time payable, and if the facts are equivalent to eviction by title paramount, the question is, what effect has that on the rent reserved, and payable out of the original rent reserved. *Doe v. Meyler* (2 Maule and Selwyn, 276); *Stevenson v. Lambard* (2 East, 575), establish that if there be eviction by title paramount of a portion there shall be apportionment, and only the apportioned rent shall be recoverable. In *Stevenson v. Lambard* the plea was pleaded in bar to the entire. The case was argued. The Court decided the plea would have been good to a moiety of the rent, but was no defence to the entire, and gave liberty to the defendant to amend. Without going into a number of cases, I take the passage in Coke Littleton—"The mere execution of a deed itself creates estoppel." The only other question is if ejectment can be maintained, though there be an eviction out of part. Though this is not such a plea of actual eviction, it comes within the principle of eviction, and within the principle of the 44th section of the Landlord and Tenant Act. Then the action having been brought for recovery of the entire, and the plea being in bar to the entire, we have now, by means of the replication, the fact that the deed was an indenture, the fact that the estoppel was created; we have the fact of what I consider equivalent to eviction of a portion of the premises, and the question is if there is anything to prevent us from giving judgment according to the very right of the case. The Commentary of Coke

on the statute *Quia Emptores* lays down that though the landlord claims a larger rent than he is entitled to, yet it is for the jury to determine what he shall recover. So here, though the party claims the entire, and the defendant pleads to the entire, it comes within the section which Keogh, J., has referred to, and notwithstanding the prayer for judgment, the Court will give judgment on the very right of the case. But that is decided in *Mercer v. O'Reilly*, which followed *Stevenson v. Lambard*. That case went to the Court of Error. The argument has not been reported, but the judgment I have taken, and it is this: The action was brought for seven quarters of rent. The Court decided that only three were recoverable, and only a proportion of these, and the Court of Error say that the judgment of the Court be reversed, and that the plaintiff recover an apportioned part of the rent according to the value of that part of the premises demised by the said lease, and that as the Court is not informed as to the part, let a jury ascertain the same. So it occurs to me there is no difficulty here to follow that precedent, and to declare that the plaintiff is entitled to the apportioned rent, and that a jury shall ascertain it as they were ordered to do in that case of *Mercer v. O'Reilly*. Though not at liberty to overrule a case, because it would create a hardship, still it is a gratification to me to think the law is consistent with justice, and that the party on the one hand is bound to pay an apportioned rent for what he has, and on the other hand that he is not to pay more. There will be a general judgment on the record for the plaintiff.

*Judgment for the plaintiff.*

## Landed Estates Court

Reported by C. J. Manning, Esq.

[JUDGE HARGREAVE.]

L. A. TOTTENHAM'S ESTATE.—December 18, 1864.

*Jurisdiction—Specific performance.*

*The Court cannot order specific performance, where proposals for purchase are brought forward, "subject to the approbation of the Court." It can only do so where a petition has been filed for the purpose of procuring indefeasible title to lands, previously sold; and where it is made a condition that such a petition shall be presented, or where both parties consent.*

In this matter an absolute order for sale having been made, and proposals for the purchase of the different lots having been brought before the Court, by the owner, questions arose upon two of them, that of a Mr. Boyd and a Mr. Rogers, which had been accepted by the owner, "subject to the approbation of the Court." After this acceptance, it became known that a mistake had been made in the rental, in reference to the lands which Mr. Boyd and Mr. Rogers had agreed to buy, the yearly value of the lands

which the owner had agreed to sell, "subject to the approbation of the Court," being in fact more than was supposed, and on this account the owner asked the Court to relieve him from his bargain, by refusing to confirm the proposals.

*Flanagan, Q.C., and M. Kelly*, were for the parties who sent the proposals.

*Pilkington, Q.C., and Tottenham* for the owner.

JUDGE HARGREAVE.—I am of opinion that the Court has no jurisdiction to enforce specific performance of the alleged contracts on which Messrs. Boyd and Rogers rely. The Court can only order specific performance, where a petition has been filed, for the purpose of procuring indefeasible title to land, previously sold; and where it is made a condition that such a petition shall be presented, or where both parties consent to such a course. The following is a copy of the minute of the order made on the motion:—"Whereas, Mr. Flanagan, Q.C., counsel for Thomas Boyd, moved for an order declaring the said Thomas Boyd the purchaser of the lands of Rosbercon, ordered to be sold in this matter (save that in the occupation of the Rev. J. Rogers), for the sum of £1350; or if the Court should not make such order, then that the said lands might be excluded from the sale, or that the sale might be postponed till the other parts of the estate should be actually sold; whereupon, and on reading notice of motion, &c.; and on hearing Mr. Pilkington, Q.C., for the owner, the Court doth refuse to declare Thomas Boyd the purchaser of the said lands, but doth give him liberty, if so advised, during next term, to file a cause petition in Chancery, against the owner and petitioner, to enforce specific performance of the agreement or alleged agreement for sale, or in the alternative to bid for the lands when put up for sale in this Court; and if declared the purchaser, to take such proceedings against the owner, as advised, for recovery of the difference in excess (if any) between his purchase money and the sum of £1350. T. Boyd to have the costs of this motion, in case of his adopting either alternatives; and to signify to the solicitor having carriage, which of the said alternatives he intends to adopt.

*Owner's costs as costs in the matter.*

#### [BEFORE JUDGE HARGREAVE.]

ESTATE OF ASSIGNEES OF P. TONER (A BANKRUPT)  
OWNER; THE BANK OF IRELAND, PETITIONERS.

*Feb. 14; May 25; May 31, 1865.*

*G. purchased from T. a lease, and obtained a conveyance. The lease and assignment to T., which were the only title deeds, were in the hands of K. K. was sub-agent of the petitioners (the Bank of Ireland), and supposed the deposit of deeds was to secure a balance due to the bank by T. K. also had a private dealing of his own with T., and lent him £300 on a note, in which V. joined as security. T., having thus contracted with the bank to give them security by depositing the deeds, and*

*availing himself of K.'s peculiar position, also agreed with V. to counter-secure him by depositing the deeds with K. The Court held that the deeds were in K.'s hands as agent of the petitioners, and to secure a debt due from T. to them, and that G., knowing where the title deeds were, and not having enquired of K. for what purpose they were in his hands, was bound by notice of the petitioner's equitable mortgage.*

*T. afterwards became bankrupt. The petitioners filed a petition for sale of the lease treating T.'s assignees in Bankruptcy as the owners, not, however, impeaching the sale to Gillan, but relying on their equitable title and Gillan's notice of it. Petitioners proved their debt in the Bankruptcy Court as upon bills of exchange, and not claiming any equitable or other mortgage, or any other security. The bankruptcy terminated in an arrangement under the 149th section of the Bankruptcy Act, under which the creditors were to receive 10s. in the pound from the owner's future profits in a specified manner.*

*Held, that the proof and the subsequent arrangement taken together, were conclusive against the petitioners setting up the mortgage, or any security of a specific nature.*

*Darley, Q.C., and Heron, Q.C., for petitioner, moved to make order for sale absolute, notwithstanding cause shown by Gillan, who claimed a lease of premises in Armagh, which had become vested in Toner in 1860, and was assigned by Toner by deed of 14th April, 1863. The Bank of Ireland were petitioners, who claimed as equitable mortgagees by deposit on Jan. 8, 1863, without writing. Gillan's deed was duly registered. Petitioners alleged the deed of April to be fraudulent and void, and made in contemplation of bankruptcy. Toner, in his schedule, stated the deposit, and that he had assigned to Gillan and one Quin to secure a debt, and that Gillan only claimed the debt. Gillan's affidavit stated there was no equitable mortgage, as the bank always took care to have a writing. He denied notice, but admitted he knew the deeds were deposited with one Kernaghan, who had become surety for him in a note. Kernaghan was the sub-agent of the bank at Armagh. Consideration for the deed was £100 due to John Quin, which Gillan paid, and £150 due by Toner to Gillan for goods. Petitioners proved in bankruptcy, and swore there was no security to the bank for the debt. This affidavit was made by John M'Veigh. M'Veigh made an affidavit in which he said that Toner told him he had disputes with one Savage, and asked him to join in surety to Kernaghan for £300, and offered to lodge title deeds to indemnify him. He agreed to do so, insisting they should be lodged with Kernaghan on his behalf. He signed joint and several promissory notes to Kernaghan. Kernaghan then got the deeds. M'Veigh paid the note, and got possession of it, but Kernaghan refused to hand over the deeds alleging the bank lien. George Johnson, the head agent of the bank, in his affidavit, stated Toner's transactions with the bank, and his difficulties. Johnson pressed for security, there being £450 due. Toner agreed with Johnson to make the depo-*

sit as security, and the parties meeting in the street, Toner said, "I have left my deeds with Kernaghan." Kernaghan denied the statement as to the deeds being a deposit to secure the debt for which M'Veigh was security. He believed they were a deposit for the bank. Toner swore that he intended the deposit as security for Kernaghan. Proof in bankruptcy took place 9th May, 1863, and bank proved 31st July, 1863. In January, 1864, an arrangement was made by a majority of consenting creditors for Toner to carry on his business, and pay 10s. in the pound out of future profits. Counsel now contended there was a good deposit, and that the proof in bankruptcy could not prevent their setting up the equitable mortgage as security, and referred to *Sumter v. Cooper* (2 Barn. & Ad. 226) *Hewitt v. Loosemore* (9 Hare, 449); *Worthington v. Mangham* (16 Sim. 547); *Hearn v. Mill* (13 Ves. 120); *Tylee v. Webb* (6 Beav. 552); *Neeson v. Clarkson* (2 Hare, 173); *Dryden v. Frost* (3 M. & C. 670); *Jones v. Smith* (1 Hare, 55); *West v. Reid* (2 Hare); *Bright's trusts* (21 Beavan, 434); *Grugeon v. Gerrard* (4 Young & Collyer, 119), as to proof in bankruptcy made in ignorance.

*Kernan, Q.C., and Fraser contra.*—The deeds were not deposited to secure the bank, and if they were, the bank has waived its security by the proof in bankruptcy, and Gillan is purchaser for value.

JUDGE HARGREAVE.—The first question which arises in this case is, whether the petitioners have or ever had a good equitable mortgage to secure Toner's balance by deposit of the deeds with Kernaghan; and although I cannot say that it is quite clear, yet I think they have established that they had a good equitable mortgage. Mr. Kernaghan occupied a peculiar position—on the one hand he was sub-agent of the petitioners, so that he might easily suppose that any deposit made with him, particularly if made at the bank, was a deposit in pursuance of an agreement with the bank to secure their debt. On the other hand it appears that he had also a private dealing of his own with Toner, and that he had lent him £300 on a note in which M'Veigh joined as security; and when Toner sent the deeds to Kernaghan, he might easily give Kernaghan, or the agent Johnson, to understand or let him suppose that they were deposited on behalf of the bank, while at the same time he might say to M'Veigh, "I have deposited the deeds with Kernaghan to indemnify you from liability on the note." This is, in fact what took place. Toner did contract with the bank to give them security by depositing these deeds, and apparently he contracted also with M'Veigh to counter-secure him by depositing the deeds with Kernaghan. He availed himself of the peculiar position occupied by Kernaghan to commit this fraud; but it does not lie in his mouth to deny the title of the bank, or perhaps that of M'Veigh either, and it may very well be that as against Toner there was a good deposit with Kernaghan, both on account of M'Veigh and on account of the bank. There may be a question which of the two would have the better title, but I think Toner would not be permitted to deny any title which either of them could claim by force of the deposit, inasmuch as he had represented to both parties that he had made the depo-

sit on their behalf. Toner must be bound, not by what he intended to do, but by what he represented himself to be doing. Therefore, I think that as against Toner there was a good equitable mortgage in favor of the bank; though I believe that when the deposit was made, Kernaghan did not know (till Johnson came in) for what object the deeds had been sent. The next question is, whether on the occasion of the alleged sale in April, 1863, of the property to Gillan, Gillan the alleged purchaser was guilty of such laches as precludes him from setting up his legal title to defeat the mortgage. Mr. Gillan admits that he was aware the deeds were deposited with Kernaghan, but he says he was informed that it was to secure M'Veigh. This knowledge fixes him with notice of the deposit, and if it turns out, as it does, that the deposit was on behalf of the bank (either alone or together with M'Veigh) he must abide the consequences. He had merely to go to Kernaghan, and say, "You have Toner's deeds. I am buying the property. What do you hold the deeds for?" The answer would have been, "The deeds were sent to me for the bank, and they are in the bank safe as a security for Toner's balance. I, therefore, think that Gillan abstained purposely from making enquiries about the title, and that he cannot avail himself of his own neglect to improve it, and therefore that he cannot rely on his legal title to defeat a charge which, but for his own laches, he would have been fully aware of. A purchaser so acting must be content to take his chance. As to the effect of the proof in bankruptcy, I feel great difficulty; and I am not sure that the difficulty would be removed by an amendment or withdrawal of the proof. Those proceedings have resulted in an arrangement by which all the creditors are bound; and the assenting creditors may have been influenced to assent by the fact that the bank, like themselves, had no security, and would only get their 10s. in the pound as secured by the arrangement. Now if this demand should be established against Gillan he would become (as purchaser) a creditor of Toner's for the amount levied off the property by the bank, and he is now probably precluded by the arrangement from proving this demand. When the bank proved their demand, and stated they had no security for it, Mr. Gillan would see at once that his title to the property under the deed of 14th April, 1863, was free from any claim of the bank; and he would know that he had no demand against Toner except £63 2s. 11d., and he would act accordingly, and he did so by proving for this sum only, and assenting to the composition. But if the bank had alleged their mortgage, as Gillan would suppose they would do if they intended to claim it, Gillan would have perceived that he was or probably would be Toner's creditor, not only for £63 2s. 11d., but also for whatever the bank might levy by force of their equitable mortgage. What course Gillan might then have adopted, I cannot say; but he would have been influenced by very different motives from those which in fact influenced him. He would not have been content to prove for £63, and he would probably not have assented to the arrangement. A motion is pending, I understand, to amend or withdraw the proof. If that motion should be refused, I



think the cause shewn by Gillan must be allowed. If the motion is granted wholly or in part, the case can be re-argued on this point, and I will let it stand over till the motion in bankruptcy is disposed of, petitioners paying the costs of this day. The bank cannot now impeach the deed as fraudulent, or as a preference to one creditor. The proceedings in bankruptcy have been brought to a close without any impeachment of this deed, and it is to be presumed that Gillan has acted on the faith that it was not to be impeached. Any further discussion of this case must be confined to the effect of the proof in its present form, or as it may be permitted by the Court of Bankruptcy to be amended or withdrawn.

*May 25, 1865.*—The case came on for further argument in consequence of an order of one of the judges of the Court of Bankruptcy, refusing to amend the proof, or allow it to be withdrawn.

*Darley, Q.C., and Heron, Q.C.,* for petitioners.—The question is whether the proof is conclusive against the bank *ipso facto*. He opened several fresh affidavits, and referred to *Dillon v. Parker* (1 Swanton, 359,) as to case of election; *Pigott v. Shaw* (6 Ad. & Ell. 469); *Howard v. Hudson* (2 Lillie & Blackburn); and *Grurgeon v. Gerard* (4 Young & Coll., 119).

*Kernan, Q.C., and Fraser contra.*—The bank, by not mentioning this mortgage in proof have altered the position of Gillan and the other creditors, and the proof followed up by the arrangement concludes the bank.

*HARGREAVE, J.*—The material facts of this case are as follows:—In the month of April, 1863, Mr. Gillan purchased from Patrick Toner the property in this matter, and obtained a conveyance. The lease of the property, and the assignment of it to Toner, which constituted its only title deeds, were in the hands of Mr. Kernaghan, and the Court has held that they were in Mr. Kernaghan's hands as agent of the petitioners, and to secure a debt due from Toner to them, and that Mr. Gillan, knowing where the title deeds were, and not having inquired of Mr. Kernaghan for what purpose they were in his hands, was bound by notice of the petitioners' equitable mortgage. Toner shortly afterwards became bankrupt, and the petitioners have filed a petition for sale of the lease, treating Toner's assignees in bankruptcy as the owners, not, however, impeaching the sale to Gillan as a fraudulent preference, or on other grounds, but relying on their equitable title and Gillan's notice of it. The case now made by Gillan is that, Toner having become bankrupt, the petitioners proved their debt in the bankruptcy as upon certain bills of exchange, and not claiming any equitable or other mortgage, or any security at all; that Gillan also proved for a debt which was incurred by Toner subsequently to the sale of the property; that the bankruptcy terminated in an arrangement under the 149th section of the Bankruptcy Act, under which the creditors were to receive 10s. in the pound from Toner's future profits in a specified manner; and that thus the bank (petitioners) elected to go in under the bankruptcy, and to waive any security of a specific nature. It has been clearly shown that the proof in bankruptcy was the result of accident, the officer of

the bank who was cognizant of the equitable mortgage being absent, and the officers who prepared the proof being in ignorance of the existence of the mortgage. The petitioners took no further step after the proof; they were not represented at either of the meetings of creditors under the 149th section, though of course they had notice of them, and they contend that Mr. Gillan is not prejudiced by their proving; that in fact he never knew they had proved, and that his position is precisely the same as if no proof had ever been made by them. I think it probable that this is the case, but I still think that it is the necessary consequence of the proof and of the result of the bankruptcy proceedings, that the petitioners are precluded from relying on their mortgage as against Mr. Gillan. It is conceded that if this bankruptcy had proceeded in the ordinary way to a realization of the assets, and the payment of a dividend on the debts proved, the petitioners could not then have resorted to this security, or that all events, if they could, that they would have recovered merely as trustees for the assignees and general creditors. I cannot draw any distinction between a bankruptcy resulting in this way, and a bankruptcy resulting in the manner pointed out by the 149th section. The petitioners are entitled to receive in the one case a dividend, and in the other case the promise of a dividend, which there are legal means, of enforcing; in both cases the result is that the original debt is no longer recoverable. But if the petitioners are allowed to sell Gillan's estate on this security, Gillan will then have a claim on Toner for the amount thus levied off his property, and he will also have the case that he has been defrauded by Toner, who represented to him that the deeds were lodged with Kernaghan for another and different purpose. The proceedings in bankruptcy are as completely determined as if there had been a final dividend, and Mr. Gillan would find himself precluded by the arrangement from recovering the loss, and from availing himself of the penal clauses of the bankrupt law in regard to the fraud practised upon him. An arrangement such as was here made and sanctioned by the Court, proceeds on the assumption that all the creditors who have proved are to occupy the same position, and after the arrangement is once made, I apprehend that the Court of Bankruptcy would never permit a creditor who had proved to repudiate the arrangement which by the Act of Parliament is binding on him, and to fall back on securities, the enforcing of which would create new demands against the bankrupt, and neutralize the arrangement. The case, no doubt, would have been very different so far as Mr. Gillan's interests are concerned, if Mr. Gillan had purchased the property from Toner expressly subject to the bank mortgage, and had taken upon himself the burden of that debt as a part of the consideration for the estate. In that case it is obvious that Mr. Gillan would be liable to pay the amount to some person; but I collect from the order of the learned judge of the Court of Bankruptcy, that in such a case he would regard the beneficial interest in the mortgage as part of Toner's general assets, and would direct the assignees to intervene in this Court for the purpose of claiming the amount realized on the mortgage. On the occasion, however, of this purchase, it is plain that

Gillan did not take on himself this debt, and in fact he is only liable to it at all under the equitable doctrine of constructive notice. Probably if the petitioners had applied to the Court of Bankruptcy for leave to withdraw their proof before anything further was done towards an arrangement, they might have been permitted to do so. That Court, however, has decided that such a course cannot be permitted at the present stage of the case, and I am not satisfied that even if the proof had been allowed to be withdrawn, it would not still have been open for the purchaser to contend that his estate was discharged. In ruling this case, I wish to be understood as deciding not that the mere fact of a proof is sufficient to prevent the petitioners from relying on their mortgage, but that the proof and the subsequent arrangement taken together are conclusive against them. The case of *Grugeon v. Gerrard* (4 Y. & C. 119) seems to establish that mere proof is not sufficient unless the creditor has so far bound himself as to require the Court of Bankruptcy to order him to deliver up his securities, which that Court would probably only do for the benefit of general creditors, and not for the benefit of a purchaser. Petitioners to pay Gillan's cost incurred since last argument.

### House of Lords.\*

[Reported by James Paterson, Esq., of the Middle Temple,  
Barrister-at-law.]

WEST v. LAWDAY.—May 16.

*Will—Legacy—Description of leasehold lands—  
Falsa demonstratio—Construction.*

*M. having lands, A. B. C. and D., in the county of Kerry, by will said: "Being possessed of certain lands in the county of Kerry, which said lands are A. B. C., all situate in the said county, I require the aforesaid lands to be sold and equally divided between W. and L.," and the residue was given to L. The lands of D. had been included with the others in one original lease in 1720, and judgment debts had been registered against all four:*

*Held (reversing the decree of the Master of the Rolls and Chancery Appeal in Ireland), that the lands of D. did not pass by the specific legacy to W. and L., but passed in the gift of the residue to L.*

THIS was an appeal from a decree of the Court of Appeal in Chancery of Ireland, affirming a decree of the Master of the Rolls as to the construction of the will of Saint John Mason. The testator was an Irish barrister, who after his retirement lived at Bath, his nearest relations at his decease being a nephew and niece. His estates in Ireland consisted of lands held under a lease for lives renewable for ever. They had all been included in an original lease, which described them as follows: "All that and those the town and lands of Ballydowney, with its sub-denominations, and Farranaspig and Groyne, with the three gneeves of West Clyny, situate, lying, and being in the barony

of Maygonihy and county of Kerry, with their rights, members, and appurtenances. The lands of Groyne, consisting of about sixty-seven acres, were held as a separate farm, by a different tenant, at a separate rent.

In 1808 part of Ballydowney had been sold by testator. He had also sold the lands of Groyne in consideration of £100 and a perpetual fee-farm or head rent of £70 per annum issuing thereout. The unsold part of Ballydowney, and the lands of Farranaspig and Clyny were in the hands of the testator's yearly tenants at the time of his death.

The testator's will, dated 16th of March, 1858, began as follows:

"Being possessed of a lease for lives renewable for ever of certain lands in the county of Kerry, in Ireland, which said lands are denominated Ballydowney, Clyny, Farranaspig, all situate in the parish of Ahaddee, near Killarney, in the said county of Kerry, and being also induced to require the services of those persons who have shown an unbounded regard during a long period of time up to the present moment, of whom Mr. James West, of No. 10 Dorset-place, Charing-cross, London, and Mrs. Susannah Lawday, of No. 4 King'smead-terrace, Bath, widow of Frederick William Lawday, late of Bath: I do therefore hereby require that the aforesaid lands should, as soon after my decease as possible, be sold in the Incumbered Estates Court in Ireland, and after the payment of all my just debts, be equally divided between the said James West and Susannah Lawday as tenants in common, and not as joint tenants. The debts affecting said lands are those owing by me to Mr. Charles Mason, of Tralee aforesaid, and those under the will of Mr. John Collis, of Kinsale, in the county of Cork, caused by a non-suit on behalf of Henry Cashell, and which have been re-docketed."

And after giving certain legacies he made the appellant West sole residuary legatee of all his real and personal estates.

At the date of the testator's will, and of his death, he had no real estate whatsoever on which his residuary devise of real estate could operate except his head-rent arising out of the town lands of Groyne. The testator died a few days after making his will, namely, on the 21st March, 1858.

A dispute arose between the appellant West and the respondent Susannah Lawday as to the estate of Groyne. The appellant claimed the whole as passing in the residuary bequest, since it was not mentioned in the specific devise; on the other hand, the respondent claimed to be tenant in common of Groyne with the appellant under the specific devise, as she contended that Groyne passed as a sub-denomination of Ballydowney, and that the testator had by mistake omitted to include it in the description of Ballydowney, Clyny, and Farranaspig.

The Master of the Rolls held that the lands of Groyne passed under the specific devise, and the Court of Appeal affirmed his decree; whereupon the plaintiff West now appealed to the House of Lords.

*Cole*, Q.C. and *Roberts* for the appellant.

*Greene*, Q.C., and *Osborne*, for the respondents.

The following authorities were referred to: *Harri-son v. Hyde* (4 H. & N. 805); *Slingsby v. Grainger*

\* From the *Law Times*, by permission.

(7 H. L. Cas. 282); *Stanley v. Stanley* (2 J. & H. 510); *Cunningham v. Buller* (3 Giff. 37); *Hall v. Fisher* (1 Coll. 47); *Quinnell v. Turner* (15 Beav. 240).

THE LORD CHANCELLOR.—My Lords, this case undoubtedly bringing, as it does, before your Lordships the concurrent opinion of two courts of justice below, namely, first of the Master of the Rolls, and then of the Court of Appeal, deserves your Lordships' careful consideration; but the elaborate arguments which we have heard, and the time which has been occupied, and properly occupied, by counsel, have given your Lordships the opportunity of becoming thoroughly conversant with the case, and of communicating with each other upon the subject. I think, therefore, that we are in a condition to come to the determination of the matter in a satisfactory manner at once. I must confess that I cannot for myself feel any great difficulty upon the subject. I desire first of all to observe with care what are the words of the gift. The words of the gift which follow an introductory preface or statement made by the testator are: "I do hereby require that the aforesaid land shall, as soon after my decease as possible, be sold." Then he proceeds to dispose of the proceeds of that sale. The direction, therefore, touching the lands is comprised in these words: "I require the aforesaid lands to be sold." Now, as I observed during the argument, it is material to remark that the words are not "the aforesaid leasehold," or "the aforesaid leasehold lands," but they are "the aforesaid lands"—a phrase which cannot be distinguished from the phrase "the lands hereinbefore mentioned," or "the lands hereinbefore described." The form, therefore, of the expression throws us back on the antecedent part of the will, to gather from thence what are the lands which had been mentioned or described. Now, the testator tells us, in the first place, that, "being possessed of a lease for lives renewable for ever of certain lands in the county of Kerry." These words certainly are not descriptive of any lands. He says "certain lands"—that is, some lands in the county of Kerry—"which said lands are denominated." Now I cannot understand where can be the difficulty. "Which said lands are"—what lands? Why they are "certain lands." "Certain lands" are merely words of reference to a thing unknown and not described, but the generality and the want of precision in that form of expression are supplied by the words that follow, and which plainly mean to substitute a definite and precise statement for an antecedent generality. Accordingly, therefore, in a manner perfectly in conformity with the idiom of the English language, he goes on to specify what are the certain lands to which he has referred and accordingly using the relative which refers to the "certain lands" he tells you "the said lands" are "denominated" so and so. Then he gives certain names, being the denominations of the lands intended to be devised, and by reference to which names we satisfy the expression "aforesaid" contained in the description subsequent to the devise, namely, "the aforesaid lands." It would have seemed to me to require no ordinary ingenuity to find a difficulty in such a simple form of expression; for unquestionably, if I had been asked what are the "certain lands in Kerry,"

I should have said the testator answers for himself—"the lands which are denominated Ballydowney, Clyny, and Farranaspig." Then he goes on to tell you where they are situate, namely, in the parish of Ahadoc. These words, therefore, are the unfolding of the explanation of the general expression "certain lands in the county of Kerry." That being the state of the case, and that being the plain and obvious meaning of the words, it is by the ingenuity of counsel that we have been involved in this kind of difficulty that these words "which said lands are denominated," so and so, are altogether erroneous, and that the testator used them under a mistake. And accordingly they desire your Lordships to regard these words as coming under the ordinary maxim of *falsa demonstratio*, that being the sort of technical reference to the rule that is referred to; and they desire your Lordships to accept the words as an imperfect enumeration of the lands that were intended to be described. It would be impossible to do so without violating a cardinal principle of language, and saying that when words, according to their ordinary and grammatical and obvious and natural sense and meaning, have a clear and unambiguous interpretation, that meaning ought to be done away with in order to substitute for it another meaning. But it is altogether a mistake to suppose that the language of this will is capable of being brought within the range of that maxim. That maxim to which I refer is applicable to a case where some subject-matter is devised as a whole under a denomination, which is applicable to the entire land, and then the words of description that include and denote the entire subject-matter are followed by words which are added on the principle of enumeration, but do not completely enumerate and exhaust all the particulars which are comprehended and included within the antecedent universal or generic denomination. Then the ordinary principle and rule of law which is perfectly consistent with common sense and reason is this, that the entirety, which has been expressly and definitely given, shall not be prejudiced by any imperfect and accurate enumeration of the particular specific gift. And, therefore, to bring the case at the bar in all its bearings at all within the rule which has been applied in the cases to which I have referred, your Lordships ought to have had something like these expressions, "being possessed of certain leasehold lands," or "being possessed of a lease in the county of Kerry," consisting of so and so, "I devise the said lease." And if there had been a devise of the lease as an entirety, it is possible that the generality of that description might not have been derogated from by an imperfect enumeration of the particulars included in the lease and falling under that generality. But there is nothing of the kind here; for, as I have already observed, with a view to anticipate the argument, the words of the gift cover and include only such lands as are antecedently mentioned; and no lands are antecedently mentioned or described, except those of Ballydowney, Clyny, and Farranaspig. Then some aid was attempted to be derived in argument by the counsel from the fact that the testator referred to the debts, and the argument which was attempted to be put was, that there were debts that affected these particular lands and affected also another estate

called the Groyne estate; and it is attempted to be said that inasmuch as he alluded to debts only "affecting the said lands," he meant by "the said lands," all the lands subject to these debts, and that therefore all the lands must be taken to be devised. But it would be impossible to accept that as a rule of interpretation, seeing that the things described and the things given are affected by the debts. Therefore, the words "debts affecting the said lands" are truly answered by finding that these three lands are charged with the debts. An attempt was made, and I think upon very insufficient grounds, to contend that the words "Ballydowney lands," in this enumeration of lands were used in a general sense and not in a specific sense. There was an attempt made at the bar to show that Ballydowney proper did include all the other descriptions. But it is equally true that Ballydowney is the proper name and denomination of a specific estate. That it is perfectly clear from the language used by the testator that Ballydowney here, being associated with Clyny and Farranaspig, is used in the sense of Ballydowney proper, and not as a general denomination including something else. That is corroborated by the only document that can be used by way of evidence, namely, the affidavit of the judgment creditors on entering up their judgments from which it is perfectly clear that there were four separate and distinct estates of which Ballydowney was one, the others being those of a specific denomination, Clyny and Farranaspig. The question is therefore, whether the testator had a pecuniary or other interest (if interest it can be called) in the estate called Groyne. It appears that in the year 1840 he had made a grant of that estate which, so far as I am able to apply the Irish law applicable to it, appears to me to have divested him of all possibility of interest in the land, and to have left him only the owner of a rentcharge or rentseck issuing out of those lands. Therefore, strictly speaking, he could not be said to be possessed of Groyne at the time of making the lease. The utmost that he could be said to be possessed of was the possibility of an interest in it. But I think it is unnecessary to found your judgment at all upon the peculiar tenancy or right, or interest, which the testator had in it at the time of the devise. If he had not made the grant of 1840, I should have humbly recommended your Lordships to have arrived at the same conclusions, namely, that the three specific estates which are described by their proper names here pass under the words "the aforesaid lands," and that that is the full extent of the gift made by the will. I therefore humbly submit to your Lordships, that the order of the Court below, both of the Court of Appeal and of the Master of the Rolls be reversed. If any costs or deposit have been paid under those orders, they must be returned to the appellant. Then I would add to that order of reversal a declaration that under the devise made by the testator of "the aforesaid lands," the lands of Groyne or his interest therein did not pass; and with that declaration remit the cause for further consideration to the Court below.

**LORD CRANWORTH.**—My Lords, my noble and learned friend has so very clearly and distinctly stated the grounds upon which he dissents from the judgment of the Court below that, concurring as I do entirely in those views so expressed, I hardly think it

necessary to add a single word. I will just make a suggestion which I hinted in at the course of the argument. Supposing, the testator, instead of enumerating three out of the four lands, had only enumerated one, could it have possibly been argued that all the other three were intended to be included? Again, read the passages at the beginning of the will without the words "which said lands are." Read it thus: "being possessed of a lease for lives renewable for ever, of certain lands in the county of Kerry, in Ireland, denominated Ballydowney, Clyny, and Farranaspig;" and afterwards "I give all the aforesaid lands." Could anybody have doubted that nothing would have passed except those lands? If so, it is a refinement indeed to contend that the putting in "which said lands are" makes any possible difference. "Which said lands are"—what lands? "Certain lands in the county of Kerry." What lands? Because "certain" they are not, till you have made them certain. Then, coupling it with the rest, it is seen that they are those three parcels of land. It appears to me to be perfectly clear (and I must own that I think there is great weight in the last observation of my noble and learned friend), that it is a strain upon language to call the Groyne lands lands of which he was possessed. Perhaps, in point of law, in one sense, it might be said that he was possessed of them, but popularly he was not possessed of them. He had an interest in the shape of a rentcharge of £70 a year issuing out of them. I do not go into the question of whether in point of law that would have passed it or not; but if you at all step out of the words of the will and speculate upon what he meant, I do not think he did mean to include them.

**LORD WENLEYDALE.**—My Lords, I am entirely of the same opinion with my noble and learned friends who have preceded me. I cannot help thinking that these difficulties would not have arisen if the Irish Court had attended to what their duty is in the construction of all wills—not to speculate upon the meaning of the testator in using the words, which lets in the consideration what he had intended to do; but to strictly recollect that their duty is to look at the words of the will and see what those words mean—a duty which has been pointed out before in an admirable work of Sir James Wigram, a work very well worthy of the attention and study of every student of the law. The duty of the judges is to ascertain the meaning of the words of the will; and if we do look at the will fairly, I do not think there is any difficulty in construing it to be not a devise of all the lands included in that lease, but a devise of particular lands which he correctly says are included in that lease. That is all that by the words of the will he can be construed to mean. Therefore, after all the consideration I have been able to bestow upon the case, I think it does not admit of the least doubt that it must be confined to what passes under the description of the lands Ballydowney, Clyny, and Farranaspig. There is not a word in the will which extends beyond that. Therefore in the result I entirely agree with my noble and learned friends that the judgment of the Court below be reversed.

*Order reversed.*

Solicitor for appellant.—Fred. Hatton.

Solicitor for respondent.—J. H. and H. R. Henderson.

## Court of Chancery.

Reported by Oliver J. Burke, Esq., Barrister-at-Law.

KEARNEY v. SAVAGE.—Nov. 15.

### *Legacy—Vesting—Postponement of payment.*

*A legacy of a defined fund vested absolutely, is payable at twenty-one, notwithstanding payment is further postponed by the will.*

*Testator bequeathed considerable personal estate, consisting of Government three per cent stock, &c., to his executors, upon trust, amongst others, to apply the dividends arising therefrom, to the maintenance of his two infant children, J. K. and E. K., during their respective minorities, and also to transfer to said J. K. two thirds of said stock at the following intervals, viz., £500 on his attaining 21 years of age, £500 thereof on his attaining 24 years, and the residue thereof on his attaining 28 years of age, or such larger portion of said stock, at such earlier intervals as my trustees shall, in their discretion, think advisable for his advancement in life; and should any dividends be due on said portion of stock, on his son attaining 21 years, to pay over the same to the said J. K., and from time to time to pay the dividends to accrue on such stock, to his said son, J. K. Held—that although the payment of a portion of the said stock was, by the terms of the will, postponed until the legatees reached 24 and 28 years of age, yet, nevertheless, the Court would order payment of same on J. K.'s attaining twenty-one.*

THIS was a cause petition presented by John T. Kearney against the respondents, John Savage, Dominick Daly, (the executors of the last will of John Kearney, deceased), Elizabeth Kearney, (petitioner's sister) and Wm. G. Connor. The petition prayed for a declaration that on the true construction of the will of John Kearney, deceased, the petitioner, on his attaining the age of twenty-one years, acquired an absolute vested and transmissible interest in a certain sum of £1,402 1s. Government consols, now standing in the said names of John Savage and Dominick Daly, against whom also an order was prayed that they should transfer the balance of said consols, after deducting thereout a sum of £441 consols assigned by petitioner to said William George Connor. The petition further prayed for the costs of the suit against the said John Savage and Dominick Daly. The petition stated that John Kearney, late of Newry, in the County of Down, shopkeeper, the father of the petitioner, made and published his last will, dated the 23rd March, 1857, as follows: "Whereas I am possessed of certain chattel property consisting of Government Three per Cent. Stock, stock in trade, standing debts, and household furniture, I give, devise, and bequeath the same and every part thereof unto Dominick Daly, of Newry in the County of Down, merchant, and John Savage, of Newry, in the County of Down, surgeon, upon the trusts and for the following intents and purposes, that is to say, in the first place immediately after my decease to dispose by public auction of all my household furniture, stock of goods and fixtures, and to collect in all debts, &c.

2ndly. to apply the dividends to arise from such stock now standing in my name in the Bank of Ireland towards the maintenance, clothing, and education of my two children, John Kearney, now aged fourteen years, and my daughter, Elizabeth Kearney, now aged twelve years, during their respective minorities. Thirdly, to transfer to my said son, John Kearney, two-thirds of said stock at the following intervals, viz. £500 thereof on his attaining the age of 21 years; £500 thereof on his attaining 24 years; the residue thereof on his attaining 28 years of age, or such larger portion of said stock at such earlier intervals as my said trustees, shall, in their discretion, think advisable for his advancement in life, and should any dividends be due on said portion of stock on my son attaining 21 years, to pay over the same to the said John Kearney, and from time to time to pay the dividends to accrue on such stock to my said son, John Kearney. Fourthly, as soon as my daughter, Elizabeth Kearney, shall have attained the age of 21, or day of marriage (which ever shall such take place sooner), provided that such marriage shall take place with the knowledge and consent of my said trustees, to transfer to my said daughter, Elizabeth Kearney, the remaining one-third of said stock, the same to be enjoyed by her and her issue absolutely, and should any dividends be then due on said last-mentioned portion of stock, to pay over the same to the said Elizabeth Kearney, but should my said daughter marry without the knowledge and consent of my said trustees, in that case I authorise them to retain the entire of said one-third of said stock in their own names, and to pay my daughter the dividends to accrue therefrom for her separate use, free from the control of her husband, the same to be disposed of by her amongst her children, but should she die without issue, and before she shall attain twenty-one years, then to transfer the entire of said stock to my said son, John Kearney, and his issue. Fifthly, should my said daughter, the said Elizabeth Kearney, depart this life unmarried, and before she shall have attained the age of twenty years, then to transfer the entire of said stock, and pay the dividends due thereon to the said John Kearney, in such proportions and at such times as my said trustees are hereby authorized to transfer and pay the two-thirds of said stock and dividends to my son, John Kearney, but should my said son depart this life unmarried, and under the age of twenty-one years, and that the two-thirds of said stock set apart for his use become the property of his sister, I direct my said trustees to retain the same in their own names, and pay over the dividends to accrue therefrom to the separate use of my said daughter, and whose separate receipt, &c. Sixthly, should both my said children depart this life before they shall have attained the age of twenty-one years, and unmarried, then to pay to my sister, Sarah Magrath, the dividends to accrue on such stock during the time of her natural life, and immediately after the decease of my said sister, to transfer said stock, and pay all the dividends due thereon to my two nephews, Lewis Lawless and John Lawless. Seventhly—I direct that my said trustees divide said stock in three equal parts, and that two equal parts thereof be kept in a separate account, and be considered the fund set apart for my son, John Kearney, the dividends to accrue

from which two-thirds are to be applied towards his maintenance, and should my said trustees in their discretion think proper to sell out a portion of said stock, the proceeds thereof to be applied by them for his advancement in a profession or otherwise, they are at liberty at any time to do so to the amount of £300 each, but no more; and that one equal third part of said stock be kept in a separate account, and be considered the fund set apart for my daughter, Elizabeth Kearney, the dividends to accrue from which are to be applied towards her maintenance. Eighthly. I authorize my said trustees to sell out the stock to be set apart for my son, John Kearney, and lend the same at interest at the rate of six pounds per cent. to be secured as a first charge on land purchased in the Incumbered Estates Court, the interest thereof to be applied to the same purposes as herein-before mentioned respecting him, and should such interest yield a surplus over and above what may be requisite for the maintenance and education of my said son, John Kearney, then to lay out such surplus in the purchase of Government stock, to abide the trusts herein before mentioned with respect to the fund to be set apart for my son, John Kearney. Ninthly—I authorize my said trustees to sell out the stock to be set apart for my daughter, Elizabeth Kearney, and lend the same at like interest and on like security, the interest thereof to be applied to the same purposes herein-before mentioned in respect to her, and should such interest yield a surplus over and above what may be requisite for the maintenance and education of my said daughter, Elizabeth Kearney, then to lay out such surplus in the purchase of Government stock, and abide the trusts herein-before mentioned with respect to the fund to be set apart for my daughter, Elizabeth Kearney. I appoint the said Dominick Daly and John Savage executors of this my last will, and I appoint the Right Reverend John Leahy Co-adjutor Roman Catholic Bishop of the Diocese of Dromore, guardian of my children.

“(Signed) JOHN KEARNEY.”

The petition then stated that testator died the 16th November, 1858, and that all the assets of testator were realized by the said executors; that in accordance with the provisions of said will the said executors divided the stock into two parts, the one consisting of two thirds of the said stock, which they had set apart as the portion belonging to petitioner, and which said two-thirds amounted to the sum of £1902 1s., and the other one-third part, or £951 0s. 6d., the executors have set apart on a separate account. The petition then stated that John J. Kearney attained his age of twenty-one years on the 10th of May, 1863, and that on the 19th of November, 1863, said executors transferred into the names of petitioner the sum of £500 New Three per Cent. Consolidated Annuities in pursuance of the provisions of the said will. That there was now standing in the books of the Governors and Company of the Bank of Ireland in the names of the said executors the sum of £1,402 1s. Three per Cent Consolidated Annuities. That the dividends in said two-thirds had been from time to time duly paid over by the said executors to petitioner. That petitioner was advised that upon the true construction of said will the said sum of £1,902

1s. Government Three per Cent. Consolidated Annuities, being two third part of said consols, subject to the trusts of the said will, became vested in, and was the absolute property in equity of petitioner, and that on his attaining the age of twenty-one years he was entitled to have said sum of £1,902 1s. Three per Cent. Consols transferred to his own name.

*Brewster, Q.C.*, with *James Henry Monahan*, appeared in support of the petition.—We insist that we are entitled to and have acquired a vested and transmissible interest in two-third parts of the stock on our attaining twenty-one years, and the executors and trustees have no right or equity to refuse to transfer the same to us. Three propositions are submitted to the Court—First, that when the interest is given *in presenti*, then the legacy vests; secondly, that when the fund, by the direction of the testator is segregated from the others, then also it vests; and thirdly, that the Court will not presume an intestacy. Now, on the first proposition, *Hanson v. Graham* (6 Ves. jun. 238); *Lane v. Goudge* (9 Ves. jun. 225); *Vize v. Stoney* (1 Drury & Warren, 337). In fact the cases are uniform.—*Lyster v. Bradley* (1 Hare, 10). There the marginal note is, “A legacy to be paid to the legatee when, or if he attained twenty-one, held to be vested at the death of the testator, and not to be contingent upon the legatee attaining twenty one.” A very remarkable case on this point is *Parker v. Golding* (13 Sim. 418). There the testator directed his trustees to pay the interest of £2,500 to his daughter for life, for her separate use, and after her death for the maintenance of all her children, until they should attain twenty-one, and then to be equally divided amongst her said children, and if his daughter should die without leaving a child, then that the principal should be divided amongst all his children then living. The daughter had children, but they all died under twenty-one, and it was held nevertheless that the legacy vested in them.—*Hammond v. Maule* (1 Coll. 281); *In re Bartholomew's Trust* (16 Sim. 585); *In re Orme* (1 Ir. Ch. R. 177). On the second proposition, *Saunders v. Vautier* (1 Craig & Phillips, 248); *Re Hart's trusts, ex parte Block* (2 De Gex & Jones, 196). The third proposition is self evident.

*Lawless, Q.C.*, with *Randal M'Donnell*, appeared for the executors and trustees of said will.—The true object of testator and the purpose of his will, was manifestly on the face of the will to prevent the petitioner during his minority and early life from becoming possessed at once of the whole property, and therefore did testator direct the executor to pay out the sum so bequeathed to him by instalments at the ages of twenty-one, twenty-four, and twenty-eight, at the same time leaving to us a discretion to enlarge the instalments directed by his will, if we should think it advisable so to do. There are passages in this will which take the case quite out of the authorities relied upon on the other side; here the fund was not to be paid out until the petitioner had reached twenty-four; and a discretionary power was vested in the trustees to pay a larger portion at either twenty-one or twenty-four. In *Watson v. Hayes* (5 Mylne & Craig, 125), the testator in his will directed his executors to apply £25 per annum for the maintenance of testator's na-

tural daughter till twenty-one or marriage, whichever should first happen, when his executors were thereby required to pay her £500. She died under twenty-one, and unmarried, and it was then held that the legacy did not vest, but failed. Now the testator in this case directs that the two-thirds are to be applied towards the maintenance of the legatee. *Jennings v. Hunter* (3 Brown's C. C. 415) was cited to shew that the giving a sum for the maintenance of a child was not at all equivalent to giving him a vested interest therein. The leading case is *Leake v. Robinson* (2 Mer. 363). Owing to the reckless extravagance of the young man, they refused taking out the money until he reached twenty eight years of age.

*Rondall M'Donnell*, cited *Butcher v. Leach* (5 Beav. 393).

*John M'Mahon* appeared for Elizabeth Kearney.

THE LORD CHANCELLOR.—This young man, the petitioner, has an absolute vested interest at twenty one years of age to these funds which he claims by his petition; and I shall order them into Court. It is said the trustees were justified, from the recklessness of the young man in withholding from him those sums, and also that there was such an ambiguity in the will as would justify the executors taking the course they have taken. Well, I do not think that there is any difficulty, on reading the will, in seeing that the petitioner has a vested interest on reaching 21. Here there is a gift over, if both the children die under twenty-one years. This rule is well known [vid. *Williams on Executors*, 5th edition, 1260], that when the testator gives a legatee an absolute interest in a defined fund, so that according to the ordinary rule he would be entitled to receive it at 21 years of age, but by the terms of the will, payment is postponed to a subsequent period, for example, till the legatee attains the age of twenty-five, this Court will, nevertheless, order payment on his attaining twenty-one. Let the money then be brought into Court, and let each party pay his own costs.

SLATOR V. JORDAN.—Nov. 16, 17.

*Will—Election—Changing word "or" into "and."*

*Testator by his will, dated 1st February, 1847, gave and devised and bequeathed to his grand-daughter, A. E., "the sum of £1000, or £50 per annum, whichever my executors think fit or most advantageous for my said grand daughter; said sum of £1000, or £50 a year, as the case may be, to be paid by my daughter, M. B., and to be chargeable and payable out of that portion of my property bequeathed to the said M. B., her heirs, &c..... and in the event of my said grand-daughter, A. E. dying unmarried, or without leaving lawful issue, her surviving, or before she attains the age of 21 years, the said sum of £1000, or £50 per annum, so bequeathed to her as aforesaid, to sink and not to be paid, but to be and remain the property of my said daughter, M. B., her heirs, &c." Said M. B., elected as sole executrix to pay said annuity, and*

*not the £1000. Held—that said election was properly made by said executrix.*

*Held also that the said words "or" and "or," which testator had so used, must be read "and" and that therefore in order that the executory devise over to M. B. might take effect, all the three events must have first happened, namely—A. E., must have died unmarried and without issue, her surviving, and before she attained the age of twenty-one; and that one of the events having happened, the executory devise over was gone.*

This was a cause petition presented by the petitioners, Patrick Slator, and Alicia Slator, his wife, against Chas. Bourke Jordan, and Maria Margaret Jordan, his wife. The petition prayed—that the trusts of the will of the late Walter Eakens might be carried into execution under the direction of the Court, and the rights of Alicia and all other parties interested might be ascertained, and, if necessary, that an account might be taken. The petition stated that Walter Eakens, of Richmond House, in the County of Wexford, made his last will bearing date the 1st of February, 1847, whereby, besides several other devises and legacies to different persons, he gave, devised, and bequeathed to his daughter, Maria M. Browne, otherwise Eakens, all his estate, right, title, and interest in all that and those the dwelling houses and lands of.....to hold the aforesaid dwellinghouses, lands, and premises, unto his daughter, and to her heirs, executors, administrators, and assigns, for ever. Testator then devised and bequeathed unto his grand-daughter (the petitioner, Alicia, by her then name of Eakens) as follows:—"I give, devise, and bequeath unto my said grand-daughter, Alicia Eakens, the sum of £1,000 or £50 per year, whichever my executors think fit or most advantageous for my said grand-daughter; said sum of £1,000, or £50 a year, as the case may be, to be paid by my daughter, the said Maria Margaret Browne, and to be chargeable and payable out of that portion of my property bequeathed to the said Margaret Browne, her heirs, executors, administrators, and assigns for ever, as aforesaid; and after reserving out of the annual interest of said £1,000, or out of the said £50 a year, as the case may be, an adequate sum for the maintenance, clothing, and education, my executors are to place the balance, if any, in Government or other approved securities, and to account with the said Alicia Eakens for same on her attaining the age of twenty-one years; and in the event of my said grand-daughter, Alicia Eakens, dying unmarried, or without leaving lawful issue her surviving, or before she attains the age of 21 years, then said sum of £1,000 or £50 per annum, so bequeathed to her as aforesaid, to sink and not to be paid, but to be and remain the property of my said daughter, Maria Margaret Browne, her heirs, executors, administrators, and assigns." Testator then having bequeathed all the residue of his property to the said Maria Margaret Browne, appointed her, together with the Rev. William Moran, of St. Peter's, Wexford, and John Thomas Devereux, executors of this his last will, the probate whereof was granted to the said Maria Margaret Browne alone. Said Alicia attained her age of twenty-one on the 15th of August, 1861, and no



settlement whatever was executed on her marriage with the petitioner, P. Slator. Said respondent, Maria Margaret Browne, in 1855, intermarried with the respondent, Chas. Bourke Jordan. The petitioners made an application bearing date 27th June, 1862, to the respondents to pay the said sum of £1,000, and in answer thereto the following reply was received from the respondents:—"In reply to your notice of 27th January, 1862, we have to inform you that we admit assets of the late Walter Eakens; that Alicia Eakens, otherwise Slator, has been paid £50 a year since the death of Walter Eakens; that by the will of the said Walter Eakens she has been bequeathed either £1,000 or £50 a year, at the discretion of the personal representative of the said will as therein mentioned; and that I, the said Maria M. Jordan as the executrix of the said Walter Eakens, and who have proved his will, have exercised my judgment, being so empowered by said will, and have deemed it more fit and advantageous for the said Alicia Eakens, otherwise Slator, to be paid £50 per annum, and not the £1,000, and said Alicia Eakens, otherwise Slator, has been accordingly paid said sum of £50 per annum as aforesaid, and she has received same in pursuance of the bequest in said will. We are accordingly willing to continue to pay the said £50 according to the bequest in said will, but we deny that we, or the assets of said Walter Eakens, are subject to the payment of the £1,000, to which your notice refers. Dated the 13th of February, 1862. Signed—Charles Bourke Jordan, and Maria Margaret Jordan, his wife."

*Brewster*, Q.C. (with whom were *Morris*, Q.C., and *Roper*) appeared for the petitioners.—The first proposition we contend for is, that there is here, under the terms of this will, a perpetual annuity, and not one determining on the life of Mrs. Slator, bequeathed by the testator to her the object of his bounty. It is utterly impossible that such a construction could be contended for, as that the annuity should cease on the life of Mrs. Slator; such could not have been the intention of the testator. It is true that there were no wards of limitation, such as "heirs," used. In *Elton v. Sheppard* (1 B. C.C. 631), a gift of personalty to trustees to pay the interest to A. with power to dispose of the fund by will as she pleased, and without any other words of limitation, was held to be an absolute gift. *Robinson v. Dugate* (2 Vernon, 181) was "where A. by his will devises his land to B. in fee, paying £400 whereof £200 to be at the disposal of his wife by her will, to whom she should think fit, the wife died intestate, the administrator shall have this £200, the property thereof being absolutely vested in the wife." *Maskelyne v. Maskelyne* (Ambler, 750); *Barford v. Street* (16 Ves. 133), and a number of cases cited in a note to the above case of *Elton v. Sheppard* (1 B. C.C. 531), where the cases are collected—[*The Attorney-General* here interposed, and said that Mr. Brewster was addressing himself to establish a proposition not denied by the respondent. We do not deny that the estate in the £50 a year or in the £1,000 was not a life estate, but was absolute to whomsoever it might belong, and did not in any way depend on the life of the respondent, Mrs. Slator.] Then the only question, as the other side does not now dispute the proposition we are proceeding with, is

whether the respondents should pay over to us absolutely this £1000, or whether we in the event of the Court holding that the election was well made by the respondents, are entitled to this perpetual annuity absolutely, so that we might sell and dispose of same. [*The Attorney-General*.—Precisely so, but we never by any of our pleadings raised the question to which Mr. Brewster was just addressing himself.] Well, now, as to this discretion exercised by Mr. Jordan, what was it she had done? Her discretion was exercised for her own benefit. It is said in *Re Beloved Wilkes' Charity* (3 Mac. N. & Gord., 440) that discretion must be exercised with an absence of indirect motive by the person who has the power; that it must be done with an honesty of intention and a fair consideration of the subject. In the words then, of Lord Truro in this last cited case, the duty of this Court is to see that that discretion of the trustee and executor has been thus exercised. It is absurd to say that the intention of the testator was, that the moment the breath was out of him, Mrs. Jordan could exercise her discretion to appoint the £50 a year to the respondent, just what a moment before the testator himself could have done. *Hart v. Tribe* (18 Beav. 218) is cited to show that this Court will prevent an improper exercise of a discretion of this kind. The next point for the consideration of the Court is, that although a concurrence of the executors in using their discretion was required by the testator, yet nevertheless that there was only one executor, and that the one most interested in selecting the £50 a year, and there was no concurrence whatever. In *Gray v. Gray* (13 Ir. Chan. R. 404) the marginal note was, "Where a discretionary trust is vested in trustees the Court will not interfere with the exercise of the discretion, if it be not capricious or improper, though a suit be instituted for the administration of the trust funds. If the trustees do not concur, the Court will distribute the trust fund among the parties equally."

*The Attorney-General* (*Lawson*), with the *Solicitor-General* (*Sullivan*) and *Edmond Jordan*, appeared for the respondents.—It was more advantageous to Mrs. Slator to have the £50 a year than the £1,000. By the £1,000 she could only have £30 a year. As to the discretion given to the executor, it will be observed that no discretion was given to Mrs. Jordan any more than to any other, save in the capacity of executrix.—*Pink v. Thinsey* (2 Mad. 162). We are not to make a will for the testator; we are to expound it. If there were a dozen executors here, the power could only vest in the executor who would act as such. Williams on Executors, p. 251, referring to Sugden on Powers, p. 124, commenting on *Lord Granville v. McNeill* (7 Hare, 156), where it is said that a power in a settlement over even real estate to one, his executors, administrators, or assigns, may be executed by those who act under the will, although another of them refuse to act. Our co-executor declined to act in this case; therefore, applying the above, we who made the election, *qua* executor, were perfectly justified in doing as we have done.—We deny that Alicia Eakens has an absolute property in this annuity or in the £1,000, inasmuch as there is an executory devise

over, "in the event of my said grand-daughter, Alicia Eakens, dying unmarried, or without leaving lawful issue her surviving, or before she attained twenty-one years of age," when it was to sink into "the property of my daughter, Margaret Browne." There is now a single event upon which the limitation over to Mrs. Jordan's estate depends—Alicia Eakens has passed twenty-one, and she has married. But if she die without issue, the annuity of £50, or the £1000 will "sink and remain the property of my daughter Maria Margaret Brown," now Jordan. This word "or" cannot be read "and."—*Coates v. Hart* (32 Beav. 349) commenting on *Grey v. Pearson* (27 Beav. 143; s. c., 6 H. L. Cas. 88).

The Solicitor-General replied.—It is open to this Court to substitute the word "and," for "or" and so Sir John Romilly thought in *Seccombe v. Edwards* (28 Beav. 440).

THE LORD CHANCELLOR said that he would give a declaration that the annuity was a perpetual annuity. I think that Mrs. Jordan, the respondent, has wisely exercised her discretion in appointing to the petitioner the £50 a year. I have considered this case carefully, and I have arrived at the conclusion that the word "or", I should say the two "ors" must be read "and," and that being so that the executory devise over could not take effect if any of the events occurred, because it was only in the failure of them all, the copulative conjunction adding them together, that the executory devise can take effect. That case in the House of Lords, *Grey v. Pearson* is not a parallel case, because that was a case where the word "and" was used. The case before us is where "or" is used, and the cases go to shew that "and" can not be used disjunctively as "or"—*Seccombe v. Edwards* (28 Beav. 440); but it is otherwise when "or" is used, and in this case we shall read "or" as "and." The conclusion I have arrived at is this. Mrs. Slaton cannot compel the Jordans to pay her this £1000, Mrs. Jordan having elected to pay her £50 a-year;—and this £50 a year is the absolute property of the petitioners, there being no executory devise over in the case, one of the events having happened.

### Court of Queen's Bench.

Reported by William Woodlock, Esq. Barrister-at-Law.

M'SWINEY AND DELANY v. WILSON.—May 12.

*Demurrer—Pleading—Action against sheriff.*

*A summons and plaint in an action against a sheriff contained two counts, the first for not levying under a writ of fi. fa. "whereby plaintiffs were delayed in recovering their money, and were likely to lose the same:" the second for a false return of nulla bona, "whereby plaintiffs were deprived of the means of obtaining their money, and the same was still unpaid, and was likely to be lost to the plaintiffs." Defences simply pleading that it was not by reason of the matters stated in the counts respectively that the*

*plaintiffs suffered the damages averred in each count respectively, were held bad.*

**DEMURRER:**—The first count of the summons and plaint complained that the plaintiffs, on the 5th of November, 1863, in the Court of Common Pleas at Dublin, by the judgment of said Court, recovered against John Wheeler the sum of £51 19s. 1d. for debt and costs, and afterwards, and upon the 3rd day of August, 1864, the plaintiffs sued out of the said Court a writ of *feri facias* upon the said judgment directed to the sheriff of the County of Westmeath, whereby her Majesty the Queen commanded the said sheriff that out of the goods and chattels of the said John Wheeler, he the said sheriff should cause to be levied in his bailiwick the sum of £33 17s. 9d. sterling, being the sum certified to be due on foot of said sum of £51 19s. 1d., so then lately recovered as aforesaid, and that he should have that money, together with interest on the said sum of £33 17s. 9d. at the rate of £4 per cent. per annum from the 5th day of November, 1863, before her justices at the Queen's Courts on the 24th day of August, 1864, to render to the plaintiffs for their debt besides costs and interest as aforesaid, and that he should do all such other acts as by the statute passed in the 16th and 17th years of her said Majesty's reign he was in that behalf commanded to do, and that he should have then there the said writ, and the said writ, before the delivery thereof to the said sheriff, contained all other endorsements, directions, and particulars necessary to make same, and the same was, at the time next thereafter mentioned, a good and sufficient writ in that behalf, and the plaintiffs thereupon caused the said writ to be delivered to the defendant as and being the sheriff of the said County of Westmeath aforesaid, to be executed, and at the time of the delivery of the said writ aforesaid and afterwards, during a reasonable time in that behalf, goods and chattels of the said John Wheeler were within the said bailiwick of the said defendant, and the defendant then had notice thereof, and could and ought to have levied thereout the money and interest mentioned in the said writ, yet the defendant, being such sheriff as aforesaid, did not nor would levy the said money and interest, and made default in the execution of the said writ, whereby the plaintiffs had been delayed in recovering the said money and interest, and were likely to lose the same. In the second count the plaintiffs further complained (to save prolixity praying that so much of the first count commencing with and including the words, "that the plaintiffs, on the 5th of November, 1863, in the Court of Common Pleas," and ending with and including the words, "and could and ought to have levied thereout the money and interest in the said writ," might be incorporated and read as if repeated in this count), and the plaintiffs said that the defendant as and being such sheriff as aforesaid, falsely returned to the said Court upon the said writ that the said John Wheeler had not, at the time of the delivery to the defendant of the said writ, or at any time up to the time of making such return, any goods and chattels within his bailiwick, whereof he could levy the amount or any part thereof, as by the said writ he was commanded, whereby the plain-

tiffs were deprived of the means of obtaining the said money and interest, and the same were still unpaid, and were likely to be lost to the plaintiffs. To the first count the defendant pleaded, secondly, that it was not by the means of any of the matters therein complained of that plaintiffs had been delayed in recovering the said money and interest, and were likely to lose the same as therein mentioned, or any part thereof. To the second count the defendant pleaded, secondly, that it was not by the means of the matters therein complained of that the plaintiffs were deprived of the means of obtaining the said money and interest or any part thereof, or were likely to lose the same as therein alleged. To each of these defences the plaintiffs demurred, saying that the same did not disclose any defences to the said counts respectively, good in substance, because the same, while they purported to be pleaded to the entire of each of said causes of action, were in fact pleas to the damages only; and because while they purported to traverse the accruing of any damages to the plaintiffs, they were in fact a traverse only to part of the damages alleged by the said writ, and thereby appearing to have accrued to the plaintiffs; and because it did not traverse the said causes of action, nor confess and avoid the same; and because it tendered an immaterial issue, and was vicious and double.

*Keogh* in support of the demurrer.—If upon the face of the pleading it appears that there is a legal damage which is not traversed, we are entitled to say that there is an actual damage. They admit in their plea to the second count that there was a false return, and that there was legal damage. All that they traverse is the concluding averment. The case comes exactly within the distinction taken by Lord Denman in *Clifton v. Hooper* (6 Q. B. 468); *Barker v. Green* (2 Bingh. 317); *Randell v. Wheble* (10 A. & E. 719); *Bales v. Wingfield* (4 Q. B. 580). A traverse of a *virtute cujus* is bad.

*Phillips* and *J. E. Walsh*, Q.C., in support of the pleading.—We submit that the defences are good. First, in an action of this kind against a sheriff, whether for not levying or for a false return, the damages are the gist of the action. Secondly, no damages can be recovered in that species of action unless they are specially laid. If the Court had concluded without the averment at the end, the pleading would be demurrable. Once damages are the gist of the action, there is an end of legal damage by implication. [*O'Brien*, J.—How do you get over *Clifton v. Hooper* (6 Q. B. 468)?] We submit that the principle upon which that case was decided is not law at present. Assuming that the sheriff could or ought to have levied, still if, notwithstanding his neglect or default, the plaintiff would have lost his debt from other surrounding circumstances, the sheriff would not be liable to an action.—*Williams v. Mostyn* (4 M. & W. 145). Damage does not accrue until a new writ issues, and there is no averment of a new writ having issued here. *Barker v. Green* is overruled by other cases.—*Levy v. Hale* (29 L. J., N. S. C. P. 127; s.c. 6 Jur. N.S. 702). Suppose there was a heavy arrear of rent due, which would swamp the debt, still even though the sheriff did not pay it, the plaintiff would have sustained no damage. [*Fitzgerald*,

*J.*—In such a case *nulla bona* would have been a true return, and you could have pleaded that you did not falsely return *nulla bona*.] The principle of *Wylie v. Birch* (14 Q. B. 477) is that where the damage did not accrue by the act of the defendant, that is an answer to the action. We have no general issue in this country. There is no way of taking a traverse except as we have done it here.—*Bullen and Leake*, p. 341, n.; 1 *Chitty on Pleading*, by Greening, 411. *Custis v. Sandford* (4 Ir. C. L. Rep. 197) shows that we have raised the very issue which would have been sent to the jury. There is a marked distinction between cases of *fi. fa.* and of *ca. sa.* There is no breach of duty in the case of *fi. fa.* unless actual damage arises by the sheriff not levying, but in the case of a *ca. sa.* there is a breach of duty in permitting an escape. That at once gets rid of the cases of *Randell v. Wheble* and *Barker v. Green*.—*Bullen and Leake*, 340, 341, 594. The exception made there is involved in the very case cited on the other side. *Clifton v. Hooper* is decided by the same judges who decided *Wylie v. Birch*, and there is not the slightest sign that they disapproved of their former decision. They are reconcilable on the distinction above mentioned, and on no other. *Randell v. Wheble* and *Clifton v. Wheble* both turn on the same doctrine. *Bales v. Wingfield* does not decide the question here. None of the cases are any authority against us, but supposing they are, the transfer here denies every possible injury arising to the plaintiff.—*Williams v. Mostyn* (4 M. & W. 145). It is said that this vicious as being a traverse of a *virtute cujus*, but *Lucas v. Nockells* (10 Bing. 157; s.c. in H. of L., 7 Bl. 140.) shows that you may always traverse a *virtute cujus*, wherever it involves a matter which is essential to the action. Whenever it is a matter of fact, and not a mere inference of law, you may traverse it.—*Beal v. Simpson* (1 Lord Raymond, 408). If it is once admitted that an argumentative denial of the averment in the plaint would be good, *a fortiori* a direct denial of it would be also. The objection to the second defence does not apply to the first defence, and the denial in the second defence applies to everything. At all events it is a mere slip and will be amended.

*Heron* Q. C., in reply.—The argument is, that there being a just debt and a *fi. fa.* going to the sheriff, and admitting that the debtor had goods, and that he made a false return, he is to be permitted to say that there was no damage, and therefore no action. That is going too far. The defence is argumentative and insensible, because on the record the facts are admitted which render it insensible and false. *Wylie v. Birch* ought to have been followed by the pleader here. There is no precedent for such a plea as this. It is not traversed in the second defence that the money is still unpaid.

*O'Brien*, J.—In this case we are all of opinion that both demurrers should be allowed, and we do not think it involves any difference with the judgment in *Clifton v. Hooper*, and that the judgment there is applicable here. That was for not executing a *ca. sa.*, and Lord Denman says, "When the clear right of a party is invaded in consequence of another's breach of duty, he must be entitled to an action against that party for some amount." It is said that

that is a mere dictum, but I cannot treat as a dictum that which is stated by the judges as the reason of their judgment. Williams, J., says the same thing. The jury had found that in point of fact no damage had been sustained, and he says, "I am of the same opinion. The special finding of the jury is immaterial except as to the amount of damages. An action *di accre* by reason of the defendant's breach of duty; so far the plaintiff's claim is supported, and under the circumstances he is entitled to nominal damages." Then Coleridge, J., adopts the same principle; and Wightman, J. says, "The plaintiff here has certainly lost the benefit of a right which he has to detain the body of the debtor. That right may have been of no value, but still there was some damage." We do not think that there is any authority to confine that to the case of a *ca. sa.* in England, and I think the case is reconcilable with *Wylie v. Birch*. That case arose on a *fi. fa.* It was an action brought against the sheriff, alleging a seizure and sale, and a false return. The defendant pleaded three pleas, and certain acts which showed that in point of fact the plaintiff sustained no damage from the defendant's admitted dereliction of duty. Those facts however were stated on special pleas, and a demurrer was taken to those pleas, and the Court held that the defendant having stated in his pleas facts which were admitted by the demurrer, and which showed that in fact the plaintiff had sustained no damage, was entitled to judgment. How does that case apply to the one before us? There is a state of facts apparent on the declaration which is admitted in the defence, that there was a *fi. fa.*; that there were goods; that it was the duty of the defendant to levy; that he did not levy, and that the writ was out of return. The second count adds that the sheriff made a false return. I would say that beyond all doubt that established a case which entitled the plaintiff to substantial damages. The sheriff admits all the facts, but traverses the conclusion that the plaintiff thereby lost his debt. It would be a most inconvenient mode of pleading, and inconsistent with the spirit of the Common Law Procedure Act to hold that the sheriff could defend himself by a general allegation of this sort, admitting the loss of the debt, without stating what the reason of the loss was, or suggesting any ground whatever for supposing that the sheriff was not answerable for his breach of duty. We were referred to a case of *Curtis v. Sandford*, but there the words complained of were not actionable in themselves without special damage. I observed that Mr. Walsh who argued the case said that a "mere general charge is not slander, but it would be different if the charge had been that the plaintiff was drunk in the discharge of his duty." It was necessary there to allege special damage in order to maintain the action, because the words spoken were of a character which would not be actionable without special damage. All that was done was to amend the summons and plaint, and direct issues for the jury. I do not think that at all affects the conclusion we arrive at, and for which the case in 29th Law Journal is rather an authority. There there was a plea of Not Guilty, and on it the plaintiff was allowed to go into a case which the defendant was allowed to answer by showing that no matter

what the debt was, the plaintiff could not have recovered anything on that execution.

HAYES, J.—I go upon the ground that the party ought to have pleaded specially.

FITZGERALD, J.—I concur that the demurrer ought to be allowed to both defences. As to the second defence there can be no reasonable ground for sustaining it. I do not think it necessary to say how far *Clifton v. Hooper* may be distinguishable. But taking it to be distinguishable, I think with my brother Hayes that where the record states, as here, a clear breach of duty on the part of the sheriff, a circumstance from which damage necessarily flows, any state of facts showing that the damage did not arise from what he had done, ought to be stated by pleading the facts specially, and not merely by an argumentative traverse as here. If he relies on bankruptcy he should plead it, as it shows that there was no breach of duty on his part. So, if there was a claim for rent he should plead *nulla bona*, or the facts. I therefore concur in opinion that the demurrer should be allowed.

*Demurrer allowed.*

MAYNE, APPELLANT; MALCOMSON, RESPONDENT.

May 3, 4, 5; June 10.

*Fixed net*—Stat. 26 & 27 Vict. c. 114, s. 4.

*A fixed net erected in 1854, but unused from 1857 to 1863, and of which during the open season of 1862 only some gye-poles remained standing, is not a "fixed net legally erected for catching salmon or trout during the open season of 1862," within the meaning of s. 4 of the stat. 26 & 27 Vict. c. 114.*

THIS was an appeal from an order of the Fishery Commissioners abating two weirs belonging to the appellant. The Commissioners, at the end of the case stated by them, gave several reasons for their order, but the only one upon which the Court decided upon the present appeal was the first, which stated that the weirs in question were not legally erected for the catching of salmon and trout during the open season of 1862. The facts, so far as related to the question raised by this ground of decision, were as follows:—The lands of East and West Asdee, which are situated on a small river running into the estuary of the Shannon, were purchased by the appellant in the Incumbered Estates Court in 1852, and, as was contended by him, he obtained by his conveyance a several fishery, which had, he alleged, been always enjoyed with the lands. In the year 1854, he erected two stake weirs in the river. These weirs were composed of a succession of long poles fixed in the bed of the river, between which poles, and attached to them by ropes for the purpose of securing them, were certain smaller stakes or "gye poles," and to these latter the nets used for taking fish were fixed. The weirs were used down to the year 1857, but from that year until 1863 they were not used; the nets and long poles were taken away; no license was paid, and in the open season of 1862 all that remained

were the smaller stakes or gye-poles. In the year 1863 the weirs were again put into working order. The commissioners (with the exception of the legal commissioner, who dissented) held, on these facts, that the weirs were not legally erected or used for the catching of salmon and trout during the open season of 1862 within the meaning of section 4 of the 23 & 24 Vict. c. 114.

*Brewster, Q.C., (with him Butt, Q.C., and Neligan)* for the appellant.—The construction arrived at by the Commissioners on the 4th section is erroneous, and renders the Act inconsistent. The Commissioners say that no weir which was not actually fished during the year 1862 can be legalised under the Act of 5 & 6 Vict. c. 106, or at all, no matter how legal it was before. The word "erect" is used in this section; elsewhere in this code the word used is "place." By a small transposition of the section it can be made to have a better construction, and to be better English than it is now. We would read it, "No fixed net for catching salmon that was not legally erected during the open season of 1862 shall be placed or used." The Act was passed on the 28th July, 1863. The provision refers to the season of 1862; that of 1863 was nearly over when the Act was passed, and the season of 1862 was selected because a bill had been brought in in 1862 that did not become law, and it was anticipated that when the bill was lost people would erect weirs which did not exist before, and therefore the legislation of 1863 referred back to that time. My argument is that the word "erected" refers to the structure, not to the use. If the weir was in use when the Act of 1863 passed, and if it had been erected before 1862 in conformity with the previous Act, the Commissioners were bound to give a certificate of its having been so erected, although it was not fished in 1862. Sections 18 & 19 of the stat. 5 & 6 Vict. c. 106, gave a right to erect weirs subject to certain conditions. In the 22nd section everything has reference to the original erection or placing of the weirs. The 23rd section uses the word "establish;" the 24th uses the same word. Section 26 speaks of "the formation and construction of the weirs," pointing to their original erection. It cannot be denied that from the passing of that Act until the late one, a man might go on erecting new weirs. He was not bound to erect them within any given time. Stat. 8 & 9 Vict. c. 108, s. 2, uses the words "to be placed or erected," shewing that "fish with or use" are very different from "erecting or placing." The words "erect or use" point to two distinct acts, and were employed because the sections imposed penalties for those different acts. That appears more strongly in section 6, where the words are, "shall erect, use, or fish." Section 6 is still more important. There the words are, "shall erect, re-erect, or use," plainly shewing that the Legislature knew well the meaning of the words, and wished to provide against all those cases. Stat. 11 & 12 Vict. c. 92, s. 29, also shows the distinction. So also stat. 13 & 14 Vict. c. 88, ss. 12, 14, 15, and 16. *Ward v. The Justices of Dublin* (4 Ir. Jur. N. S., p. 236) is most important as showing the distinction between erecting and using. If the words meant the same thing the judgment would mean nothing. Sections 17, 18, and 43, are important in the same view.

In section 17 the words are, "erect, re-erect, use or fish." Those in section 18 are "erect, use, or fish." The Legislature had all these sections in view when the last Act was passed, and it will carry out their intention to hold that the word "erect" referred to the original construction of the weir. It is impossible that it can refer to the use of the weir, having regard to the words used in the whole of this code. If the weir had not been erected at all until the year 1862, it would not be legal. The section means "erected under the provisions of the Act of 1842." The actual fishing in 1862 was not intended to be imperative. If this was not a fixed net, the Commissioners had no jurisdiction to abate it.

*Longfield, Q.C., and Barry, Q.C.,* for the respondent.—The decision of the Commissioners was that leaving some stumps or poles was not sufficient to satisfy s. 4 of the stat. 23 & 24 Vict. c. 114. The Court is asked to decide that a weir which was derelict in 1867, and of which since then nothing remained but some unused stumps or poles, was a net legally erected in the open season of the year 1862, and that that, which was not erected in point of fact, was erected in point of law, and was in existence during all the time when it was not in existence. There was no *animus revertendi* here. The appellant fished for one or two years; he then leaves the weir derelict, and afterwards comes and says it was legally erected in 1862. The intention of the Legislature was to preserve the rights of those persons only who were availing themselves of those rights in 1862. Section 4 preserved existing rights; not shadowy rights, but rights which were valuable, and then in exercise. Unquestionably the weir cannot be said to be erected unless it is in a position for fishing. Even if it was not necessary that the net should be in actual use, still at least there should be a substantial erection, which does not exist in this case. As to the construction which it was sought on the other side to put upon the section, we must read the words in their collocation as we find them, in their ordinary grammatical sense. *Prima facie* the words mean such an erection as would enable the weirs to catch fish during the open season. The words "for catching salmon or trout," are used as a qualification of the verb "erected," to show the purpose of the erection, and not as an adjective descriptive of the engine. Sect. 5 shows this. Sections 2, 3, 5, 6, and 8 of 8 & 9 Vict. c. 108, are an illustration. It will be found that the words "fixed net" are always used by themselves, without the words "for catching salmon or trout," and the words "fixed net" have a defined meaning of themselves. The argument on the other side ignores the words "during the open season." Those words are put there as descriptive of the kind of erection which the Act dealt with. For the purpose of preventing the construction of new nets, it would have been sufficient to say, "no net erected in 1862." The words "during the open season" were introduced to show the sort of erection that was meant. The Legislature intended to save the rights of those who in 1862 were actively engaged in exercising their rights. The words "used" and "erected" are sometimes used synonymously in this code.

*Butt, Q.C.,* replied.

*Curr. adv. vult.*

June 10.—LEFROY, C. J.—We are all of opinion to affirm the Commissioners' report, that the weir was not legally erected on the first ground.

O'BRIEN, J.—The only doubt which I entertain,—and it is not sufficiently strong to warrant me in dissenting from the judgment of the Court—is, whether the Commissioners themselves—their power being to abate a fixed net—can exercise the power which is given them by s. 5 of the Act, and then say under s. 4 that it was not a fixed net legally erected for catching salmon or trout during the open season of 1862. If they deal with it as a weir that they have power to abate under the Act, it is difficult to say that it was not a weir that was standing in 1862; but as the rest of the Court are of an opposite opinion, the doubt upon my mind is not sufficiently strong to enable me to dissent from their decision.

HAYES, J.—I am of opinion that neither of the weirs was a weir legally erected during the open season of 1862, within the meaning of section 4 of the Act. It is clear that it is not necessary that the business of a weir, being a fixed net, should be carried on during that season, but merely that it should be, during that season, a fixed net erected for the purpose of catching salmon and trout. The question is, what is a fixed net erected for the purpose of catching salmon and trout during the open season of 1862? It cannot be merely the setting up or fixing of the poles from which the net must be removed at the end of one open season, and to which it may be put back at the next season. If the setting up merely of the poles would not satisfy the Act, still less would the setting up of mere gye-poles. Again, s. 22 of the 11 & 12 Vict. c. 92, enacts "that if any person shall erect any engine, net, instrument, or device for the taking of salmon, without the same being licensed, the engine or net shall be forfeited and sold." This plainly contemplates that by the erection, which implied the necessity of the payment of a licence, was meant putting the net into fishing order. It is an abuse of language to say that a net is erected when no portion of the fishing gear is erected. Whether the object of the Legislature was to prevent the erection of totally new weirs, or to prevent the revival of old weirs which had been disused, it is manifest that the purposes of the Legislature would not be satisfied by merely a few poles being driven into the sand. Upon these grounds I am of opinion that both the nets which have been the subject of argument here are bad.

FITZGERALD, J.—I agree that the judgment of the Commissioners should be affirmed upon the first ground stated by them, which is, that these weirs had not been legally erected for the catching of salmon and trout during the open season of 1862, within the meaning of sec. 4 of st. 26 & 27 Vict. c. 114. Now it is upon that ground that I agree with the decision of the Commissioners, offering no opinion on the other points, as it is unnecessary for me, in the view which I take, to do so. I can only say that I listened with great attention to the ingenious arguments which were addressed to us by the counsel for the appellant upon the construction of the 4th section, and I also carefully considered the very ingenious judgment of the legal Commissioner; but, notwithstanding every ef-

fort on my part to ascertain any doubt, I could find no subject of doubt on the very plain language of the section. There is some difficulty in construing it with reference to the 6th section; but I can see my way to that, and when the Legislature says, in language which can admit of no doubt, that no fixed net that was not legally erected for catching salmon or trout during the open season of 1862, shall be placed or used for catching salmon or trout in any inland or tidal waters, are we to blot out those plain words from the Act, and say that the Legislature intended something else which they did not express? It may be a cruel and severe law, but that is matter for the Legislature; and I agree with my brother Hayes, that it would be an evasion of the language of the Legislature to hold that the placing of a few gye-poles would be sufficient to satisfy the requirements of the Act. I never entertained a shadow of doubt upon the subject, although I paid the utmost attention to the arguments which were addressed to us.

LEFROY, C. J.—It would be a mere repetition for me to go over the grounds on which I concur in the decision of the Commissioners, my brother Fitzgerald having stated the grounds on which I go.

REEVES, APPELLANT; MALCOMSON, RESPONDENT.

May 6; June 8, 10.

*Partial abatement—Meaning of word "land"—St. 5 & 6 Vict. c. 106, s. 19.*

*Where a weir was partly within and partly beyond low water mark, and the inner of its two pockets was outside low water mark. Held (O'Brien, J., dissentiente), that it should be abated entirely, and not partially.*

*The meaning of the words "land adjoining" in s. 19 of stat. 5 & 6 Vict. c. 106, is not confined to arable land, but may be satisfied by the possession of land partly road and partly shingle.*

THIS was an appeal from a decision of the Fishery Commissioners abating three weirs of the appellant—the Rushen weir, the Parcrnadh weir, and the Lynch's Point weir, all situate upon the estuary of the River Shannon. Upon the hearing of the appeal the appeal was abandoned as to the Rushen weir, the Commissioners having found that it was injurious to navigation. With respect to the Parcrnadh weir, they found that it was 582 feet in length, having two pockets connected by a leader, and having a similar leader running out from the shore to the inner pocket, and that at low water mark the inner pocket was 240 feet outside the ordinary low-water mark. Upon this they condemned the entire weir as being illegal and contrary to the provisions of the st. 5 & 6 Vict. c. 108, s. 26. The appellant, upon the inquiry below, sought to uphold both the Parcrnadh and Lynch's Point weir upon the grounds that he was the occupier of land adjoining the weirs within s. 19 of st. 5 & 6 Vict. c. 106. In order to make out this, he showed possession of land adjoining each

weir, which was separated by a wall or fence from the tenants' farms, and consisted partly of road and partly of shingle, no part of it being arable. The Commissioners (the legal commissioner dissenting), held that this was not land within the meaning of the section. There were several other points raised in the course of the argument, but as the Court decided only upon the points just given, the report is confined to them.

*Brewster, Q.C. and Butt, Q.C.* (with them *Tundy and Reeves*) for the appellant.—The Commissioners ought only to have abated as much of Parcruadh weir as was beyond low-water mark. The Legislature in this code of laws, plainly shows that it contemplated a partial abatement in certain cases. Statute 8 & 9 Vict. c. 108, ss. 3 and 6, speak of removing "part of" the weirs. It was never intended that that part which never was a nuisance should be abated. The Legislature made the weir a nuisance only so far as it extended below low-water mark. The words "part thereof" also occur in st. 13 & 14 Vict. c. 88, ss. 14, 15, 17, 18, which last is most important. Part of a thing may be a nuisance, another part not, and in such a case if the destruction of a part must destroy the whole, there the party cannot complain; but it is otherwise if the parts are separable.—17 Viner's Abr. 38. As to the other point, there is nothing to confine the meaning of the word "land" to arable land. *The Queen v. M'Carthy* (12 Ir. C. L. Rep. 79).

*Longfield, Q.C. and Shaw, Q.C.* for the respondent.—The Parcruadh weir was illegal as extending beyond low-water mark. Everything which made it a fishing weir was beyond the legal boundary. Supposing it was now partially abated, that is supposing the fishing part was brought within low-water mark, it would not be a weir legally erected in the open season of 1862. The strip of land was not sufficient to satisfy s. 19 of 5 & 6 Vict. c. 108. The presumption is, that the road and waste land passed to the tenants of the adjoining land, and therefore, was not in the possession of Mr. Reeves at all.—*Doe v. Pearsay* (7 B. & Cr. 304); *Berridge v. Ward* (30 L. J. C. P. 218; s. c. 10 C. B. N. S. 400); *Johnson's Dictionary*, "Shore." [*O'Brien, J.*, referred to *Hale de Jure Maris*, p. 12.]

*Cur. adv. vult.*

*June 10.*—*FITZGERALD, J.*—The appeal in this case involves the right to three weirs; but, as I understood, one of them, the Rusheen weir, was given up, and I think properly so, for on the case stated, there could be no doubt that it was injurious to navigation. The case next involves several very serious questions as to a set of weirs called the Parcruadh weir; but upon those questions, save one, I mean to offer no opinion. The Commissioners find, as to it, that it was 582 feet in length, having two pockets connected by a leader, and having a similar leader running out from the shore to the inner pocket, and that at low-water the inner pocket was 240 feet outside the ordinary low-water mark. It follows, from that state of things, that the entire of the fishing part of this weir was illegal and contrary to the provisions of the previous Act, 5 & 6 Vict. c. 106, s. 26 of which prohibits the erection of such weirs so as to extend below low water-mark, and therefore, as to Parcruadh weir,

its condemnation by the Commissioners, so far as it was a fishing weir, was correct, and so I hold, without entering into questions of title. With reference to the projection of Parcruadh weir beyond low-water mark, the majority of them decide that as the whole of the fishing part of the weir projected beyond low water mark, the whole of the weir must be removed; and I, unfortunately, found myself obliged to concur with this view, that they were right in deciding that the whole of it should be removed. We had a good deal of discussion which would be more properly applicable to the Lynch's Point weir; and for my part, I am of opinion that, whether the question is as to nuisance to navigation, or as to illegality on other grounds, I have no doubt that if the Commissioners find that only a portion of a weir is illegal, they can direct a partial abatement, and there is a similar power in this Court; and if in this case, after removing the portion which was illegal, there still remained a fishing weir, we might direct a partial abatement; but in this case I can see my way to no other judgment than that which the Commissioners have arrived at. They have determined that the whole of this thing that was a fishing weir was below low-water mark; and if, on that state of facts, we were to direct a partial abatement, the result would be only to raise a question which we should decide as we do this one. The result would be that they would abate the whole of it save a portion of the inner leader, which would remain; but that portion would not be a weir legally erected for catching salmon and trout during the open season of 1862. It would be open to any party to question it, and on its being again brought before the Commissioners, the question would be, could it be legal, it not being a weir legally erected in the open season of 1862. The determination on that could only be that the structure should be abated. Under the 4th section the only weir that is to continue is one erected in the open season of 1862. This weir existed certainly in the open season of 1862, but the whole of what constituted it a weir was in violation of the law. It is no doubt a great misfortune to Mr. Reeves, and I wish I could give my judgment in his favour, but I am coerced by the language of the statute. I concur, therefore, as to Parcruadh weir, that the Commissioners were right in holding that the whole of the weir was illegal and ought to be removed. We now come to Lynch's Point weir. As to that, the finding was that the evidence did not show how much of it projected beyond low-water mark, and that an opportunity should be given for a survey. If the question as to partial abatement arises upon this weir, it is plain that if the fishing weir is above low-water mark, the remedy will be to remove that which is below.

*HAYES, J.*—I concur in the view taken by my brother Fitzgerald, and even in his expression of regret at being compelled to take that view. Now, with respect to the questions raised in this case, it is contended here that there is a grant of a several fishery. I confess I cannot find either in the words of the charter, or in the user which has been had, anything to warrant the conclusion that there was a several fishery in the place in question. The next argument was that, even if there was not a several fishery, there



was in Mr. Reeves such a possession of land adjoining the water as would warrant his possession of a weir. Notwithstanding the arguments addressed to us on the part of the respondent, it is my opinion that the appellant was the occupier of land which would warrant his having a weir. It makes no difference whether the land which he occupied was fertile land or mere shingle. No matter what its nature may be, it is land which enables him to have access to the fishery, and having regard to what I think was the policy of the Legislature, namely, not to leave the fishery to a mere scramble, but to give it to an owner whose interest it would be to protect the peace of the public. I think he had land in his occupation within the meaning of the Act. But, then, as to these two weirs and their projection beyond low-water mark. In the year 1842, when the 19th sec. of the 5 & 6 Vic. passed, there was a concession made to the public of a right which had not been theretofore enjoyed. That right was given on certain terms, one of which was, that no stake-net, &c. should be placed or erected, or suffered to remain, in such a manner that the same shall extend to a greater distance than from high-water to low-water mark of spring tides, except in the cases mentioned in the section. That seems to have been the condition on which the right granted in sec. 19 was given; and I think that any person who after that erected a weir and pushed it beyond low-water mark, did what was illegal, and the weir might have been partially abated. That right of partial abatement existed until the late Act, but then matters were different, for then the Legislature says, "We must have no more of these new weirs erected by owners of adjacent lands; and we will say that no persons save those who had weirs legally erected in 1862 shall have a right to them." Could this weir be said to be legally erected by a person who for years before 1862 had persisted in keeping up an illegal weir? I concur, therefore, with my brother Fitzgerald as to Parovadh weir; and as to the other, I am willing to say nothing, and therefore, on the whole, I follow the judgment of my brother Fitzgerald.

**FITZGERALD, J.**—The main point escaped my attention when I was delivering my judgment. The judgment of the Commissioners ought to be reversed so far as they say that the appellant had failed to establish a title under sec. 19. I think the strip of land which he occupied was sufficient to satisfy that section. On that point, therefore, the judgment must be reversed, but it will be upheld upon the other ground which I mentioned.

**O'BRIEN, J.**—Upon one point I differ from my brothers, and the importance of the case makes me give my judgment at perhaps some length. The question upon which I differ is upon the illegality of the whole thing as it stood in 1862, by reason of so much of it extending beyond low-water mark, being fatal to the whole thing, so that there must be a complete abatement of it. I am unable to assent to the view which is taken by my brothers upon this point. If we are compelled to give an Act of Parliament a retrospective operation, so as to make it applicable to existing rights, we must of course do so, but I look upon it that if the words are not clear, and the in-

terpretation of the Legislature not clear, we should not do it. Now, what were the rights of the parties in 1862? I admit the illegality of the fishing part of the weir. There is no doubt that the then Commissioners of Fisheries might have removed it; but could they have removed it at all? By the sections to which we were referred was clearly contemplated a dealing with a part of the weir. There was one section in the second Act, sec. 3 of 8 & 9 Vict. c. 108, that recites that, "Whereas notwithstanding the provisions of the said first-recited Act with regard to the erection and use of stake-weirs, stake-nets, bag-nets, fixed-nets, and contrivances for fixing or placing nets, the same or some parts thereof are in many instances erected and used in places prohibited by the said recited Act by parties who have no title to do so; and it is expedient for the protection of public rights, and to prevent disputes, that the said Commissioners should have power to suspend the use of such weirs, nets, and contrivances, and remove the same, in all cases where it shall appear to them that the same or any part thereof are illegally erected, placed, or used; and that the said Commissioners should for such purposes have and use the same powers and authorities with respect to such weirs, nets, and contrivances, or any part thereof, as they are now authorised under the said first-recited Act to use and exercise in cases of weirs or nets and contrivances erected in such manner as in their judgment to be injurious and detrimental to navigation." That is exactly the case here. Part of the weir was illegally placed: and what is their power then? They had the same power as under the former Act they had with respect to weirs erected in such manner as in their judgment to be injurious and detrimental to navigation; and the section goes on, after the recital which I have read, to give the Commissioners power to "make an order or decision in writing under their hands and seals, declaring that such stake-weir, stake-net, bag-net, fixed net, or contrivance, or any part thereof, is a nuisance, and shall be abated and removed;" and that power is recognised and dealt with by subsequent Acts. What, then, was the state of things here? Mr. Reeves's weir, so far as it extended beyond low-water mark, was illegal, and the Commissioners might have abated it. Section 15 of the present Act expressly says that the present Commissioners are to have all the rights, powers, privileges, and jurisdiction, with certain exceptions, not material here, vested in or exercised by the Commissioners of Public Works and the Inspecting Commissioners of Fisheries by any Act relating to salmon fisheries. Well, now, it has been doubted whether for any purpose the present Commissioners have the power of partial abatement. It has certainly been conceded for some purposes, and let us see what there is in this case to prevent their enforcing it. I take it that it was not the intention of the Legislature that the Act should have a retrospective operation in this sense, that anything that was illegal in 1862 should be illegal afterwards. Was it the intention of the Legislature to put Mr. Reeves in a worse position after 1862 than he was in that year? I cannot conceive why the power which the Commissioners had of ordering a partial abatement should not

still exist. The majority of the Court are of opinion that, with regard to Lynch's Point weir, that as it only projects a few feet beyond low-water mark, it may be partially abated; but I cannot understand why, upon the particular structure of this weir of Parcrudh, part of it which is above low-water mark, it should be ordered to be removed altogether, and that the weir at Lynch's Point should be only partially abated. I cannot find any necessity for such a strict interpretation of the Act as is insisted upon. The fourth section says that no fixed net that was not legally erected for catching salmon or trout during the open season of 1862, shall be placed or used for catching salmon or trout in any inland or tidal waters. If one of the pockets be above low-water mark, according to the decision as to the Lynch's Point weir, and as I believe, the weir would stand; but why, when part of the weir is placed in a place where the appellant is entitled to have it, why the fact of his not having a pocket there should make his weir bad, I do not understand. As to the question upon the 19th section of the first Act, there is no difference among the Court as to that. It was argued that the strip of land belonging to Mr. Reeves was not land because it was not profitable land, or tilled or grazed, because it was shingle in one part and road in another. Are we to construe an Act of Parliament; are we to lay down a principle which would be varied and different in every case before us; that in every case we should have a survey made, and ascertain the quality of the land? The definition which is given in Hale, in the case in 5 B. & Ald., 268, and in every book upon the subject, the definition of the word "shore" is that portion which lies between the ordinary high and low-water mark. Adopting that definition, we have something certain to go upon, instead of saying that the word is used in the 19th section in a sense which would vary with every different sea-shore. Then, was Mr. Reeves in occupation of that land? It is sought to get rid of that, because it is said that a lease was made by a Mr. Reeves to Hodgins in 1829, which, it is said, passed this very ground down to the high-water mark. On looking to the map it is anything but clear that it does so, but what do we find? This is a claim set up that Hodgins is the owner, not Reeves; and yet we find Hodgins, sixteen or seventeen years after the lease, making a proposal, dealing with this land as belonging to Mr. Reeves, and then, after that, Mr. Reeves's title is to be impeached by saying that the lease of 1829 passed something which the tenant in that lease never looked upon as his. I think, upon the whole, that the objects of the Act of Parliament, and the justice of the case, are to be met by directing the prostration of Parcrudh weir, so far as it goes beyond low-water mark, and therefore I cannot concur in the judgment of the Court as to that.

LEFROY, C. J.—When I consider the view with which this Act was passed, and that it was to promote the public interest, to discourage as much as possible the system that had crept in, which not merely operated as a partial nuisance, but would, if not checked, have ended in a total destruction of the salmon fishery in Ireland;—when I consider the principle of this Act, I feel myself bound to promote

as far as possible that great legislative object, and in the construction in which I should act, that I should have regard to the public interest and good towards that which the Legislature made a nuisance, whether wholly or in part, that I should feel myself bound upon the Common Law principle, where the matter taken altogether was a nuisance, to hold that the whole of it should be abated; but where a partial abatement would redress the injury, I should deal with it there upon the principle of the Common Law, which is satisfied by an abatement where an erection was in part a nuisance in restraining it to that part. With that view, that general principle guiding me, I concur with the judgment which has been given by my brothers Hayes and Fitzgerald, and differ from that of my brother O'Brien; and I can add nothing to what has been said in the judgment which has been given by my brothers Fitzgerald and Hayes, further than to express my full concurrence in the reasons which they have given.

## Court of Exchequer.

Reported by Albert E. Sargent, Esq., Barrister-at-Law.

[BEFORE THE FULL COURT.]

EXPOSITO v. JEFFARES.—Nov. 8, 25.

*Motion to impound sum of money until result of cross action.*

*On application by defendant to have a sum of money impounded till the result of a cross action, Held that the application must be refused.*

THE summons and plaint was as follows—"That defendant is indebted to plaintiff in the sum of £54 2s. 10d. money payable by defendant to plaintiff for freight and captain's gratuity for conveyance by plaintiff to defendant at his request of goods in plaintiff's ship, called, to wit, L'Amica, and for the care and attendance of the plaintiff and his servants in and about the loading, conveyance, and unloading of the said goods, and for money found to be due on accounts stated." There was a cross action impending at suit of defendant against plaintiff for an alleged breach of contract with reference to the conveyance of the goods.

O'Brien, for defendant, applied to have a sum of money impounded till the result of the cross action. £49 12s. 1d. was lodged in Court to meet the demand of £54 2s. 10d. in plaint claimed.

Counsel relied on *Smith v. Adams* (8 Ir. C. L. R., App., xxi); *Apostolu v. White* (8 Ir. C. L. Rep., App. xxii).

Tandy, contra, for plaintiff, cited *Bland v. Carville* (8 Ir. Jur. N. S. 6.) and the judgment of Lefroy, C. J. in that case.

O'Brien was heard in reply.

*Cur. adv. vult.*

Nov. 25.—The unanimous decision of the Court was now given by

**PIGOT, C. B.**—There exists no express authority to guide us in this case, for though there is no doubt about the order which was made by the Common Pleas in *Apostolu v. White*, yet we have no means of knowing whether that order was made upon argument or not, or whether by consent or otherwise. There was afterwards another case in the Queen's Bench, in which, as also in England, an application similar to the one now before the Court was refused. Subsequently there was an application of a like nature made to the Queen's Bench in *Bland v. Carville* (8 Ir. Jur. N. S. 6). The Court there had before them their former order, and also that made in the Common Pleas, and after deliberation they decided that they would not follow *Apostolu v. White*, and the motion was refused. It is of the utmost moment that there should be certainty with regard to the practice of the Court. There is no authority in England for the decision in *Apostolu v. White*, and in this country a Court of co-ordinate jurisdiction twice refused an application similar to this. The evil complained of is this—A foreign captain or owner of a ship comes to this country, and earns a sum of money for the freight of goods in his ship, and whether the goods are damaged or not, the owner of the goods should pay the freight, but if the foreigner should not return to this country, and if (as may be the case) the goods are damaged to an amount far beyond that of the freight, there is certainly a great hardship cast upon the owner of the goods if he cannot recover damages from the foreigner, and it was this consideration which influenced the Court in deciding *Apostolu v. Whyte*. But nevertheless we are of opinion that this application must be refused with costs.

[BEFORE THE LORD CHIEF BARON AND BARONS FITZGERALD AND DEASY.]

**MATTHEWS v. DUBLIN AND DROGHEDA RAILWAY COMPANY.**—Nov. 13, 21.

*Injury to plaintiff's cattle—Conditional order to reduce verdict to one for nominal damages—Railway and Canal Traffic Act, 1854.*

*Plaintiff, wishing to sell his cattle at Huntingdon Market, entered into a contract at Kells with defendants that they should carry the cattle by their train to Dublin, and thence to Holyhead (to catch the train for Huntingdon) by one of their steamers, which was advertised to sail at a certain hour (which would have brought the cattle to Huntingdon in time), defendants did not send the cattle by that steamer, but by another, which sailed subsequently, and thus the cattle were late for the market, and had to be sold at a loss. At the trial the jury found for the plaintiff with substantial damages. Held, on motion to change the verdict into one for defendants, or else into one of nominal damages pursuant to leave reserved at the trial, that the conditional order obtained for that purpose must be discharged, and that the question as to the contract and the*

*amount of damages was rightly left to the jury, although plaintiff was aware of a sailing bill of defendants, whereby they alleged that they would not be responsible if, owing to want of room, cattle did not go on by the first boat, and had to wait for another.*

THIS was an action brought by plaintiff, who was a cattle dealer in Kells, against the Dublin and Drogheda Railway Company, for injury resulting to 39 head of cattle belonging to plaintiff. The facts, as disclosed in the evidence at the trial, were as follows:—Plaintiff entered into a contract with defendants to have his cattle conveyed from Kells to Huntingdon by train and steamer, which latter was advertised to sail from the North Wall, Dublin, at 10 o'clock, p.m. on November 17, 1864, so as to be in time for Huntingdon Market on the morning of the 19th. Defendants neglected to send the cattle by the stipulated steamer, and hence they did not reach Huntingdon till Sunday afternoon, November 20th, and were thus late for the market. They were also found to be then suffering from distemper, and these two causes combined occasioned to plaintiff a considerable loss in his sale of the cattle a few days after. Plaintiff then brought his action in the sittings after last Hilary Term against defendants for not having forwarded the cattle by the steamer mentioned, and for not carrying them from Kells to Huntingdon in a reasonable time, and for having, through their negligence, killed a calf of plaintiff's.

The jury found a verdict for plaintiff with substantial damages, and a conditional order having been obtained to reduce the verdict into one for nominal damages pursuant to leave reserved.

*Butt, Q.C.* (with him *Palles, Q.C.* and *Lyde*) now showed cause against the conditional order.—He contended that plaintiff was entitled to compensation from defendants because they did not send on his cattle in time for the Huntingdon Market, and in point of fact were 24 hours behind time, owing to their having sent the cattle by another boat, thus violating their contract with plaintiff.—*Powell's Inland Carriers*, 263; *Bolckrow and another v. Seymour and others* (17 C. B., N. S., 107); *Garnett and another v. Willan and another* (5 B. & Al. 53); 17 & 18 Vict. c. 31; *Green v. Sichel and others* (29 Law J., Q. B. 215); *Simons v. Great Western Railway Co.* (18 C. B. 805); *White v. Great Western Rail. Co.* (2 C. B., N. S., 7); *M'Manus v. Lancashire and Yorkshire Railway Co.* (2 H. & N. 693), which case was reversed in 4 H. & N. 327; and the reversal approved of in *Peck v. North Staffordshire Railway Co.* (10 H. of L. 566); *Beal v. South Devon Railway Co.* (5 H. & N. 875; s.c. Cam. Scac. 3 H. & C. 337).

*Serjeant Armstrong* (with him *S. Ferguson, Q.C.*, and *Boyd*) contra.—The two questions to be argued are—1. Whether the Lord Chief Baron should not have directed the jury to have found for defendants. 2. Whether the damages should not be reduced to nominal ones. Counsel contended that the original contract was subsequently qualified by a sailing bill, limiting defendant's liability under the contract.—*White v. Great Western Railway Co.* (2 C. B., N. S.,

7). [Fitzgerald, B.—Your contract was to send them to Huntingdon Market, and by the boat that evening.] For the nominal breach of contract plaintiff was entitled to nominal damages, and no more. The jury gave damages because the cattle were not in time for Huntingdon Market on Saturday. They found that they were not damaged by having been kept longer on the journey, and in Dublin. [Pigot, C. B.—The damages were given on account of the cattle not having arrived in Huntingdon some time on Saturday. People often regulate the transmission of their cattle by the company's time tables, and expect that they will be in time. If there was an express contract to send the cattle by a particular boat, and they were not sent, then surely there was an express violation of the contract; are not defendants then liable for all the subsequent damage flowing from this breach of contract?] No, unless gross negligence is proved.

Ferguson, Q.C., on same side.—All the injury to plaintiff's cattle arose from the distemper which showed itself in the transit from Dublin to Huntingdon, through no fault of defendants, and this action is an attempt on the part of the plaintiff to charge defendants with all damage resulting therefrom. [Pigot, C. B.—How can we deal with this? We are not now engaged in a motion for a new trial on the grounds that the verdict was against evidence or the weight of evidence. There was evidence that delay alone is injurious to cattle.] Counsel referred to *Nicholson v. Willan* (5 East. 507). [Fitzgerald, B.—Assume now that there is a reasonable provision which therefore governs the contract, also that there was evidence that the contract was that the cattle were to go by that particular boat, then the measure of the damages would be the loss in value of the cattle from the difference in time when they ought to have arrived in Huntingdon, and the time when they actually did arrive there.] Counsel referred to stipulation in company's bills that if there was not room in the boat, the company were not to be liable, and the cattle were to go on in the next.

Palles, Q.C., in reply, cited *Harris v. Rickett* (4 H. & N. 1); *Rogers v. Hadley* (2 H. & C. 227); *Anderson v. Chester and Holyhead Railway Co.* (4 Ir. C. L. R. 435); *Walker v. York and North Midland Railway Company* (2 E. & B. 750); *Peek v. North Staffordshire Railway Co.* (10 H. of L. 566). Counsel concluded by referring to the provisions of 17 & 18 Vict. c. 31.

. Cur. adv. vult.

Nov. 21.—The judgment of the Court was now delivered by

FITZGERALD, B.—His Lordship, after going through the facts minutely, proceeded as follows:—It is impossible to deny that unless the risk note was to qualify the contract there was evidence to go to the jury as to whether the company were not obliged by their contract to send on the cattle. The Lord Chief Baron told the jury to consider whether M'Kenna told plaintiff he would forward the cattle by the boat mentioned, or whether it was to be by any other boat. He told them that if the contract alleged to have been made between plaintiff and M'Kenna was so made, no

act of the company could absolve them from that. He asked the attention of the jury to the fact that plaintiff knew of the sailing bill, and that they were to regard this knowledge as raising a question whether such alleged contracts was made or not. He refused to direct the jury that the sailing bill was incorporated with the contract, but he left this to the jury for their consideration. The Lord Chief Baron left three questions to the jury for their guidance as to the amount of damages they ought to give—1. Did plaintiff suffer any loss from the delay in Dublin, and being thus late for the market in Huntingdon? The answer the jury gave to this was, that plaintiff suffered damage to the amount of £35 7s. 2d.? 2. Did plaintiff suffer any loss from the delay as causing the disease among his cattle? Answer, No. 3. What loss was there (if any) owing to the fact that the cattle did not go by the boat in question? Answer, £16 11s. 2d. The jury thus found that the distemper was not occasioned by the delay in Dublin. The verdict then was for these two sums £35 7s. 2d. and £16 11s. 2d.; and liberty was reserved to defendants to move to have the verdict changed into one for defendants, or to reduce the damages to nominal ones. It was urged in argument—1. That there was no evidence of the contract to go to the jury except parol. Now, if parol evidence was admissible, I have shown that there was evidence to go to the jury. At the trial there was no objection as to the admissibility of parol evidence; indeed the main effort at the trial was by the instrumentality of parol evidence to show that the original contract had been qualified by the sailing bill. 2. It was urged that there was proof of plaintiff's knowledge of the sailing bill, and that the stipulation contained in the sailing bill being an essential part of the contract, destroyed all claim for damages. This idea seems to me to be unreasonable. It was then contended that in the computation of damages the jury were not to take into consideration the time when the cattle arrived in Huntingdon, but I think the stipulation does not preclude the comparison between the actual time of the delivery of the cattle in Huntingdon and the reasonable time for their arrival there, and the jury were to estimate the difference in the amount of price which they would have fetched if sold at a reasonable time, and that which they did fetch when actually sold. If the contract was that the cattle should be sent by a particular boat, the same computation must be entered into, and this notwithstanding plaintiff's knowledge of the sailing bill. The jury may have considered that Saturday was a reasonable time for the arrival of the cattle. For these reasons the conditional order must be discharged.

[BEFORE THE FULL COURT.]

REDDY v. DALTON.—Nov. 15.

*Judgment by default against defendant—Motion to set aside the judgment—Costs of motion.*

*Plaintiff in an action of assault marked judgment*

*against defendant by default. On motion to set aside the judgment grounded on affidavit by defendant that the default was occasioned by mistake on his part, Held, that the judgment should be set aside, and that as plaintiff ought not to have opposed the motion, he should not have the costs of the motion.*

THIS was an action for assault. Plaintiff marked judgment by default. Defendant now moved to set aside the judgment, and that he should be at liberty to plead within 24 hours. The motion was grounded on an affidavit of defendant, setting forth that he had changed his attorney on the last day for pleading, and that he did not know that was the last day, and that on discovering his mistake he served plaintiff with a notice offering to pay all costs incurred up to that time if plaintiff would allow the judgment to be taken off the file, and that plaintiff refused this.

*Keogh* for defendant.—I do not complain that plaintiff should have marked judgment; he had a perfect right to do that; but I do complain that when it was shown to him to have occurred by mistake, and all costs offered to be paid to him, he should then refuse to allow the judgment to be taken off the file.

*Purcell, Q.C., and O'Driscoll* for plaintiff.—There is no pretence of saying that the judgment was not quite regular. Defendant was very remiss in the matter. Why did he not go to his attorney in time?

*Pigot, C.B.*—We sit here to administer justice, not iniquity, and we would be acting most iniquitously if we were to allow plaintiff his costs in this motion. He was offered all costs by defendant when the notice was served on him, and when he was shown the mistake which had occurred, and in that notice defendant's attorney challenged plaintiff's attorney to point out any other costs to which he might be entitled, and that they should be paid him. We see the animus with which these proceedings have been conducted on the part of the plaintiff. The writ of inquiry was served without apprising defendant's attorney, but of course plaintiff was entitled so to act if he wished, however ungenerous such conduct might be, and possibly a properly constituted mind would not have acted so. The marking judgment was quite regular; therefore all costs incurred up to that defendant must pay, but this motion will be granted. Plaintiff has gained nothing by appearing to oppose this motion. His counsel say they have no grounds for appearing, and plaintiff has appeared, as it seems to us, merely to get the costs of two counsel against defendant in opposing a motion which he must have known would, of course, be granted. We have been asked by plaintiff's counsel whether we are laying down any universal rule that when there is an application to take a judgment off the file, the party who has marked judgment shall not get his costs. We lay down no universal rule, but if 500 cases like the present were brought before us, I, for one, would give judgment as I do now. Plaintiff makes two affidavits, merely, as I think, to saddle defendant with the costs of this application, for they are altogether irrelevant. Defendant's affidavit shows he has merits, and therefore he is entitled to have the judgment set aside. It was suggested to us by plaintiff's counsel that this re-

sponsibility ought not to be cast on attorneys of deciding what motions ought to be opposed, and what ought not, but I think the great majority of the profession are quite capable of deciding whether a motion such as this ought to be opposed or not, and I am of opinion that the generality of the profession would not resist this motion. Plaintiff must abide the costs of this motion—defendant to plead to-morrow.

[BEFORE THE LORD CHIEF BARON AND FITZGERALD AND DEASY, B.B.]

M'GRATH v. SEMPLE.—Nov. 16.

*Motion to plead to action on bill of exchange.*

*On an application to be allowed to plead to an action on a bill of exchange grounded on affidavit, Held, that a covenant between indorser and indorsee, that latter should not sue till prior parties to a bill have been exhausted, is ground for granting motion.*

*Purcell, Q.C.*, for defendant applied for leave to plead to the action which was on a bill of exchange by indorsee against indorser. The motion was grounded on affidavit that there was an agreement entered into between the indorser and indorsee that no action should be brought on the bill till the prior parties to it should have been exhausted. Counsel relied on *Byles on Bills*, 140; *Pike v. Street* (Dan. & Lloyd, 159); *Clay v. Turley* (27 L. J. Exch. 2); *Mather v. Marsland* (27 L. J., Exch., 148).

*Kelly, contra*, for plaintiff, cited *Byles on Bills*, 204, to show that a covenant not to sue for a limited time does not suspend the right of action, but merely gives a right to sue on the covenant.—*Thimbleby v. Barron* (3 M. & W. 210).

*Pigot, C.B.*—At first I was inclined to think that this motion should be governed by the authorities cited by plaintiff's counsel, but those cited on the other side must govern the case. The motion will be granted. The costs to be costs in the cause.

## Court of Probate.

Reported by W. R. MILLER, Esq., LL.D., Barrister-at-Law.

TRINITY AND MICHAELMAS TERMS, 1865.

IN THE GOODS OF JAMES GIBSON, DECEASED.

*Probate Duty—Limited grants.*

*Where a grant of administration with a will annexed, limited to a portion of the estate of which the testator was at his death possessed, had been ordered by the Court to a creditor having an interest in that part of the assets, such creditor is not bound to file an affidavit and schedule, swearing to or accounting for more assets than he would have, under the particular grant, authority over;*

*and the duty payable by him on the grant should be limited accordingly.*

*Dr. Miller*, on behalf of *Mrs. Judith Keenan*, a creditor by statutable mortgage of a legatee (*James Gibson*) of the deceased, in respect of a farm at *Toneyhassill*, in the County of *Cavan*, of a chattel nature, applied to the Court for an order, that notwithstanding that a certificate from the Stamp Office of the payment of the duty had not been produced to the registrar, and that the vellum or parchment engrossment of the will was not stamped with the proper amount of duty payable thereon, the registrar should issue to the applicant a grant of administration with the will limited as directed by the order of the 16th May, 1865.

It appeared from the affidavits and documents used in support of the motion, that the testator had died in 1823, having by his will disposed of his property, consisting of several farms of land, amongst his family in various ways; and the particular farm of *Toneyhassill* he gave in remainder to his grandson, *James Gibson*. This remainder ultimately became vested in the said grandson, who by a statutable mortgage for £400, assigned it to *Judith Keenan* as a security for an advance and loan to that amount and interest. She in 1864 took the proper proceedings in the Landed Estates Court to sell the said farm for payment of her debt and other incumbrances, and it became necessary, as the will of the testator never had been proved, to raise a personal representative to him. The necessary steps then were had in the Probate Court for that purpose by citation of all the proper parties, and on the 16th May, 1865, the Court of Probate made an order that *Judith Keenan* or her nominee should be at liberty to apply for and obtain a grant of administration with the said will of the said deceased annexed limited during the absence of *Jeremiah Gibson* (an absent next of kin), and until he should apply for and obtain a grant, and also limited to the farm so mortgaged as aforesaid.

The papers necessary to lodge in order to obtain the grant, viz., the affidavit of the applicant as administrator with the will annexed, the schedule of assets and the affidavit verifying it, with the engrossment on parchment of the will, were then lodged in the office, the affidavit and schedule, however, being in terms confined to the farm so mortgaged. On these being transmitted in due course to the Stamp Office, the solicitor for that department objected that they were defective, and that unless they were amended by covering all the estate of the deceased, the certificate would not be given, nor would the vellum be stamped. Thereupon the duty on the limited grant with reference to the farm so mortgaged, was offered and was refused. The present motion was then made, in order to have the opinion of the Court on the point.

*Mr. Jebb* appeared for the Stamp Office to resist the motion, and contended that the form of affidavit and schedule annexed to the 56 G. 3, c. 56, should be literally followed.

The judgment of the Court contains a sufficient and succinct statement of the different sections of the statute relied on by the counsel on each side.

Nov. 11.—*KEATINGE, J.*—On the 16th May last,

an order was made by this Court, giving leave to *Judith Keenan*, or her nominee, to apply for and obtain letters of administration of the goods of the deceased, with his will annexed, limited during the absence of *Jeremiah Gibson*, and until he should apply for and obtain a grant, and also limited to a portion of the property of the deceased, viz., to his interest in the lands of *Toneyhassill*, in the County of *Cavan*. Proceeding under that order, *Judith Keenan* made an affidavit, to which was annexed the common form of schedule of assets annexed, but, save as to the farm in question, not filled up, it being stated that the administration was a limited one, as in the order of this Court was mentioned; and in that part of the affidavit relating to the property it was stated that the property of the deceased, over which the party would, under the administration, acquire authority, was confined to the farm in question. That affidavit and schedule were objected to by the Stamp Office authorities, who contended that as in ordinary cases of general grants, a party cannot obtain probate or administration without giving a statement of the entire of the estate and effects of the deceased. The statute which obliged parties to bring in a schedule and account, is the 56 Geo. 3, c. 56, and it provides certain stamp duties to be payable according to the amount of the property, and the object of that Act was to oblige parties to state not only the value of the property, but to give all information in their power respecting it, so as to put the Stamp Office in the fullest possession of the same, and enable them to detect and prevent frauds on the revenue. Now no duty whatever is payable on trust property, or what a deceased person was entitled to, not beneficially, but in trust for some other person or purpose. That is evident from the 116th section of that Act. Then it is on the 117th section and the form of oath in the schedule that the objection in this case is grounded. That section provides that no Court is to grant probate or administration of the goods of a deceased person, without first requiring and receiving from the person or persons applying an affidavit or affirmation in the form contained in the schedule thereunto annexed, that the estate and effects of the deceased, *for or in respect of which probate or administration is or are to be granted*, are under the value of a certain sum to be specified in such affidavit, to the best of deponent's or affirmant's knowledge, information, and belief, and according to the account to be annexed to such affidavit, according to which sum the stamp duty shall be ascertained which shall be then required on such probate or letters of administration; and by the 118th section such affidavit is to be exempt from stamp duty, and is to be in the form in the schedule to the Act annexed directed in that respect, and is, when sworn, to be certified by the registrar, and transmitted with the copy of the will or account of the letters of administration to the Stamp Office, and it is then provided that if the registrar shall neglect to transmit such affidavit or affirmation as so directed, or shall issue any such probate or letters of administration without having transmitted same, and received the certificate from the stamp office of the duty having been paid, or if the vellum or parchment is not stamped with the proper stamp according to such cer-

tificate, every person so offending shall forfeit £50. I turn now to the affidavit, and the material words are as follows—"That I have made diligent search and due inquiry after and in respect of the personal estate and effects of the said deceased, in order to ascertain the full amount and value thereof, and that to the best of my knowledge, information, and belief, the whole of the goods, rights, and credits of which the said deceased died possessed of, &c., are under the value of £ ,," &c. Now it is perfectly plain from the language of the 117th section, and from that of the affidavit which I have just read, that the Legislature professed to deal with administrations not limited, but to ordinary administrations or probates concerning the entire property, and I think it is very questionable whether under that section and schedule a party getting a limited grant could in strictness be required to send in any account at all to the Stamp Office. This view appears to be fully borne out by unmistakable language used. The party is, by the 117th, section, to swear that the estate of the deceased for or in respect of which probate or administration is required is under a certain sum, according to which the duty is to be ascertained, and if the proposition of the Stamp Office can be sustained, they might say, You must, under the 117th section, account for all the property, and pay duty on all, although the grant is a limited one. In fact it appears to me that the Legislature has overlooked and ignored all but ordinary general grants of probate or administration. The word *estate* means the entire estate; but if a doubt existed on this point, it is set aside by the words in the form of oath—"The whole of the goods and chattels of which the deceased died," &c. What now has been the practice respecting this point? I have got from the Stamp Office itself various documents showing what the practice has been. Most diligent search was made under my directions in the Probate Court offices, and from the grants and documents there I was able to refer the Stamp Office authorities to the affidavits and schedules which heretofore were exclusively filed in the Stamp Office. It appears from them that from time to time affidavits and schedules, such as are in the present case, were received and acted on without objection. Thus in 1859, in *The Goods of Harriett M'Guinness*. She appointed two or three executors, for different parts of her property, and they applied for separate grants and accounts, and affidavits were used and acted on so confined in each case to the particular part of the property in question. So in the *Goods of Flanagan*, also in 1859, a case identical with the present. The deceased had disposed by will of his property among different members of his family, who all took possession and remained in it for years without proving the will. It happened that a part of it was mortgaged by the then owner of that part, and it became necessary to make out title to that portion; and for that purpose a limited grant had been made in 1859. The affidavit and schedule were also limited. There were several other cases of a similar kind. Indeed in one (*Rowley v. Crawford*), the party insisted on filing no affidavits or schedule at all, and the Stamp Office yielded. In fact to hold otherwise would lead to absurd consequences. Suppose a single bond debt for

a small amount, and an executor named as to it alone, if he could not get probate without swearing that he had made diligent enquiry as to all the assets, and that they amounted to so and so, it would be impossible for him in many cases to get probate at all. But the Stamp Office says that it cannot touch the form of oath. Now I say on the fullest consideration that such a view of the Act is quite erroneous. The account is in order to ascertain the duty to be paid. Is it contended that more duty is to be paid than on the limited grant? If so, it is quite contrary to the opinion of the head of their own office, contained in a very clear letter of Mr. Trevor, the comptroller of the English Inland Revenue Department, which the Stamp Office here procured, and a copy of which was sent to me. With the form of the present motion a difficulty arises which may hereafter require a great deal of consideration. Supposing my view of the Act to be wrong, and that the grant should issue, the officer who should direct the grant to issue would be liable to a penalty of £50, and my order would not protect him. I have no direct authority, I am afraid, over the Stamp Office, and it may be that the only remedy for the party will be an application to the Court of Queen's Bench for a *mandamus*. At the same time I shall be quite open to an application to me to reconsider the matter, and if I shall be, on more careful consideration, satisfied that I have jurisdiction to act, I shall most decidedly exert it. On the present motion my order will be to make no rule for the present on the motion, save the declaration herein contained, viz., that in my opinion the Stamp Office are bound to receive and act on the affidavit and account tendered, and have full power to mould the affidavit so as to suit the facts of each case, and I reserve liberty to the applicant to renew the motion if so advised.

IN THE GOODS OF G. W. HOWARD, DECEASED.—Nov. 3.

#### *Practice—Caveats.*

*It is irregular to enter a second caveat for the same person after withdrawal of another, unless with leave of the judge or a registrar. In such a case it was set aside with costs.*

James S. Green for Mrs. Howard, the widow, and sole executrix, and universal legatee named in the will of the deceased, moved to set aside a caveat lodged on behalf of Messrs. Newbon & Co., on the 22nd day of September last, and for the costs of the motion. Two other caveats had been lodged on the part of the same persons, and on being warned by the executrix had been withdrawn; and on the 22nd of September, 1865, a third caveat was lodged by the same proctor.

KEATINGE, J., directed the proctor who filed the caveats to make an affidavit to explain the matter fully.

Dr. Miller, for the proctor, opened the affidavit, and it appeared from it that the Messrs. Newbon held three policies of insurance on the life of the said de-



ceased for upwards of £2,000 as security for money due to them for costs, and money lent. The executrix was cited in the regular way to accept or refuse probate, and the first caveat was entered merely as required by the rules on the extracting of the citation, and ought not to have been warned at all; and the proctor for Mr. Newbon gave notice accordingly to the opposite side. In fact that caveat was inoperative on the appearance of the executrix, in consequence of that notice, and on her statement that she would accept probate, so that as to the first caveat no irregularity whatever had occurred, and a similar observation applied to the second caveat, which was filed by the express leave of the registrar, as the Commissioners of Inland Revenue had declined to withhold their certificate of the duty having been paid, though the executrix swore the assets only under £100. The sole object in view was to have the grant stamped with the proper amount, so as to entitle the parties to realize the monies due on the policies of insurance. Then as to the only remaining caveat, it appeared that arrangements had been going on in London which were supposed to be settled, but which broke off, and this explained the withdrawal of the second caveat and the entry of the third. The letters of Messrs. Newbon to their proctor fully showed that they had expressly directed their proctor to withdraw the second caveat, supposing matters to have been arranged, and to enter the third on finding the negotiations broken off, and so endeavour to enter an appearance, in order to bring the matter before the Court for its adjudication.

KEATINGE, J.—I do not regret the discussion of this motion, as it affords me an opportunity of stating my opinion of the impropriety in the practice that prevails as to the entry of caveats. It is most irregular for any practitioner to enter without the leave of the judge or a registrar a second caveat after a former one has been withdrawn. The registrars under the new rules have much more extensive powers than heretofore, and in proper cases the leave would as of course be given; and I have reason to know that in some cases parties who had entered caveats got others in the same interest to lodge others, either in the name of the same solicitor or of some other solicitor acting for the former. If any such cases shall in future come before the Court, which has in that respect most extensive powers, it will know how to deal with them. But the present case is not of that kind, and is a very peculiar one. The Messrs. Newbon held certain policies of insurance on the life of the deceased as security for debts due to them. The proctor undoubtedly was in error in entering the third caveat without leave, and it must be set aside, but he acted from no improper motive, but under the pressure of his client's directions, and from an anxiety to do the best for the promotion of their interests. I am not asked to make any order against him for costs, but I must set aside the caveat with costs against the Messrs. Newbon.

*Caveat set aside with costs.*

COMMONS v. CLARK.—Nov. 7.

*Evidence of execution—Costs.*

*Where the attesting witness, or witnesses, were unable, from recollection or otherwise, to state whether it was mentioned at the time of execution that the paper was a will, or that both witnesses were present together, the defect was supplied by a third person present on the occasion, and it was held legal evidence, but costs were allowed to the defendant.*

THE will in this case of John Commons was drawn by a Mr. William Ebbs eight years ago, who, though not an attesting witness, was present at the execution. He deposed to the mode of execution, viz., the testator acknowledged it as his will in the presence of the two attesting witnesses, and executed it in their presence, and they attested it in his presence and in that of each other; all being present at the same time. He had no interest in the case. Only one of the attesting witnesses was produced, and she was a markswoman, and could not read. She was a servant to Mr. Ebbs at the time in question, and had lived with him in all about six weeks; she had attested a paper for a middle-aged man (about the age of the deceased) in Mr. Ebbs' parlour about the time of the date of the will (eight years ago), and she had attested only the one paper while in his service, but could not state what it was, nor indeed if it was written on at all, nor whether the other witness was present at the time.

Dr. Ball, Q.C., (with him Dames) in support of the will for the plaintiff, a legatee, asked for a decree.

Dr. Townsend, Q. C., for the defendant, asked for costs. According to the case of *Byrne v. Hogan* (6 Ir. Jur. N. S. 115), if Mr. Ebbs had not been examined, the will in question could not be proved merely on Ann Byrne's evidence; but it must be admitted that William Ebbs' evidence supplies her defects, and such evidence has been in England held admissible.—*Bennett v. Sharp* (1 Jur. N. S. 456). The case besides is very peculiar; the will has been for eight years never produced, but kept in Mr. Ebbs' custody or that of his attorney. The defendant had given notice of only cross-examining.

KEATINGE, J.—I consider the evidence given is sufficient to entitle the plaintiff to a decree, but the defendant under the circumstances is clearly entitled to costs.

*Decree accordingly.*

DOYLE v. ROBINSON.—Nov. 23.

*Practice—Will not duly attested, and not propounded—Citation—Administration as in case of intestacy.*

*Where a will was alleged to have been made by the deceased, but it was alleged that it was not duly executed, on a citation by the person entitled in case of intestacy, on all persons interested under it, to propound it, or show cause why it should not be*

condemned, and on their non appearance, an order for administration in common form, as in a case of intestacy was made, the will being lodged in the registry.

*Dr. Townsend, Q.C.*, for the Rev. James B. Doyle, the husband of the deceased, applied for leave to file a declaration alleging intestacy, under the 41st rule, or for an order granting administration as in common form, and as in case of intestacy, to the applicant of the goods of the deceased.

A will was forthcoming of the deceased, dated the 26th of May, 1858, and a codicil thereto without date. The will appeared to be attested by three witnesses, and the codicil by two of the same witnesses; but there was no regular attestation clause to either. In the will she appointed two executors. It was alleged, by affidavit, that the will had been sent by the deceased to the witnesses, who had respectively been her servants, one after the other, and that none of them had seen her sign it, and that two of the witnesses were dead, and that the survivor had stated that the will had been attested in that informal manner.

A citation had issued on the 18th May, 1865, by the present applicant, directed to the executors named in the will, and to the minor children of the deceased, who were legatees under it, calling on them to prove the will and codicil, or show cause why they should not be pronounced null and invalid, and that in default of their doing so, the judge of the Court of Probate would proceed to condemn the said will and codicil. That citation was duly served on all the parties, but none of them had appeared. A rule to proceed in default had been entered.

In *Palmer v. Dent* (2 Rob. 284), probate in common form was given of a will made by a person labouring under insanity, and showing on its face symptoms of insanity. The citation there was to propound it, with an intimation that if the parties cited did not appear, the Court would give probate in common form.

A similar order was made in *Morton v. Thorpe* (3 S. & Tr. 179), where the citation contained an intimation that in default of appearing, the Court or a registrar would proceed to act in the matter.

*KEATINGE, J.*—It is not necessary for you to file any declaration. If you desire to take probate in common form, I think on the authority of the cases cited you are entitled to it; but perhaps then the parties cited would not be bound. In these cases it is usual for the order to recite that it appeared to the Court that the will is invalid, and to allow you to apply for and obtain in the registry in common form letters of administration of the goods of the deceased as of an intestate.

entitled in priority to the testamentary guardian of a minor, a principal legatee in the will, to a grant *de bonis non*, notwithstanding that in the Court of Chancery the latter would, on the construction of the will, endeavour to make the former account for the greater part of the assets treated by the latter as residuary, and alleged by the former as belonging to him under the bequests in the will.

*Walter Bourke, Q.C.*, (with him *Wilson*) for the Rev. Patrick Reilly, the testamentary guardian of Thomas Reilly, the younger, the son of the deceased, applied, by petition, for a grant of administration of the unadministered goods of John Reilly, deceased, with his will and codicil annexed. John Reilly had, by his will of the 3rd February, 1860, left all his property in several places named in the will to his son, Thomas Reilly, for life, with remainder to his son, Thomas Reilly the younger, and named several executors, one of whom was the Rev. P. Reilly, whom he also appointed guardian of the said Thomas Reilly the younger. He made a codicil to that will by which he named his son, Thomas Reilly, residuary legatee, but without in terms revoking the bequests in his will. The executors renounced, and Thomas Reilly, the son, applied for and obtained administration with the will and codicil annexed. He made a will appointing Thomas Vance and W. Kelly, his executors, and died. Proceedings are pending in Chancery to administer the estate of John Reilly, and it was necessary to raise a personal representative to him. It was argued for the minor that under the will, and on his father's death, he became entitled to all the property, real and personal, of his grandfather, and that nothing remained to pass under the residuary clause in the codicil.

*T. Purcell, Q.C.*, (with him *Meldon*) for the executors of Thomas Reilly, asked for a grant *de bonis non* to be given to them. The will dealt only with the several properties or farms mentioned, but not with the chattel and personal estate which passed under the codicil to Thomas Reilly as residuary legatee. The residuary legatee and his representatives are entitled in priority.

*KEATINGE, J.*—Whatever may be the construction of the will and codicil, is a matter with which this Court has nothing to do, but it is the settled rule of this Court, to give administration *de bonis non* with a will annexed, to the residuary legatee and his representatives in priority to a pecuniary or principal legatee. If, therefore, the minor is not entitled, neither can his guardians be entitled; and as the executors of Thomas Reilly desire the grant, I give it to them. The petitioners must pay the costs of the respondents.

*Order accordingly.*

#### GOODS OF REILLY.

*Præcis—Administration de bonis non.*

*The executors of a residuary legatee who had got a grant of administration with the will annexed, is*

## Court of Appeal in Chancery.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

IN THE MATTER OF THE ESTATE OF THE ASSIGNEES OF PATRICK TONER, A BANKRUPT, OWNER; THE BANK OF IRELAND, PETITIONERS.—Nov. 22.

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

*Bankrupt—Equitable mortgage by—Non proof of, in bankruptcy—Termination of bankruptcy under 149th section of Bankruptcy Act.*

*P. T. being indebted to the Bank of Ireland in a sum of £450, did in December, 1862, by way of equitable mortgage lodge with said bank certain title deeds of his to certain premises in the city of A. Afterwards, on the 14th of April, 1863, said P. T. conveyed to G. said premises (G. having knowledge of said outstanding equitable mortgage to said bank.) On the 12th of May, 1865, P. T. was declared a bankrupt, and the bank when offering proof of said debt, inadvertently alleged that said £450 was secured to them by the bills of exchange of P. T., and they omitted all mention of said equitable mortgage. Finally on 27th June, 1864, the bankruptcy terminated in an arrangement whereby 10s. in the pound was secured to the creditors under the 149th section of the Bankruptcy Act by said P. T. On the 21st of February, 1865, a petition having been filed for the sale of the estate of P. T. by said bank as equitable mortgagees, Judge Hargreave while he held that the bank were equitable mortgagees, nevertheless allowed the case to stand over until a motion then pending before the Court of Bankruptcy for liberty to the said bank to amend their proofs was disposed of, which motion on coming to be heard was, at that late stage of the proceedings, refused by said last mentioned Court. Thereupon on this case being re-entered for argument in the Landed Estates Court, Judge Hargreave by his order dated 25th May, 1865, dismissed said petition. Held, affirming the order of Judge Hargreave, that the petition was rightly dismissed.*

THIS case came before the Court on appeal taken by the Governor and Company of the Bank of Ireland, from an order made by Judge Hargreave, one of the judges of the Landed Estates Court. The facts of the case are shortly these:—In December, 1862, Patrick Toner being indebted to the Bank of Ireland in a sum of £450, and having been called upon by the agent or manager of said bank to give some security for said debt, he, said Patrick Toner, on the 8th of January, 1863, caused to be lodged with the said manager, by way of equitable mortgage, certain title-deeds of his, the said Patrick Toner's, namely, a lease of a certain tenement in Thomas-street, in the city of Armagh, for a term of 31 years, and for such further term as should be granted, pursuant to a covenant for perpetual renewal, at the yearly rent of £20; also an assignment of the above lease and premises dated 8th of June, 1860. These documents were given by way

of equitable mortgage for said debt, and also for any balance which might be due on his bank account. The petition of appeal then stated that ever since said deposit, said title deeds have been and still are in the possession of appellants as equitable mortgagees; that in April, 1863, said Patrick Toner, being then in embarrassed circumstances, and on the eve of bankruptcy, executed a deed of conveyance dated 14th April, 1863, by which he conveyed to George Gillan the premises mentioned in the aforesaid title-deeds; that Gillan did not obtain possession of those deeds, nor did he make any inquiry about them, although it appeared that he knew well they had been placed in the hands of a Mr. Kernaghan, who was the sub-agent of the petitioners at their branch bank at Armagh, and who, after receiving them, had handed them over to one George Johnson, the agent of petitioners. That on the 9th of May, 1863, Patrick Toner made a declaration of insolvency, and on the 12th May he was declared a bankrupt, and that in the matter of said bankruptcy a proof of debt was filed on the 31st of July, 1863, which was verified by John M'Elwaine, deputy assistant secretary of petitioners in Dublin in the absence of J. G. Armstrong, who was the proper officer of the petitioners, whose duty it would have been, had he been in Dublin, to have verified such proof; that said M'Elwaine being perfectly ignorant of the execution of said equitable mortgage did not in such proof of debt rely on said equitable mortgage, and that therefore he only stated the amount due to petitioners, and that the same was due on foot of bills of exchange held by petitioners, and upon which said Patrick Toner was liable to petitioners. That on the 27th of July, 1864, the said bankruptcy terminated in an arrangement under the 149th sect., under which the creditors were to receive ten shillings in the pound from Toner's future profits. The petitioners were no parties to this arrangement, though the arrangement having been assented to by the required proportion in number and value of the creditors was binding under the Act upon all creditors, and there was nothing ever paid to the petitioners under that arrangement. That said George Gillan, to whom the said conveyance had been made by said Toner, having advertised for sale the said premises included in the equitable mortgage, the Bank of Ireland, on the 26th May, 1864, caused a notice to be served on said Gillan, and also upon John M'Veigh, the trade assignee of said Toner, "cautioning them against proceeding to a sale, and apprising them of the bank's intention to proceed to sell the premises in the Landed Estates Court." On the 15th Nov. 1864, petitioners (the bank) obtained a conditional order for sale in the Landed Estates Court, and on the 17th January, 1865, George Gillan filed an affidavit as cause against making the same absolute. The case made by that affidavit was, that the Bank were not equitable mortgagees at all, and that although said George Gillan knew the title deeds were lodged at the petitioners' branch bank at Armagh, yet that they were lodged for another purpose, and also that if even petitioners were entitled as equitable mortgagees, yet that inasmuch as Gillan was a *bona fide* purchaser for value and without notice, his title could not be impeached, and he did not in said affidavit rely on the

proof made by petitioners in said bankruptcy as amounting to a waiver of their equitable mortgage, or as being an election on their part. That a notice was served on behalf of petitioners that an application would be made on the 8th of February, 1865, to make absolute the said conditional order for sale, notwithstanding the cause shown by Gillan. That on the 20th of February, 1865, said motion came on to be heard before Judge Hargreave, who then decided that petitioners were equitable mortgagees, and that as such they were entitled to priority to the said George Gillan, but he directed the motion to stand till a motion then pending in the Court of Bankruptcy was disposed of, which notice was to amend or withdraw the proof made by petitioners; that said motion before the Court of Bankruptcy was refused by Judge Lynch, on the grounds that petitioners were not, at that late period of the proceedings in bankruptcy entitled to prove in any other different right than that claimed by their proof already made. Thereupon the case was re-entered for further argument before Judge Hargreave, when his Lordship, by his order dated 31st of May, allowed the cause shown by the said George Gillan, and ordered the petition filed in that matter by the Bank of Ireland to be dismissed; Judge Hargreave on that occasion delivered judgment; and from the order made in conformity with that judgment the present appeal was brought.

*Brewster, Q.C., with Darley, Q.C., and Heron, Q.C.,* were in support of the appeal taken by the Bank of Ireland.

*Chatterton, Q.C., Kernan, Q.C., and Frazer,* appeared for the respondent, the purchaser (Mr. Gillan) of the estate of Mr. Toner, the conveyance whereof was dated on the 14th of April, 1863, and was registered in the office for registry of deeds in Ireland, on the 18th of April, 1863, under which deed the respondent had entered into possession and had remained so in possession of the premises ever since. The arguments on both sides are mere repetitions of those given in the Court below, which, together with the judgment of Judge Hargreave are reported *in extenso, sup. p. 379.*

**LORD CHANCELLOR.**—The questions in this case have been discussed at great length, especially with regard to the bankrupt law. As to the question of notice of the equitable mortgage, that there was such a mortgage there is no doubt. This has been clearly proved. Whether the mortgage will prevail over the assignment, depends on the doctrine of notice. The first question is, whether what has taken place in the Bankrupt Court will interfere with the rights of the bank. These equitable mortgages have always been discountenanced by the Courts. I cannot say I feel inclined to assist persons in any inconveniences which may result from their taking such mortgages. It would perhaps have been as well never to have allowed them. However, the law is settled now, and I cannot help it, but it is no hardship to say that those who will take them must look carefully after them. In this case, after the deposit of the deeds and after the assignment, the debtor becomes bankrupt. The bank prefer a claim against the estate, and assert that they have no security for this debt, save bills of exchange, and the proof is ultimately received for £450 as a debt not co-

vered by any other security. I apprehend it is perfectly clear that the rule of the Bankrupt Court which requires that securities should be stated, is not confined to securities given by the bankrupt himself, because there are purposes for which it may be very essential that the fact of the security should be known to the Court. Whatever the result may be, the nature of the securities should be known to the assignees and to the Court of Bankruptcy, so that if any moneys have been recovered upon them they may take this into consideration, and act accordingly. It seems to be conceded that if the security has been given by a third person, the creditor may prove his debt under the bankruptcy, notwithstanding the security. But then if he omits to notice the security in making his proof, he is guilty of a concealment from the Court, which may be very prejudicial to the other creditors in case he should be fraudulent enough to conceal any subsequent payment on foot of the security, which with his dividend may amount to more than the amount due to him, and which, therefore, he ought so far to hold in trust for the other creditors. If a creditor conceal his securities, his proof may be ordered to be expunged, and he shall be obliged to make another proof. Certainly, it seems established that a creditor is entitled to prove his whole debt without taking into account the security of a third person, or that of a third person's estate. That is laid down in many cases. In *Ex parte Shepherd* (1 Mont. Deac. De Gex, 101), at p. 111, Sir J. Cross says, "It is not disputed that if the security had been made available prior to the proof, excess would never have been received, as the dividends would then have been paid on the sum of £2,871 only, and the object of entering the proof first was to give that advantage, and it is admitted by both parties that if the debt and the security had been charged upon the same fund, the security must have been applied in the first instance in reduction of the debt, but that if the reduction were charged upon a stranger to the bankruptcy the whole debt might be proved without regard to the security; and that it was so determined in *Peacock's case* (2 G. & J. 27), and in several other cases since." Well, this security seems to have been charged on an estate which was not the estate of the bankrupt, and so it was competent to the bank to prove, and go in under the bankruptcy, and get their dividends. But they were bound, I think, to have stated this security as a matter of fact. Mr. Armstrong, who had charge of the securities, and who actually knew of the deposit, at the time being out of town, instead of waiting till his return, Mr. McElwaine made the affidavit in his absence, and he knew nothing but what the person who made the proof told him, and the securities lay in the hands of the bank all through, until they came to use them in the Landed Estates Court. If the bankruptcy had gone on in the ordinary course, the Bankrupt Court might have allowed the bank to amend their proof. It seems to me that the Bank might have been allowed to have appended an explanation stating the truth of the matter. Now, the effect of the arrangement was to place all the creditors in the condition of parties bound to accept 10s. in the pound, and they entered into that arrangement without notice of the claims of the bank to hold their security, and upon the understanding

that Mr. Toner was to be a free man, earning by his own labors the money out of which the annual dividend was to be payable. Now it is to be considered what was the effect of holding back that security as against the bank. The bank had a right to enforce the payment of £450 as against Mr. Gillan's estate, and Gillan might then sue Mr. Toner for the damages sustained by reason of Toner's conveying to him those lands, which were at the time mortgaged to the bank, and take his body in execution. The result would be that Mr. Toner would be no longer able to pay the annual dividend to his creditors. Now, the bank had notice twice of his arrangement. All that time Mr. Johnson, who was the proper authority, held the title deeds, and knew all the facts, and yet he never communicated to anybody the existence of this equitable mortgage. The parties entered into this arrangement on the understanding that Mr. Toner would then be liable to no demands but those provided for by the agreement. Now, if the Bank of Ireland enforced the equitable mortgage against Mr. Gillan, he would have an action against Mr. Toner which otherwise he would not have, and this would defeat the whole arrangement, and injure the creditors. That is a very serious feature in this case, and though it may be said that Mr. Gillan signed the composition knowing the proof was defective, yet the other creditors signed it without that knowledge. I have come to the conclusion that the judgment of the judge below is right, and the order must be affirmed.

THE LORD JUSTICE OF APPEAL concurred, and remarked upon the very mature consideration which the case seemed to have received from the judge below.

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

KELLETT v. KELLETT.—Nov. 21, 22, 25.

*Will—Revocation of by codicils thereto—Practice—Respondents though not filing cross appeal, permitted after hearing to appeal against the order of the Court below.*

*Testator by his will dated 26th June, 1841, charged certain lands of which he was seised with a sum of £1000 each, for each of his five daughters, and he desired and directed his "trustees shall pay to, or permit and suffer each of my five daughters to receive and take for the term of her natural life the interest at the rate of 5 per cent. per annum, from the day of my decease.....and in case my said daughters, or any of them shall hereafter marry, then upon trust.....to pay the children, if any, of my said daughters who shall marry.....and when each of my daughters shall die unmarried.....upon trust to pay and apply the principal sum of £1000 hereby provided for her so dying, to or amongst all or any of my other children.....in such shares and proportions as each of my said five daughters shall by deed or will appoint, in default of such appointment, then upon trust to pay and apply the principal*

*sum of £1000 of her so dying to and amongst such of my other children as shall be then surviving, and the issue, if any, of such of them as shall then be dead, in equal shares and proportions."* Testator by a codicil made to said will, having recited that upon the occasion of the marriage of one of his daughters S., subsequent to the making of said will, he had paid and secured to her a sum of £1250 as a marriage portion, and also that he had given to his three daughters H. & A. & M. (one of the said five daughters F. having died) "a sum of £1000 each as in will mentioned, Now I revoke my said will so far as the same devise or bequest to the said S. is an object thereof.....and I do hereby further revoke my said will so far as the said sum of £1000 to each of my said daughters H. & A. & M. is given absolutely, as I hereby declare, and my will is that in the event of my said daughters H. A. & M. or any of them remaining single or unmarried, they or she remaining single or unmarried shall only have and be entitled to interest for their or her natural lives or natural life, and no longer, in the said sum of £1000 each, which devise and bequest of £1000 to each of them, the said H. A. & M., I do hereby confirm subject to the conditions and restrictions aforesaid." By a subsequent codicil this £1000 was increased to £1250. Testator died in April, 1847. Said M. died in December, 1847, and previous thereto she appointed her said fortune to or amongst her said two surviving sisters, A. and H. share and share alike. Afterwards H. died, and she appointed the fortune left by her father to A. Held, affirming an order of the Master of the Rolls, that A. was entitled to interest at 5 per cent. for life on her sum of £1250; and also that the powers of appointment given in the will to A. M. and H. were revoked by the first codicil; but that the bequests over in said will in default of appointment were not revoked, and consequently that his other children who survived M. and H. were entitled under the terms of the will to a distributive share of said two sums of £1250 each, the said fortune of M. and H.

*Testator by his will recited that he did demise, &c. the house of Waterstown and 30 acres of land, held for the lives of his said five daughters to one T. B., but subject to the yearly rent of £2 10s. per acre. And he did thereby declare that the said lease was so made to T. B. in trust, to and for the lives of his said five daughters and the survivors of them; and in order after his decease to provide them with a residence; and by a third codicil thereto, he, when speaking of his said daughters, determined and willed "that they shall have the house of Waterstown and 30 acres of land.....at their disposal."*

*Held—affirming the order of the Master of the Rolls, that A. having survived her sisters was entitled under the third codicil in the will to the interest of the testator in the house of Waterstown and 30 acres of land, but free from the rent of £2 10s. per acre.*

*Practice.*

*The appellant having appealed from the order of the Master of the Rolls, and having prayed in his peti-*

*tion of appeal "that the order might be varied in conformity with the construction of the will and codicils," the respondent was allowed on the appeal to go into a case shewing that said order was further erroneous in other portions thereof though respondent had not appealed therefrom, as if the case were at a re-hearing.*

THIS was an appeal from a decretal order of the Master of the Rolls, bearing date the 26th May, 1865. The subject of contention in this case was the construction to be put on the will and three codicils of Robert Kellett, who died on the 27th of April, 1847, leaving five children him surviving, namely, Edward Kellett, Orange Sterling Kellett, Harriet Kellett, Matilda Kellett, and Arabella Kellett. The cause petition was presented by said Arabella Kellett, on the 23rd of January, 1865, against the said Rev. Orange Sterling Kellett, and Thomas Barnes, the respondents. The petition stated that said Robert Kellett, the father of said five children, was at the time of his death seized in fee of the lands of Tarmon, and in quasi fee of the lands of Lissanimore, in the County of Cavan, and of part of the lands of Waterstown, Moynalty, and Boynagh, in the County of Meath, under leases for lives, which are still subsisting, and also of other parts of Waterstown, either under an agreement for a lease, or as tenant from year to year; that the said Robert Kellett made his will bearing date the 26th of June, 1841, and thereby he demised the lands of Tarmon and Lissanimore unto Thomas Barnes, jun., and to his, the said testator's sons, Edward Kellett and Orange Sterling Kellett, and their heirs, upon trust, to pay the rents and renewal fines in respect of the same, "and upon further trusts by and out of the said rents, issues, and profits of said lands and hereditaments, or by demise, mortgage, or sale thereof, or any part thereof, to levy and raise, to and for my daughter, Frances Kellett, the sum of £1,000; to and for my daughter, Henrietta Kellett, the sum of £1,000; to and for my daughter Arabella Kellett, the sum of £1,000; to and for my daughter, Susan Kellett, £1,000, and to and for my daughter, Matilda Kellett, the sum of £1,000, my eldest daughter, Eliza Frances Moffett, having been already provided for, said several sums to be subject to the provisions hereinafter expressed, that is to say, I desire and direct my said trustees shall pay to, or permit and suffer each of my five daughters to receive and take for the term of her natural life, the interest from the day of my decease at the rate of five per cent per annum on the principal sum of £1,000 hereby provided for her, and in case my said daughters, or any of them, shall hereafter marry, then upon trust to pay to, or to permit and suffer the husband of each of my said daughters who shall marry, and his assigns, to receive and take the interest at the rate aforesaid of the said principal sum of £1,000 hereby provided for her so marrying, for the term of his natural life, and from and after the death of the survivor of each of my said daughters, who shall marry, upon trust to pay to the children, if any, of such of my said daughters who shall marry, the principal sum of £1,000 hereby provided for their mother in equal shares and proportions, the shares of such of said children as shall be sons to be

paid at the age of 21 years, and of such as shall be daughters, at the age of 21 years, or day or respective days of marriage, and upon the death of and according and when each of my said daughters shall die unmarried, or being married should die without leaving issue, who, being a son or sons, shall live to attain the age of twenty-one years, or, being a daughter or daughters, shall live to attain that age or be married, upon trust to pay and apply the principal sum of £1,000 hereby provided for her so dying, to and amongst all or any of my other children, whether my sons, or sons' daughters, their, his, or her issue, in such shares and proportions as each of my said five daughters so dying shall by deed or will appoint, and in default of such appointment, then upon trust to pay and apply the principal sum of £1,000 of her so dying to and amongst such of my other children as shall be then surviving, and the issue of, if any of such of them as shall then be dead, in equal shares and proportions, the issue of such of my children as shall then be dead to take to and amongst them the share which their parents, if living, would have been entitled to under this limitation." The will then contained several other trusts, and subject to all said trusts he gave, devised, and bequeathed "the said lands, hereditaments, and premises devised as aforesaid, and every part and parcel thereof, with their appurtenances, unto my said two sons, the said Edward Kellett, and Orange Sterling Kellett, equally to be divided between them, share and share alike, and to the heirs of their respective bodies as tenants in common in tail, with cross-remainders between them." The testator then proceeded to deal with the above-mentioned lands of Waterstown thus—"And whereas by indenture bearing equal date herewith, I did demise, set, release, and confirm unto the said Thomas Barnes, junior, the house of Waterstown as at present furnished, and that part of said lands therein described, containing 30 acres, late Irish plantation measure or thereabouts, to hold for the lives of my said five daughters, Frances, Henrietta, Arabella, Susan, and Matilda Kellett, provided my interest in the said lands shall so long continue, subject to the yearly rent of £2 10s. per Irish acre. Now I do hereby declare that the said lease was so made to the said Thomas Barnes, junior, in trust, to and for the lives of my said five daughters and the survivors of them, and in order after my decease to provide them with a residence." Testator then bequeathed certain legacies to different other parties, and as to all the rest of his real and personal estate, including the lands held by him upon determinable leases for lives, and that part of the said lands of Waterstown, with the dwelling-house there, granted as aforesaid by him on lease to Thomas Barnes, junior; he thereby devised and bequeathed the same, subject to the payment of his debts and the reservations therein-before mentioned, unto his said sons, Edward Kellett and Orange S. Kellett (the appellant) in equal shares, and then appointed said Edward Kellett and Orange Sterling Kellett, executors. His said daughter, Frances, died before the following codicil:—

The first codicil to the above bearing date the 31st December, 1842, is as follows—"This is a codicil to the last will and testament of Mr. Robert Kellett, of

Waterstown, in the County of Meath, which will bears date the 26th of June, in the year of our Lord 1841. Whereas I have, by my said will given, devised, and bequeathed unto my daughter, Susan Mayne, otherwise Kellett, the wife of Robert Mayne, Esq., by her then name of Susan Kellett, the sums of £1,000 as in said will mentioned; and whereas the said Susan Mayne, otherwise Kellett, has since the date of said will intermarried with the said Robert Mayne, and whereas upon the occasion of said marriage I paid to the said Robert Mayne, and secured to the trustees of the deed of settlement bearing date the 2nd August, 1842, and which was made previous to and in contemplation of said marriage, the sum of £1,250 as and for the marriage portion or fortune of the said Susan Mayne; and whereas by my said will I have given and bequeathed to my said daughters, Henrietta, Arabella, and Matilda Kellett, the sum of £1,000 each, as in said will mentioned. Now, I revoke my said will so far as the same devise or bequest of £1,000 to the said Susan Mayne, otherwise Kellett, is an object thereof, and I hereby declare that she shall not take the said legacy of £1,000 by my said will given to her, nor any other devise or advantage whatever, which she may be entitled to under the said will in case I had not made and executed this codicil thereto, and I do hereby further revoke my said will so far as the said sum of £1,000 to each of my said daughters, Henrietta, Arabella, and Matilda Kellett, is given absolutely, as I hereby declare, and my will is that in the event of my said daughters, Henrietta, Arabella, and Matilda, or any of them, remaining single or unmarried, they or she so remaining single or unmarried shall only have and be entitled to interest for their or her natural lives, or natural life, and no longer in the said sum of £1,000, each which devise and bequest of £1,000 to each of them, the said Henrietta, Arabella, and Matilda, I do hereby confirm, subject to the conditions or restrictions aforesaid."

Second codicil to the above will—"Whereas I have appointed Edward Kellett and Orange S. Kellett my residuary devisees and legatees, and whereas the said Orange S. Kellett has lately, and since the date of my said will, intermarried with Mary Anne Grattan, and whereas upon the occasion of the said marriage I made a provision for my said son by deed bearing date the 20th Feb. 1844, and whereas I estimated the amount settled by said deed equivalent to a moiety of said residue, now I do hereby revoke my said will so far as the said residuary devise and bequest unto the said Edward Kellett and Orange Kellett, and so far as the said Orange Kellett is beneficially the object thereof. And I hereby declare that the said Orange S. Kellett shall not take the moiety of said residue, or any part thereof of my said will given to him, or the benefit of any other devise or advantage whatever which he may be entitled to under my said will, in case I had not made and executed this codicil thereto, and I hereby nominate and appoint my son Edward Kellett my sole executor and residuary legatee."

Third codicil to the above will, dated Apr. 21, 1847—"I, Robert Kellett, of Waterstown, knowing that I made and disposed of my property by will and codicil, do now further determine and will that my three

daughters, Henrietta, Arabella Kellett, and Matilda Kellett, shall get fortunes equal to what was settled upon my daughter, Susan Mayne, by marriage settlement, and that they shall have the house of Waterstown, thirty acres of land as laid out, furniture, and plate, at their disposal, and that the codicil with respect to my son Orange Sterling Kellett, clerk, shall be cancelled, and in lieu of his marriage settlement that he shall be considered, as I have settled by my will, equally with my son Edward, except that Edward is to have my interest in the lands of Boyragh, to whom I now bequeath it.

#### "ROBERT KELLETT."

The petition then stated that the petitioner died on the 27th April, 1847; that Matilda Kellett made her will on the 14th of December, 1847, and she thereby stated that in pursuance of the power of appointment given to her by her late father, said Robert, she thereby bequeathed and appointed the said fortune left to her by her said father, and all his rights under his will and codicils, and also all real and personal property of which she might die possessed, unto her sister (the petitioner), Arabella Kellett, and also to her sister Harriet Kellett, share and share alike. Said Matilda died in 1863. The petition then stated that said Harriet Kellett made her will dated the 10th of September, 1864, and she in like manner as her sister Matilda had done, by her will appointed the fortune left to her by her father to her sister Arabella. The other child of Robert Kellett, namely, Frances Kellett, died in his lifetime, and Jane Kellett died unmarried and intestate, and without issue, and petition further stated that the said Edward Kellett and Orange Sterling Kellett, the appellant, or one of them, paid to the petitioner, Arabella, and to her sisters, Matilda and Harriet, the interest upon the said three sums of £1,250 each, from the death of the said Robert Kellett, up to the death of the said Matilda Kellett and thenceforward the interest on said two sums of £1,250 each, up to the death of said Harriet Kellett, after retaining thereout the rent of the said thirty acres of Waterstown at the rate of £2 10s. per Irish acre, but the appellant refused to pay after the death of the said Matilda any interest upon the said sum of £1,250, to which she had been entitled, or upon the sum of £1,250, to which the said Harriet was entitled after her death, for this reason, that upon the deaths of the said Matilda and Harriet respectively the said two last-mentioned sums of £1,250 each ceased to be charges, and that neither the said Matilda or Harriet had any power to bequeath or appoint same; whereas on the contrary his sister, the said Arabella Kellett, the petitioner below, insisted that she and her said two sisters became each entitled to a sum of £1,250 each during their respective lives, with power to appoint same to any one or more of her brothers and sisters, and that therefore said Arabella, the petitioner below, was entitled, as appointee both of Matilda and Harriet, to such two sums of £1,250 each, and also to the third sum of £1,250 in her own right as legatee as aforesaid under her father's said will and codicils, which three sums make together £3,750, and said petitioner, Arabella, also claimed to be entitled to the house and thirty acres of the lands of Waterstown. That Orange S. Kellett became the assignee of that



portion of the lands devised to Edward Kellett, and that said Orange S. Kellett is now in possession or in receipt of the rents of all said lands. That the petitioner stated that the lease in Robert Kellett's will of the house and 30 acres of Waterstown to Thomas Barnes was never executed, and that Arabella and her two deceased sisters were not tenants of his, but merely co-tenants with Orange S. Kellett, of said house and lands. The petition then prayed that the trusts of the will might be carried into effect. The appellant in his petition of appeal, insisted that in the events which had happened Harriet and Matilda Kellett, who died unmarried, had no greater interest in their fortunes of £1,000, which were afterwards increased to £1,250, than for their lives respectively, and that the effect of the first codicil to testator's will was to revoke his bequest to each of them so remaining single, of the principal of her portion, and of all disposing powers over it. And appellant alleged that testator never executed any lease of the part of Waterstown mentioned in his will, and submitted that his intention was to revoke his bequest to each of them so remaining single of the principal of the portion, and of all disposing powers over it. And appellant submitted that his intention was that the house of Waterstown, with 30 acres of land, should be held and enjoyed as a residence for his unmarried daughters during their lives at a rent of £2 10s. per acre, and that his testamentary disposition in that respect went no farther than to carry out that intention by leaving Waterstown to his unmarried daughters, with 30 acres of land, and the plate and furniture accessory to it, for their lives and no longer, and that upon the death of the survivor of his daughters unmarried, all this property should revert to the appellant. The petition of appeal then stated that the case came on for hearing before the Master of the Rolls, when, after hearing the case argued by counsel on both sides, his Honor made a decretal order bearing date the 26th May, 1865, which order is now being appealed from; the curial part of which is as follows:—

"It is ordered and declared.....First, that the trusts of the will and codicils of Robert Kellett, deceased, in the petition mentioned be carried into execution; secondly, that the petitioner, Arabella Kellett, is entitled under the said will and codicils to interest at the rate of five per cent. per annum on the sum of £1,250 for life subject to the provisions in the said will and codicils contained in the event of her marrying; thirdly, that the powers to appoint given by the said will to the said Arabella Kellett, Matilda Kellett and Harriet Kellett respectively, in respect of the sums of £1,000, £1,000, and £1,000 in the said will mentioned, and which sums are by the third codicil increased to £1,250, £1,250, and £1,250, were revoked by the first codicil to the said will, but that the bequests in said will, in default of appointment by the said Arabella, Matilda, and Harriet respectively were not revoked by the said final codicil; fourthly, that the said Arabella Kellett became entitled on the death of Matilda Kellett, who died unmarried, to a distributive share of the said Matilda's £1,250 under the clause in default of appointment contained in said will; fifthly, that the said Arabella Kellett became entitled on the death

of Harriet Kellett, who died unmarried, to a distributive share of said Harriet's £1,250 under the clause in default of appointment in said will contained; sixthly, that the said Arabella Kellett will be entitled under the will of Harriet Kellett (when the same shall be proved) to the distributive share of the said Matilda Kellett's £1250, to which the said Henrietta-Kellett became entitled on the death of the said Matilda, under the said clause in default of appointment contained in the said will. Seventhly, that the respondent, Orange Sterling Kellett, is entitled to a distributive share of the said Matilda Kellett's £1250, and a distributive share of the said Henrietta Kellett's £1250, under the said clause in default of appointment contained in the said will; but the Court doth not decide who is or are entitled to the other distributive shares of £1250, and £1250, the persons interested therein not being before the Court. Eighthly, that the said three sums of £1250, £1250, and £1250, with the interest payable thereon, were well charged, by the said will and codicils, on the lands of Tarmon, otherwise Ballycanphilip and Lisannimore (differently spelt in the copies of the will sent to the Court), in the said will mentioned. Ninthly, that it be referred to the Master of this Court in rotation to take an account of what is due to the petitioner, Arabella Kellett, having regard to the said declarations. Tenthly, that the petitioner, Arabella Kellett, having survived her sister, Frances, who died in the testator's lifetime, and having survived her said sisters, Matilda and Henrietta and having regard to the provisions in the first codicil as to her sister Susan, is entitled, under the third codicil to the said will, to the interest of the testator in the house of Waterstown, and the thirty acres of land as laid out, and in the third codicil and in the will of the testator mentioned, but free from the rent of two pounds ten shillings an acre, in the said will mentioned. Eleventhly, that the petitioner, Arabella, is entitled absolutely to the furniture and plate in the said third codicil mentioned. Twelfthly, that the petitioner and respondents, respectively, do abide their own costs of this suit, up to and including this hearing." The appellant now submitted that this decretal order was erroneous, and that same ought to be reversed or varied.

The petition then prayed for a declaration that the bequests in said will contained, in default of appointment, by the said Arabella, Matilda, and Henrietta Kellett, were revoked by the first codicil to said will, and that the said order might be varied and amended accordingly, and also in conformity with the construction of the said will, and of the several codicils thereto.

*Ball, Q.C., John E. Walsh, Q.C., Warren, Q.C., and Byrne* appeared in support of the appellant's case. The attention of the Court is directed to two distinct subjects. First point with respect to the legacies of £1250. And secondly with respect to the devise of Waterstown.

On the first question we submit that the conclusion which the Master of the Rolls has arrived at is erroneous. The two ladies who died were mere tenants for life, so to speak, of their fortunes of £1250; yet, nevertheless, they dealt with these fortunes as if they were theirs wholly and absolutely. It is plain

the testator meant to cut down the absolute gift in the will which he made to his daughter, unmarried, to a mere tenancy for life—because he says in his will (he having made such of his daughters as should have been married and should have children, mere tenants for life) that his children who would be unmarried, should have the power of appointment among those in the will named. By the first codicil then he cuts down to a mere tenancy for life the gift in the will, for he actually says that such of his daughters as should remain single “or unmarried, shall only have and be entitled to interest for their natural lives, and no longer in said” sum of £1000 each; the testator then cut down to a life interest his unmarried daughters, and he deprives his daughter of any interest whatever, beyond that of her life in the funds; he revokes then even the naked power of appointment of the fortunes given to each of them, and in revoking the power of appointment; he also impliedly revokes what depended on the non-exercise of this power, which was given in the will, namely, the disposition over, for the disposition over was not to take effect unless in default of the appointment, in fact the ulterior remainders were accessorial to or dependent on the power of appointment, and the power failing, the accessorials failed likewise. Now there is no other way to give effect to the intention of the testator than to cut down to a life estate or interest in these sums the interest of those ladies, and then you will adopt the expressions of the testator. *Baldwin v. Baldridge* (22 Beav. 413) and *Phillips v. Allen* (7 Sim. 446) are both cases where the codicil revokes the gifts given in the will *in toto*. So also *Murray v. Johnson* (3 Dr. & Warr. 143); *Boulcott v. Boulcott* (2 Drew. 25); and *Wells v. Wells* (17 Jur. 1020) was where the codicil operated as a revocation of the gifts contained in the will. Now it is incumbent on you to give a meaning to the codicil, and no other meaning you can give can so harmonize with the manifest intention of the testator, as the one we contend for, namely—that the bequests in the will to Arabella, Matilda, and Henrietta Kellett, were revoked by the first codicil, save so far as a life interest given to those ladies.

*The Attorney General (Lawson) the Solicitor General (Sullivan), with Brewster, Q.C., and James C. Loury, contra*, on the first point. The effect of a codicil is not and can not be, to revoke the will itself; for the clear rule of the Court is, unless the revocation is in language as clear, and unambiguous as the will itself, it is an established rule not to disturb the disposition of a will, further than is absolutely necessary for the purpose of giving effect to the codicil [1 Jar. on Wills, 3rd ed. 162]. Now we admit that whatever the codicil revokes is revoked, and whatever the codicil leaves unrevoked is unrevoked. Tindal, C.J., lays down the law thus in *Doe v. Hicks* (8 Bing. 480). “If a devise in the will is clear, it is incumbent on those who contend it is not to take effect by reason of a revocation in the codicil, to shew that the intention to revoke is equally clear and free from doubt, as the original intention to devise. For if there is only a reasonable doubt whether the clause of revocation was intended to include the particular devise, then such devise ought undoubtedly to stand.

*Duffield v. Duffield* (3 Bligh. N.S., 261).” Now has the testator exonerated those lands from the burden which he operated them with for those ladies? Decidedly not. Apply the principle above just enunciated in *Doe v. Hicks* to this case, and it goes the length of shewing that the Master of the Rolls was erroneous in disturbing the will at all, by the words of this first codicil, which is void for the uncertainty of the language used. [*The Lord Chancellor*.—You have not appealed from the order of the Master of the Rolls; there is no cross appeal here.] There is no necessity for a cross appeal, for the appellants have prayed in the petition of appeal, that the order of the Master of the Rolls may be varied and amended in conformity with the construction of the wills and codicils; so your Lordships are prayed to shape the orders, so as to conform to the true meaning of the will and codicils. The Master of the Rolls was erroneous in holding that the power of appointment was revoked. [*Warren, Q.C.*—You have not appealed, and are precluded therefore from raising this question.] An appeal is in the nature of a rehearing of the whole case. [*The Lord Chancellor* said he would consider the question, though no appeal was taken.]

*John E. Walsh, Q.C.*, replied. [*The Lord Chancellor*.—The testator says in his first codicil that he revokes what is not in his will at all; don’t you observe he says—“now I revoke my said will so far as the said sum of £1000 to each of my said daughters Henrietta, Arabella, and Matilda Kellett, is given absolutely;” where is it given absolutely in the will?] [*Lord Justice of Appeal*.—How do you expound the word “absolutely” with respect to the terms of the will?] The testator conceived he had given it absolutely in the will; that is “absolutely” to be raised.

*Ball, Q.C.*, on the second point. The question now before the Court arises on the will, and upon the construction of the third codicil. You must reconcile the will and codicil. [*The Lord Chancellor*.—Suppose I leave my estate to A.B. in my will, and in my codicil leave it to C.D., how can I reconcile them? This is a mere question of what this codicil means. By the third codicil the lands in question, plate, &c., are left to his daughter, “at their disposal;” what construction do you put upon that?] That is not an absolute gift. The will merely leaves them a life interest therein.

*Brewster, Q.C.*—The second codicil revoked every benefit devised to Orange S. Kellett in the will.

THE LORD CHANCELLOR.—Upon the first question that has been argued we shall give judgment upon Saturday, but upon the second question we both think that the Master of the Rolls came to a right conclusion; why here the third codicil is both clear and express, there is nothing whatever of difficulty therein, and nothing that suggests a doubt; clearly he wished them to have a residence by the terms of the will; and by the codicil he gives whatever interest he had in these lands absolutely to his daughters.

*Cur. adv. vult.*

*Saturday, Nov. 22.*—THE LORD CHANCELLOR.—We have here to consider what construction is to be given to the will and codicils of the testator Robert

Kellett. Now cases like those before us are cases upon which the utmost uncertainty must always prevail. On the one hand counsel for the inheritor contends for one construction, and on the other, counsel for this lady Miss Arabella Kellett confidently contends for a totally different construction. Miss Kellett contends that the codicil was void for uncertainty, and that therefore the will remained perfectly intact. The inheritor's construction of the very same codicil is that that was a revocation of all the limitations in the will. The Master of the Rolls, before whom the case was argued, was of opinion that the codicils had the effect of revoking to a certain extent the dispositions of the will, and leaving untouched others that were not specifically revoked. Well, it remains for us now to say whether or not we can give any satisfactory construction other than that which the Master of the Rolls has given it. Now the question turns merely upon the construction to be given to a very few words. The testator first charges his estate with £1000 for each of his three daughters, and that they were to receive interest thereupon from the day of his death, and then he desires if any of them shall marry that the £1000 should be paid to the children of that marriage with a power of appointment among such children. Well, clearly the will merely leaves such of his daughters as married a life estate with remainder to their children, and he merely clothes those married daughters with a power of appointment, and that power to and among their own children. Now we come to the codicil, having closed the will, and while I may remark that the will was evidently prepared by a professional person, I have no doubt on my mind but that the codicil was not so prepared. It is remarkable for the inaccuracy of language that has been used. This gentleman in the codicil to his will notices that between the time of his making his will and codicil one of his daughters (Susan) got married, he then absolutely and entirely revokes the "bequest of £1000 to the said Susan Mayne, otherwise Kellett;" that is a specific revocation, plain and simple; the language however used by the testator cutting down the bequests to his other daughter is not so unambiguous: in the will he desired his trustees to "permit each of my five daughters to receive and take for the term of her natural life the interest from the day of my decease—the interest at the rate of 5 per cent. per annum of the principal sum of £1000 hereby provided for her;" then the testator gave each of his daughters who should marry the power of appointment on their £1000, among their children; but in case they did not marry, the £1000 was to be paid to and amongst his other children; and he gave his unmarried daughters a mere power of appointment over the £1000. This is not an absolute gift. This first codicil "revokes my said will so far as the sum of £1000 to each of my said daughters Henrietta, Arabella, and Matilda, or any of them is given absolutely, as I declare and my will is that in the event of any of my said daughters, Henrietta, Arabella and Matilda remaining single or unmarried, they or she remaining single or unmarried shall only have and be entitled to interest for their or her natural lives, or natural life, and no longer in the said sum of £1000 each, which devise and bequest of £1000 to each of

them the said Henrietta, Arabella, and Matilda, I do hereby confirm subject to the conditions and restrictions aforesaid." Well, we doubt that that is a revocation of the will so far as it cuts down to a life interest the several portions of the three ladies, I am of opinion that those powers to appoint were revoked by the first codicil, but does not this codicil leave unrevoked the bequests over in default of such appointment? I do not find any express intention to disappoint the legatees in the event of the daughters dying unmarried. There cannot be a doubt but that there is a deal of uncertainty about this case; but can we see any construction more satisfactory than this construction we are giving it, unsatisfactory as it undoubtedly is? This is one of those strange documents upon which various opinions may be formed. I am then, and so is my Lord Justice of Appeal, of opinion that we can not reverse the decision of the Master of the Rolls, though I am very far from being satisfied that this is a very clear case.

THE LORD JUSTICE OF APPEAL concurred.

IN THE MATTER OF ASKEN MORRISON, A BANKRUPT.  
Nov. 20.

*Irish Bankrupt and Insolvent Act, 1857.*

*The Court of Bankruptcy has no power to adjourn the final examination of a bankrupt sine die, where it is admitted that the bankrupt has laid a full and true declaration of all his estate and effects before the Court.*

THIS case came before the Court on appeal from an order of Judge Lynch. That learned judge's judgment is given *in extenso, supra*, page 197. The petition of appeal stated that the appellant commenced business in Dublin in the year 1837, and continued trading, until his stoppage, as wholesale warehouseman, at Nos. 6 and 7 William-street, Dublin. That appellant carried on said business in partnership with his brother, Wm. Morrison, up to his brother's death, in Nov. 1858, and that since that time appellant has alone conducted said business, but that the name of the old firm "A. & W. Morrison & Co." was retained. That the final inability of appellant to meet his engagements arose from losses in trade, bad debts, heavy discounts paid to the banks, the high rate of interest on money in Dublin for the last five years, and from want of adequate capital to carry on the trade. That the immediate cause of appellant's stoppage was the failure of Perrin & Sons, of Liverpool, for whom appellant had signed guaranteed bills to the extent of £5,600. That appellant filed his petition of arrangement on the 23rd day of January, 1865, and that on the 14th day of February last appellant was adjudicated a bankrupt. That appellant filed his schedule and balance-sheet on the 31st day of March, 1865; and afterwards, pursuant to the requisition of the assignees, filed several accounts relating to appellant's trade, and the assignees have required no further or other accounts or balance sheets in relation to appellant's trade or dealings. That the total amount of debts

due at the filing of the petition was £84,499 1s. 2d. from which were to be deducted liabilities on endorsements for which value was given to the acceptors by the appellant to the amount of £27,042 4s. 9d. That on further deducting from said total amount of debts the portions of same for which bankrupt received no consideration, and the portion partially secured, there was left a net amount of debts actually due, and the value of which was to be accounted for, to the amount of £49,891 11s. 2d.; and appellant saith that said schedule was thoroughly and accurately vouched. That the amount of good debts was stated in the schedule to be £4,038 0s. 7d., and the assignees have already collected £2,449 2s. 11d. of said debts. That the total estimated value of the moveable chattels was £9,660 2s. 2d. and the assignees have already realised £8,738 13s. 7d. from the sale of same. The petition then went on to state that in the opposition which the assignees made to the passing of appellant's final examination, it was not even alleged that appellant had not made a full and true disclosure and discovery of his assets and liabilities, estate and effects; and appellant alleged he surrendered all his property to the Court; that his schedule and said accounts so filed disclosed all his dealings; and that nothing was alleged against appellant by the assignees to the effect that the appellant ought not to be permitted to depose to and sign the final examination paper in the form settled by the judges of the Court of Bankruptcy, pursuant to the statute; and appellant saith he hath truly complied with all the requisitions, and hath done all the things mentioned in the final examination paper, form No. 41, as necessary to be done by the bankrupt before passing his final examination. That said assignees, not objecting to the truth or fulness of the disclosures and the discovery of appellant in relation to property, opposed the passing appellant's final examination, upon three separate grounds—"reckless trading," "passing of accommodation bills to enormous amount," and "the dealings with Mr. Salter, a member of the firm of Switzer, Ferguson & Co., who put the name of said firm to accommodation bills without the authority of said firm;" it being alleged by the assignees that appellant procured the said Salter to do so, and knew he was committing a fraud on the firm of Switzer, Ferguson, and Company.

The Solicitor-General (*Sullivan*), *Brewster*, Q. C., *Heron*, Q. C., and *Charles Meldon*, appeared in support of the appeal.—The Court of Bankruptcy is bound to pass the final examination of a bankrupt, when it appears that he has made a full and true disclosure of his estate and effects. The 138th sect. of 20 & 21 Vict. c. 60, directs what accounts are to be furnished by the bankrupt, and the form in which they are to be prepared, and provides for the amendment thereof before final examination. The Court has settled a certain form of certificate, which correctly states all the matters required to be done by the bankrupt. The 143rd section points out the mode of obtaining the certificate of conformity, and provides that except in certain cases therein mentioned the bankrupt shall be entitled to an immediate certificate on passing his examination. In case of fraud, or if the Court shall direct a proce-

cution, a special meeting must be held to consider the question of certificate, and at such meeting the conduct of the trader can be taken into consideration, and the judge may adjourn the certificate for such time being not more than three years, as he thinks fit. This section provides for the certificate being granted, even though a bankrupt is ordered to be prosecuted. It never can have been the intention of the Legislature to have granted a greater power than this to the Court. The 376th and following sections of the Act provide for punishments to be awarded to a fraudulent bankrupt, and directs the manner of prosecuting, and the case of fraud prior to bankruptcy is thereby fully provided for. To give the effect sought for to the 140th section of the Act would be in effect to repeal three sections, and to render them a nullity—in fact such a construction would give to the Court a power of enforcing perpetual imprisonment against a bankrupt. The policy of the law has been to affix certain punishments to certain acts, and not to allow a single judge the very large power sought here.—*Re Burke* (14 Ir. Chan. Rep. 109) is a case in which this Court, on mature deliberation, and after full argument, expressed their opinion on this subject, and must be taken as conclusive and binding. The policy of the law with respect to bankrupts has gradually become less severe. Formerly the punishment for a fraudulent bankrupt was death, but now the recent enactments go very much to lighten the penalties for misconduct in bankrupts. 12 & 13 Vict. c. 106, regulated the practice in England in 1849, and the 107th section of the same chapter regulated the practice in Ireland. These are similar, and although the practice has since been changed in England, the more lenient one remains in force in Ireland. The duty of the judge is only to follow the directions contained in the 144th section, and certify that the bankrupt has conformed to the law as therein laid down. As to reckless trading and misconduct, the recent decisions seem to establish a more lenient practice than the judge here followed, as appears by numerous decisions, but the subject is very well considered in the case of *Ex parte Hammond* (1 De Gex, M'N. & G. 699), and *Ex parte Dance* (1 De Gex F. & J. 286).

The Attorney-General, *Kernan*, Q. C. and *Orpen*, contra, for the assignees.—The case cited, *Re Burke*, was not decided on the point alleged, but on totally different grounds, and the Court of Appeal did not properly enter on the consideration of the question, and consequently it is not any authority here. The 140th section gives the Court full power to adjourn the final examination *sine die*. There are no words controlling that power. It cannot be the policy of the law to allow a bankrupt who has been guilty of forgery or other such conduct, to begin trading again. The Act of 1857 gave original jurisdiction to the Court. Formerly the Commissioners were acting only under the direction of the Court of Chancery, and all appeals were to the Chancellor, so it is not surprising they should have the power now sought for. The policy of the Act is to give power of perpetual imprisonment to the judge, and this is the law in England, and there is no reason for a difference in the law of both countries. This decision is watched with

great interest by two classes of persons—1. The mercantile world, who tremble at a decision such as is sought for by the appellant. 2. Fraudulent traders, who will hail such a decision as a permission to them to indulge in every kind of misconduct and fraud, even felony, knowing that if they only confess all, the sole punishment will be a suspension of their certificate for three years.

**THE LORD CHANCELLOR.**—The question in this case is, whether the Court of Bankruptcy has got a power to adjourn the final examination of a bankrupt *sine die* where it is admitted that the bankrupt has laid a full and true declaration of all his estate and effects before the Court, and has in every way conformed to the rules of the Court. Having regard, then, to the provisions of the Act of Parliament, it appears to me to be very plain indeed that the order of the Court below cannot be sustained. That order purported to adjourn the final examination *sine die* under a power supposed to be given to the Court in that behalf by the 140th section of the Act of Parliament (20 & 21 Vict. chap. 60); but the section of the Act contained no suggestion or reason why such a construction should be given, nor did the wording of the section sanction such a supposition. The case of *In re Burke* (14 Ir. Ch. 107) was cited, but not as an express authority on this point, and I will approach the consideration of this subject quite irrespective of the decision in that case. The order of Judge Lynch, I repeat, cannot be sustained, and we are both of that opinion. No doubt that the Bankrupt Act of 1857 gives full power to the Court to adjourn the final examination *sine die*, but this must be considered with and read with the other sections of the Act, and we must give full effect to the policy of the bankrupt law. The meaning of the term examination is perfectly clear, it means a full and true discovery of all the estate and effects of the bankrupt; and the 376th section more fully defines what a discovery is, and what the examination should be, for it said he should make a discovery of his property, papers, &c., except his wearing apparel, and that of his family, and if he concealed any part of his property, or papers relating thereto, he should be guilty of a misdemeanor. That is an exposition of the meaning of the word "examination." Those requirements must be strictly followed in the certificate. In this case the examination is quite complete, and everything contained in the certificate has been done, and the law conformed to. It is argued for the respondent that the bankrupt was guilty of conduct which might be fraudulent, or might be considered as fraudulent, and of negligence, and that therefore the final examination must be adjourned. No doubt there is power for the Court to adjourn the final examination, but if so, it is for the purpose of obtaining a full and better examination. The case may arise which is provided for by the Act, as if the accounts and schedules were so incomplete that they cannot be bettered, and in such a case the Court will adjourn the examination *sine die*, but if so, the bankrupt can come in, stating that he can satisfactorily account, and then he can apply to be re-examined. But in the case before us now no adjournment could render the examination more satisfactory. The certificate only states that in the opinion of the Court the bankrupt

has conformed to the forms of the Court and complied with the requisite of the bankruptcy law. There are two stages of the proceedings—first, the examination, and after that the conduct of the bankrupt is to be inquired into. The second of those should only be inquired into when inquiry into the first is concluded. The judge, in the first instance, is not to inquire into whether the bankrupt has conformed to the law of traders, but whether he has conformed to the law of bankruptcy. If the judge is of opinion that the bankrupt has been guilty of misconduct as a trader, he can suspend his certificate for three years. Now, if the power contended for here was in the Court, it would annul all the sections of the Act relating to punishments; for then the Court might say, "We will not let the trader pass this examination; we will stop all proceedings *in limine*; we will not ask him a question; and we will adjourn the matter for ever." Any frauds that might be committed were punishable under the Act of Parliament. The judge has power to order a prosecution, but he has no power to say to the trader, "Your conduct has been so bad that I will not allow you to be examined at all; and you need not offer yourself for examination." The Bankruptcy Act enacts very fully what crimes should be punished, and awards punishments for them. The 381st section declared that he might be prosecuted for any fraud on his creditors, but it must be a fraud committed within three months before his bankruptcy. The jurisdiction is not in the Court below, those things are all provided for by other sections. Reverse the order of Judge Lynch.

**THE LORD JUSTICE OF APPEAL** concurred.

## Court of Chancery.

Reported by Oliver J. Burke, Esq., Barrister-at-Law.

IN RE CORNELIUS CREAGH, A SUPPOSED LUNATIC.  
Nov. 18.

*Commission, in the nature of a writ, de lunatico inquirendo—Venue.*

*Although a commission of lunacy is generally executed in the county where the supposed lunatic resides, yet it is perfectly competent to the Court to change the venue, when such change is manifestly a saving of costs to the estate of said supposed lunatic, and the Court, on these grounds changed the venue in this case from Ennis, to which place the Commission originally sped, to Dublin.*

THIS case came before the Court on motion by petition of Pierce Creagh, esquire, that a certain order made in this matter bearing date the 19th day of December, 1864, might be varied, and that the Commission thereby ordered to be sped to Ennis in the County of Clare, might be sped in the city of Dublin, before a special jury of the county of the city of Dub-

lin. The petition stated that many of the jurors of said county were relatives of said Cornelius Creagh, and of his, said Cornelius's, son-in-law, and of his influential solicitor, Mr. Michael Cullinan, a landed proprietor in that county. The petition then stated that petitioner was informed by certain persons therein named, that there was a great prejudice against him in said county, and that a fair and impartial trial could not be had there: and further, that the balance of convenience inclined towards Dublin. Petitioner's witnesses, 18 in number (in petition respectively named), among whom were medical witnesses of great eminence, who would necessarily be examined to prove the unsoundness of said Cornelius Creagh's mind, resided all in, or in the immediate vicinity of the city of Dublin. The petition also stated that one sided accounts of the motion for the commission, when it was before the Court, had appeared in the county papers, and that the speech delivered on that occasion by Mr. Brewster had appeared in all the county papers, while the speeches of Mr. Pierce Creagh's counsel were entirely suppressed; consequently an intensity of feeling hostile to the petitioner was wide spread among the special jurors of the County of Clare. In addition to which, the costs of bringing down special counsel at the ensuing assizes, would be enormous, while the same counsel, and the same medical witnesses would be on the spot in Dublin if the venue were changed.

*Whiteside*, Q.C., (with him *Dames*) was heard in support of the petition.—This Court has ample power to change the venue. It was for the Lord Chancellor to consider whether the preponderance of convenience inclined to Dublin rather than to Ennis. And all the authorities, though they are not numerous on this point at all, show that the Chancellor has power to alter the venue. The marginal note of *In re Waters*, a supposed Lunatic (2 Myln. & Cr. 38), and decided in 1836 by Lord Cottenham, is as follows—"To avoid expense, a Commission was directed to issue into Middlesex, although the supposed lunatic was residing in Herts."

*Brewster*, Q.C. (with *Exham*, Q.C., and *B. Smith*) was heard against the motion.—The general rule is laid down by Lord Hardwicke in *Ex parte Southcot* (2 Ves. sen. [407]), that the Commission ought to issue to the county where the mansion-house of the supposed lunatic is, which house is supposed to be the place of residence, and is considered as such, as in parochial payments, &c. In *Ex parte Baker* (19 Ves. jun. 340), Lord Eldon held that a commission of lunacy is uniformly executed at the residence of the party, for that purpose his mansion-house, and if none, his last place of abode would be considered his residence, and that there was no instance of an exception when the supposed lunatic was within the realm, and further that the convenience of witnesses, or that of counsel was no ground for exception. This is an unheard of application of the petition to change the venue he himself has selected.

THE LORD CHANCELLOR.—There can be no doubt that the general rule is that laid down by Mr. Brewster—however, there can be, and are, exceptions to that rule; though the Court is generally slow to make such exceptions, yet it is fully competent to the Court to do so. Now, as to the convenience of witnesses, I

do not think, on considering the affidavits, that much is to be said either way. There is, however, an element in this case not to be overlooked, and that is, that a number of the witnesses to be brought down are medical men—men of great eminence in their profession—Doctor Corrigan, for example. Now, bringing down such a man as that must be attended with enormous expense to the estate, if Mr. Cornelius Creagh be found on inquiry to be a lunatic, and I must therefore take care that the least possible costs shall be incurred. Those in charge of this gentleman's estate may not mind that much; they may not mind it, but I do. Again, special counsel may be, and it is said will be, brought down to the assizes at enormous expense. Lastly, a great deal of exasperation exists, it would appear on both sides, this family being divided in itself, and feelings of that kind, no doubt, must spread wider and wider each day among the friends of this family, who are connected widely through the County of Clare. Change the venue to Dublin.

### Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

[CORAM KEOGH, CHRISTIAN, AND O'HAGAN, J.J.]

CASEY v. OSBORNE.—June 22.

#### Construction of agreement.

*The plaintiff, who was a solicitor and attorney, held in his possession a will executed by a deceased client, upon which with other documents he claimed to have a lien for costs due to him by the client. The solicitor for the defendant (who was the son and heir-at-law of the deceased client) obtained possession of these documents upon giving to the plaintiff a written undertaking on the part of the defendant to pay to the plaintiff £100 in full for his costs in the event of making use of the documents in the progress of any suit. Subsequently, upon the defendant's application, the Court of Probate made an order that letters of administration to his deceased father should be granted to the defendant, upon condition of his lodging the will in question with the other documents; and upon his complying with this condition the letters of administration were granted. Held, that the plaintiff was entitled to recover the sum of £100.*

THE summons and plaint complained that heretofore and prior to the making of the agreement herein-after mentioned, the plaintiff had been solicitor and attorney of one Richard Boyse Osborne, now deceased, the father of the defendant, and as such solicitor and attorney was a creditor of the said Richard Boyse Osborne on foot of certain costs for business done for him by the plaintiff as such attorney and solicitor in a large sum, and far exceeding the sum of £100 herein-after mentioned, and also as such attorney and solicitor

tor had in his possession certain papers, writings, and documents which had been delivered to him by the said Richard Boyse Osborne, on all which plaintiff, at the time of the making of the agreement herein-after mentioned, claimed and had a lien for his said costs, and which were a security to the plaintiff for the payment thereof, and the defendant, at the time of the making of the agreement herein-after mentioned, was the son and heir-at-law of the said Richard Boyse Osborne, and as such was interested in and desirous of obtaining possession of the said papers, writings and documents, and thereupon in consideration that the plaintiff would abandon his said lien, and deliver up to one Robert W. Cherry as the attorney and solicitor of the defendant, the said papers, writings, and documents, he the said defendant undertook and promised that in the event of their (the said Robert W. Cherry and the defendant) making use of the said papers, writings, and documents in the progress of any suit, he the said defendant would pay to the plaintiff a sum of £100 in full for his said costs; the plaintiff did abandon his said lien; and did deliver up to the said R. W. Cherry, as the attorney and solicitor of the defendant, the said papers, writings, and documents; and afterwards the said defendant and the said Robert William Cherry, as his solicitor and his attorney, did make use of the same papers, writings, and documents, or some of them, in the progress of a certain suit in which the said defendant was an interested party, yet the defendant did not pay to the plaintiff the said sum of £100 or any part thereof.

The defence alleged that the said defendant, or the said Robert William Cherry, did not make use of the papers, writings, or documents in the summons and plaint mentioned, or any of them, in the progress of any suit.

At the trial before Monahan, C.J., it appeared that the father of defendant, Mr. Richard B. Osborne, had been a client of the plaintiff. He was in embarrassed circumstances for some time prior to his death, which took place in the year 1853. Shortly previously to the death of Mr. Osborne, senior, he executed to Mr. A. Smith, his former solicitor, a conveyance of his entire estate in the lands of Stone House. Before this deed was executed, Mr. Smith called on plaintiff and stated to him that he was aware that he, plaintiff, had acted as his (Osborne's) solicitor, and that a considerable sum was due to him for costs and advances; and that although he, Smith, was in no way bound to pay any part of these costs, and might take the conveyance of the estate without plaintiff being able to claim any lien upon it; yet as he did not wish that plaintiff should be at the loss of everything he would pay him the amount of his costs out of pocket, on the terms of plaintiff handing over to him the papers and documents of Mr. Osborne, held by him as a security. The plaintiff agreed to accept these terms; and the costs out of pocket having been measured at £60, Mr. Smith paid plaintiff that sum, and took for it a receipt. Plaintiff's client, Mr. Osborne, having died, the validity of the conveyance executed by him to Mr. Smith, became subsequently the subject of a suit between the widow of Mr. Osborne and Mr. Smith, and that litigation having resulted in the

defeat of Mrs. Osborne, certain proceedings were adopted by the defendant in this cause as the heir-at-law of his father, the late Mr. Osborne, against the representatives of Mr. Smith, who had died, on the allegation that Mr. Osborne, at the time he executed the conveyance was not sane. Previously to commencing the latter proceedings, Mr. Robert W. Cherry, defendant's solicitor, called upon plaintiff to obtain from him certain information which he required, in order to enable him to prepare a petition, and to sustain the suit he proposed to institute against Mr. Smith's representatives, and for any document which he, Mr. Casey, held. Plaintiff informed him that he held, at that time, an original will made by Mr. Osborne, dated 8th July, 1850, and some letters and other documents belonging to Mr. Osborne; but that as a sum of over £300 was due to him for costs and advances by Mr. Osborne, deceased, he would require some provision to be made for payment before he would give the required information, or hand over the documents he held. Mr. Cherry then proposed to give him an undertaking to pay the costs in case the suit succeeded. This Mr. Casey refused to take, Mr. Cherry having stated his intention of examining Mr. Casey in the cause, as any evidence he had to give in the matter would be subject to be impeached, on the ground that he was interested in the result of the suit. Mr. Cherry then proposed to Mr. Casey to give him an undertaking on behalf of his client, who resided in Canada, to pay £100 as a settlement for his costs, upon his handing over the will and letters which he had, the money to be payable in case the documents to be handed over by Mr. Casey should be made use of in any suit; and Mr. Cherry then on behalf of his client, the present defendant, wrote the following undertaking:—

Dublin, 23rd December, 1857.

DEAR SIR—I have this day received from you several documents, relating to the late Richard B. Osborne, and in the event of our making use of them in the progress of any suit, I undertake on the part of Mr. Richard B. Osborne, to pay you £100 in full for your costs. I am, &c.—ROBERT WM. CHERRY.

Mr. Casey then handed over to Mr. Cherry, Mr. Osborne's original will, and other papers and letters he held, and gave him all the information he possessed, and also the addresses of persons who could give evidence as to the state of Mr. Osborne's health and capacity. Although this transaction took place in 1858, Mr. Cherry did not commence any proceedings until 1861, when he, on behalf of his client, Mr. Richard B. Osborne, as the heir-at-law of his father, applied to the Court of Probate for administration to Richard B. Osborne, deceased, notwithstanding that he, the deceased, had made and executed three wills, on the grounds as stated in the affidavit of Mr. Cherry, sworn and filed the 13th day of July, 1861, in which he particularly referred to the will so handed over to him by Mr. Casey; and by an order of said Court, in said matter, bearing date the 18th December, 1861, administration was ordered to be granted, upon lodging the three wills mentioned in the affidavit, and letters of administration were thereupon issued. Having so obtained administration, Mr.



Osborne upon the 7th July, 1862, filed a petition in the Court of Chancery, praying relief against the representatives of Mr. Smith.

The Chief Justice directed a verdict for the defendant, and reserved liberty to the plaintiff to apply to have it changed into a verdict for him.

A conditional order was accordingly obtained, against which

*Estlin, Q.C., and Owen, showed cause.*

*Doues, Q.C., and S. Walker for the plaintiff.*

KROGH, J.—There is nothing in the case but the meaning of this document. [His Lordship read it.] I cannot imagine any words being more clear and unambiguous. What is the meaning of suit? It is the suing out process or taking steps in a Court for a particular purpose. Was not that done here? The party wished to clothe himself with the character of administrator; he wished to obtain letters. He takes whatever steps are necessary. He thereby takes a step in the Court; he sues for letters of administration. The Court made an order, "You shall have them on lodging the documents A, B, and C, one of which is the identical document." There is the proceeding taken.—The only Court of competent jurisdiction makes an order of the Court entitled "In the matter of the goods of" a particular person. You do bring in the will, and it is only upon complying with the condition that progress is made in that suit, and that letters are obtained. We are all of opinion that that was a suit—that this document was used in that suit.

CHRISTIAN, J.—I am not without some misgiving as to whether this is the use contemplated when the letter was signed, I mean so far as the Probate Court is concerned. I think it is better to rest the decision on that use in the Probate Court. I should have thought it necessary to confer with the Chief Justice in reference to the Court of Chancery. But as to the Court of Probate, I think it is pretty free from doubt. Nothing can be more general, nothing more free from ambiguity. Has there been a suit? There is a proceeding set on foot, an exercise of jurisdiction of the Court in one of the most usual matters. That would have been on citation if the party had not come in armed with the consent. But it is not the less a suit because of that. Mr. Owen has pointed out the distinction between contentions and non-contentious business, but it is a suit although the forms of the Court allow it to be proceeded with *ex parte*. The document has been employed, and without it the object in that suit could not have been obtained. It is said the plaintiff might have been compelled to bring it in. Mr. Walker has given a good answer to that. He would not in that case have lost his lien; the Court would have given it back to him. The lien he lost when he parted with the possession of these documents on the faith of that letter.

O'HAGAN, J.—I found my judgment also on the proceeding in the Probate Court. It is much safer that the judgment should be founded on that.

*Rule absolute.*

## Court of Exchequer.

Reported by Valentine J. Coppinger, Esq. Barrister-at-Law.

[CORAM HUGHES, B., AND DEASY, B.]

U. ATL WARD

*Substitution of service.*

*It is not a sufficient ground to found a motion for substitution of service on the solicitor of a defendant resident abroad, to show that that solicitor is acting for him in a suit depending in the Landed Estates Court, with reference to certain lands, no matter whether he be owner or incumbrancer thereof, nor even if the solicitor be shown to have money of defendant's in his pocket, inasmuch as such facts are not evidence of a general authority in him to act for defendant.*

Gamble, in this case, applied to the Court for liberty to substitute service of a writ of summons and plaint, on defendant residing in Australia, by serving the attorney acting for him in a cause at present pending in the Landed Estates Court. The substance of the affidavit was as follows—It was an action upon a bill of exchange brought by the plaintiffs against the defendant who was entitled to a sum of money out of an estate at present passing through the Landed Estates Court, and was there represented by Mr. Frederick Saunders, solicitor.

HUGHES, B.—This gentleman is the attorney for the defendant in a particular transaction, but so far as at present appears to us, his authority is limited to that transaction, and we have not therefore a sufficient case made to satisfy us that we should grant the order. If the defendant were actually the owner of the estate, we should require to know whether the solicitor was a general agent with a general authority. Even if Mr. Saunders had the money in his pocket, we could not, under these circumstances, grant this order, nor could you attach the money without having first obtained a judgment.

*Motion refused.*

BARRY v. MIDLAND GREAT WESTERN RAILWAY COMPANY OF IRELAND.

*Demurrer—Railways Clauses Consolidation Act, 1845, s. 154—Bye-laws—Arrest—3 & 4 Vict. c. 97, s. 16.*

*A railway passenger having duly paid for and obtained his ticket, refused, on arriving at his destination, to give up same to the company's officer, and thereupon, being personally unknown to the officer, was taken into custody for the purpose of being brought before a magistrate. To an action for arrest and false imprisonment at his suit, the defendants pleaded—*

*1. That the plaintiffs having been guilty of a breach of one of their bye-laws, was properly arrested un-*

der the authority of section 154 of the Railways Clauses Consolidation Act (1845), which provides a summary procedure for bringing to justice certain classes of offenders; and

2. That the plaintiff having been guilty of an offence against the 3 & 4 Vict. c. 97, s. 16, was properly arrested under the authority of, and in the manner provided by that statute.

Held, on demurrer to the first plea—That the summary procedure provided by the 154th section of the Railways Clauses Consolidation Act (1845) was applicable to the case of an offence against a bye-law, though not expressly purporting so to be, and that therefore the plea disclosed a good defence (*Pigot, C. B.*, dissentiente).

Held, on demurrer to the second plea—That the second plea was bad, inasmuch as the 16th section of the 3 & 4 Vict., c. 97, was conversant with a direct personal obstruction of the company's officer, and was not applicable to a case like the present, where the offence was one of omission only.

THIS was an action for arrest and false imprisonment against the Midland Great Western Company of Ireland, brought by a Mr. Michael Barry, a passenger on their line, and now came before the Court on demurrer to two of the defendant's pleas.

The defences, upon which the several issues of laws were knit, were as follows:—

2. That before and at the time of committing said several supposed trespasses, the defendants were a railway company duly incorporated under the Midland Great Western Railway of Ireland Act, 1845, and the several statutes incorporated therewith, including the Railways Clauses Consolidation Act, 1845, and as such they duly made and published certain bye-laws, including the bye-law herein-after more particularly mentioned, which bye-laws long before and at said time when and so forth had been duly reduced into writing and sealed with the company's seal, and duly approved and confirmed by the proper authorities in that behalf, and had been duly printed on boards, and duly published and affixed on the company's stations, and duly kept so affixed in pursuance of the statutory enactments in that behalf, and all conditions were performed, all things happened, and all times elapsed necessary to render said bye-laws valid, operative, and binding within the meaning of the statutes aforesaid, and to render penalties thereby provided duly enforceable at the said time when and so forth; and defendants aver that said bye-laws contained amongst others the provision or bye-law following: "That no passenger will be allowed to take his seat in or upon any of the company's carriages, or to travel therein upon the said railway without having first obtained a ticket and paid his fare at the respective offices or stations of the company on the line, each passenger on paying his fare will be furnished with a ticket which he is to show when required by the guard in charge of the train or other officer of the company, and to deliver up the same before leaving the company's premises upon demand to the guard or other servant of the company duly authorized to collect tickets: each passenger not producing or delivering up his ticket will be required to pay the fare from

the place from which the train originally started, or in default of payment thereof shall forfeit or pay the sum not exceeding 40s."

And the defendants say that under the express provisions of the Railways Clauses Consolidation Act, 1845, it was provided that bye-laws confirmed, published, and affixed in manner as said bye-law had been, and then was as aforesaid, should be observed by and binding upon all parties to whom respectively the same were applicable, and defendants aver that the plaintiff became and was a passenger on their railway within the meaning of said bye-law from a certain station on defendant's railway to their terminus in Dublin, and was duly furnished by the defendants with a ticket as provided by said bye-laws in that behalf, and defendants say that at the termination of said journey, and when the train in which the plaintiff then travelled had arrived at Dublin aforesaid for the purpose of allowing the plaintiff and the other passengers in said train to leave the defendants' premises, the officers of the company duly authorized to collect the tickets, demanded of the plaintiff and the other passengers to deliver up their tickets aforesaid before leaving the defendants' premises, which the plaintiff then wilfully refused to do, and thereupon said officers duly and in pursuance of said bye-law demanded of the plaintiff to pay his fare as by said bye-law provided which he also wilfully refused to do, and defendants aver that during all time aforesaid, and when refusing as aforesaid, the plaintiff, to his own knowledge had said ticket in his possession. and ready to be delivered up had he thought fit so to do, and defendants further aver the name and residence of the plaintiff were respectively then unknown to the said several officers of the defendants, and thereupon one Arthur Fleming, then being the defendant's station master, agent, and officer, and the plaintiff's name and residence being then unknown to him, caused the plaintiff to be seized and detained for the purpose of being conveyed with all convenient despatch before a justice of the peace, and the plaintiff was then accordingly in fact conveyed with all convenient despatch before a justice of the peace on the charge of having committed an offence against the said provision and bye-law, and to be duly dealt with according to law, as he lawfully might be, for the causes aforesaid, which are the several supposed trespasses in the plaintiff declared on.

3. That at the said time when and so forth, the plaintiff had been such passenger on the defendants' railway as on the second plea averred, and the defendants were such incorporated railway company as therein averred, and the said bye-law therein mentioned had then previously been made, published, and confirmed, and was in full force, validity, and effect as in the said plea averred, and the several acts complained of happened after the passing of the statute 3 & 4 Vict. c. 97, and defendants aver that the train in which the plaintiff then travelled arrived in Dublin at the termination of the journey, at, to wit, eleven o'clock at night, and stopped in order that the passengers' tickets including the plaintiff's might be collected, and the said passengers might be enabled to leave the defendants' premises, and defendants aver that it was requisite and necessary for the due carry-

ing on of the duties and business of the defendants as a railway company, and for checking the accounts and the due making up of the books of the said company that all and such of the tickets that had been issued to the passengers by the said train should be duly collected and handed over the company's servants, whose business it was to check the accounts and make up the books of the said company, and defendants say it therefore became and was the duty of the officers and agents of the company then being authorised to demand and collect the tickets, to go to the carriages then being at said terminus, and with reasonable despatch to collect, demand, and take from the passengers, including the plaintiff, their respective tickets so that the company's servants might be enabled to discharge the several passengers at the termination of the journey, and to conclude the business of the company for the night. The defendants' officers duly authorised to demand and collect the tickets, did accordingly go to the carriage in which the plaintiff was, for the purpose aforesaid, and demanded of the passengers therein, including the plaintiff, to deliver up their tickets, and several of the other passengers thereupon duly delivered up their tickets, but the defendants say that the plaintiff then wilfully obstructed and impeded the said officers and agents of the defendants in the execution of their duty upon the said railway, and at the said terminus, to wit, by wilfully and repeatedly refusing to deliver up to them or any of them the said ticket which it was then their duty to collect as aforesaid for the purpose aforesaid, although, as defendants aver, the plaintiff then had the said ticket in his possession ready to be delivered up had he desired so to do, and although, as plaintiff well knew, he was, by so obstructing and impeding said officer, delaying the said train at the hour aforesaid, and preventing the company's servants from discharging the passengers and concluding the company's business as aforesaid, and defendants say that thereupon the said officers of the company caused the plaintiff to be seized and detained until he could be conveniently taken before a justice of the peace in pursuance of the provisions of the statutory enactments in that behalf, which he lawfully might be for the causes aforesaid, and which are the several trespasses in the summons and plaint alleged.

#### *Demurrers.*

As to the second defence the plaintiff says that same does not disclose any valid or sufficient defence in law to the action of the said plaintiff, because plaintiff says that said defence professes to justify the detention and seizure of the plaintiff as in the plaint alleged, by reason of a breach by the plaintiff of one of the bye-laws for conducting the business of the said defendants' railway, and because such breach of a bye-law did not in law justify the detention and seizure of the plaintiff.

And as to the third defence by defendants pleaded the plaintiff says that same does not disclose any valid or sufficient defence in law, because the facts stated in said defence, and which purport to constitute a wilful obstruction of the defendants' officer in the discharge of his duty, are not sufficient to constitute an obstruction within the meaning of the statute provid-

ing for the offence of wilfully obstructing an officer of a railway company in the discharge of his duty.

#### *Points for Argument.*

As to the second defence—

First—Because no breach of a bye-law justifies a seizure or detention within the meaning or provision of 8 & 9 Vict. c. 20, s. 154, being the section under which said defence professes to justify the seizure and detention of the plaintiff.

Second—Because it is immaterial whether or not the name and residence of the plaintiff were unknown to the defendants' officers.

Third—Because seizure and detention of a party offending is only justified by a violation by such party of some provision of an Act of Parliament, to which such penalty of seizure and detention is attached.

Fourth—Because the alleged refusal of the plaintiff to deliver up his ticket as mentioned in said defence was not a violation of any of the provisions of the 8 & 9 Vict. cap. 20, ss. 103 & 104, said sections being the only statutable provisions with regard to passengers upon the railways offending against the traffic and other regulations for the management of railways in said sections mentioned.

As to the third defence—

First—Because said defence professes to justify the seizure and detention of the plaintiff, by an alleged wilful obstruction by the plaintiff of an officer of the defendants in the discharge of his duty, and because the facts stated in said defence do not disclose a wilful obstruction within the provisions of the 3rd Vict., c. 97, s. 16, under which section said third defence professes to justify the seizure and detention of the plaintiff.

Second—Because the alleged obstruction did not amount to an obstruction within the meaning of said 16th section.

Third—Because even if said alleged obstruction were an obstruction within the meaning of said 16th section, same was not a wilful obstruction within the meaning of said section.

Fourth—Because to constitute a wilful obstruction within the meaning of said 16th section it should be stated that plaintiff had the *intention* of obstructing, and the averments made in such third defence do not shew or state any intention to obstruct.

Fifth—Because it is consistent with the averment that the plaintiff knew he was delaying the train, that the plaintiff had not the intention of delaying the train, and because the intention of the plaintiff might have been, consistently with said averment, to effect some other object by the alleged delay in delivering, or refusal to deliver, said ticket to the officer of the said company.

*M'Kenna* (with him *Heron*, Q.C., and *Morris*, Q.C.) in support of the demurrers.—The summary procedure provided by the 8 Vict. c. 18, s. 154, in terms refers to offences under the Act and the special Act, and does not refer to offences created by a bye-law. In *Chilton v. London & Croydon R. Co.* (16 M. & W. p. 212; 5 R. C. p. 4; 16 L. J., Exch. p. 89) decided under an analogous section of the special Act, it was held that such section was not applicable to an offence created by a bye-law. As to the

second ground of demurrer, it would be pushing the law very far to hold that any Act which, in its ultimate consequence, has the effect of impeding any officer of a Railway Company in the execution of his duty, would render a man liable to this summary process of arrest.

*Falkiner* (and the *Solicitor-General*) for the defendant.—The argument founded on the maxim "*expressio unius*," &c. and with reference to the Railways Clauses Act (1845) s. 154, loses its weight, when we observe that that portion of the statute extending from section 140 to section 160, constitutes in itself a sub-code applicable to bye-laws; it would be quite different if we were bound to interpret the section as standing by itself. The bye-law in this case is made under authority of sections 108 & 109, and ought to be treated as part of the statute, on the same principle that an appointment made under a power is to be treated as made by the instrument creating the power. The present case differs from that of *Chilton v. London & Croydon Railway Company* in this, that the language of the statute under which that case was decided was different. The 110 & 111 sections expressly provide that the bye-laws shall be binding upon all parties when duly published, &c. Unless the 154th section extends to offences created by bye-laws, certain classes of offences would go unpunished; see sections 144 & 152. The 151st section deals with offences under bye-laws, though not expressly mentioning them. Unless the 154th section applied to bye-laws, there would be no power of appeal in a case of infringement of a bye-law. As to the third count we contend that the facts do disclose such a wilful obstruction of the company's officer as was contemplated by 3 & 4 Vict. c. 97, s. 16.

*Heron*, Q.C. in reply.—The power to imprison can only be given in a statute by most express words. See Comyn's Digest, tit. Bye-law. In this case certain acts were made by the bye-law, to constitute an offence, which had not been an offence until that bye-law became law; and it cannot be said that the offence was created by the Act itself. The 143rd and 145th sections distinguish between offences under bye-laws, and offences not under bye-laws; the 154th section applies to the latter class only. As to the second ground of demurrer, I have searched in vain for any case which goes the length of holding that any acts which have a tendency to obstruct an officer in the discharge of his duty, constitute a wilful obstruction within the 3 & 4 Vict. c. 97, s. 16.

*PICOT*, C. B.—In this case I am very sorry to say that I am obliged to differ from my learned colleagues. The action was brought for an alleged trespass and false imprisonment against the Midland Great Western Railway Company of Ireland, and the company in their pleas put forward the following defence. [Reads second defence.] To this plea the plaintiff demurred, and the question which we have to determine thereon arises on the 8 Vict., c. 20, s. 154, which provides that "it shall be lawful for any officer or agent of the company, and all persons called by him to his assistance, to seize and detain any person who shall have committed any offence against the provisions of this or the special Act, and whose name and residence

shall be unknown to such officer or agent, and convey him, with all reasonable despatch, before some justice, without any warrant or any other authority than this or the special Act; and such justice shall proceed with all convenient despatch to the hearing and determining of the complaint against such offender." The question now to be determined is whether or not the circumstances stated on the face of the plea justify an arrest under this section. In order to arrive at a correct decision on this point, the whole statute must be carefully looked into, and I shall now mention the sections which seem to me to have any bearing on the present point. The 145th section in terms provides a remedy for the infringement of a bye-law. [Reads it.] There is a form of conviction given in the schedule: and the following sections provide for the levying of the penalties thereunder. Secs. 103 & 104 provides for certain specific offences. [Reads them.] The bye-law in this case was passed in pursuance of secs. 108 and 109. [Reads them.] Now the argument on the part of the plaintiff is, that the mode provided by the statute for recovering a penalty provided by a bye-law, is under the 145th section, and it is contended that the 154th section only extends to those cases which are expressly provided for by the Act itself. The defendant on the other hand urges that the bye-law is to be treated as so far incorporated in as to become a part of the statute, and that the penalty to which the plaintiff had in the present case rendered himself liable is in fact a penalty imposed by the Act itself, though not mentioned in it. I confess that for my own part I have been unable to surmount the difficulty that I felt from the beginning in holding it to be such an offence as fell within the 154th section. It is true that the bye-law in question was imposed under the authority of the 109th section, and that s. 111 provides that such bye-laws shall be binding upon and observed by all parties, and shall be sufficient to justify all persons acting under the same; but there is no doubt also that s. 145 provided a remedy applicable to an infringement thereof; it is besides the first section of the statute that deals with offences created by bye-laws. It provides a certain procedure before two justices for those offences when not otherwise provided for. Now there are other penalties provided for by certain sections of the statute—for instance, ss. 23, 24, and 144, and these are clearly capable of being dealt with by a single justice. On the wording of the 145th section, the observation is at once suggested that when the Legislature meant the section to apply to bye-laws, they used language expressly applicable to them, as is seen in sections 143, 145, and 159. This Act forms part of a code of laws passed at about the same time including 8 Vict. c. 20, 8 Vict. c. 18, and 8 Vict. c. 16. In each of these statutes we find that section 165 of the first, 136 of the second, and 147 of the third, substantially correspond. We now come to the 154th section of the Act. In terms this section is made applicable to persons who have committed an offence against the provisions of this or the special Act, &c. It is only by implication that the section can be held to apply to any other class of offence. But still the provisions of a bye-law are not the provisions of a statute, and it is to this that it gives the summary power of arrest.

This being a penal enactment, I cannot bring myself to give it so large a construction. I find no reason for dropping the phrase "or by bye-law," if it were in fact intended to extend to offences created by bye-laws. It seems to me that the maxim *expressum facit cessare tacitum* here applies. I think, too, the probabilities are that it was made so by design. We might imagine that this resulted from the carelessness of the draughtsman. I confess that for my part I would be slow to confer the summary power of arrest. In fact the 3 & 4 Vict. c. 97, though purporting to be passed for the regulation of railways, expressly confines it to offences committed by the company's own officers, and withholds it as to strangers, while in framing the 103rd and 104th secs. it was considered necessary to give the power in express terms with regard to a class of offences where it was deemed advisable it should exist. Some other sections were referred to in the argument which I do not consider entitled to much weight. It is true that the word "bye-law" is not mentioned in sect. 148, but section 146 would seem sufficiently to supply the omission. Again, "bye-law" is omitted from section 151, and yet it is said that the section ought to apply to a penalty imposed by a bye-law. But a penalty may be imposed by a bye-law for an offence created by a statute, so that if we even admit the principle, it does not follow that the provisions of a bye-law are not on that account the provisions of the statute. It was said again that if we do not supply the word bye-law in s. 157, there would be no power of appeal in the cases of offence against the bye-laws. This argument is founded on a misreading of the section, inasmuch as it is the phrase "determination or adjudication," and not the words "penalty or forfeiture," which governs the subsequent phrase "under the provision of this or the special Act or any Act incorporated therewith." A reference to the 153rd section makes this plain. To all this the observation applies, *si velut non dixit*, and on the whole I am of opinion that section 154 was not applicable to the circumstances of the present case, and that the demurrer to the second defence should be allowed. With respect to the demurrer to the other defence, I think it ought to be allowed, and I believe that my brothers concur with me in that view. The question arises upon the construction of 3 & 4 Vict. c. 97, s. 16. It appears to me that this section only applies to a wilful personal obstruction, and is not intended to apply to any other breach of duty.

FITZGERALD, B.—[Reads 8 Vict. c. 20, ss. 8 & 9.] I am of opinion that the bye-law in the present case was duly made under the authority of section 9; that the requirements of the statute for the purpose of making it binding had been complied with; and that the bye-law itself was within the scope of the authority given by the 109th section. The 154th section provides this summary power of arrest where an offence has been committed against the provisions "of this or the special Act" by a person whose name and residence are unknown to the company's officer. The plaintiff here committed an offence against section 109 of the statute, and his name and residence being unknown, he was liable to be seized and brought before a justice. As to the other defence, I am of opinion that it is unsustainable. In order to consti-

tute an obstruction within the meaning of 3 & 4 Vict. c. 97, s. 16, some act must be done, the immediate effect of which is to obstruct the officer in the execution of his duty.

HUGHES, B.—I concur with my brother Fitzgerald in the result at which he has arrived, and I adopt his reasons.

DEASY, B.—I also concur in that view. Unless s. 154 applied under the circumstances of the present case, there would be no means of enforcing the bye-law in the vast majority of cases. In fact, in ninety-nine cases out of a hundred, the name of the party is unknown. It being thus essential, the question then arises, is the language of the 154th section sufficiently large to include an offence created by a bye-law. I am of opinion that it is. The fact of the omission of the word "bye-law" in this, and the insertion of it in other sections, ought not then to overweigh this paramount necessity.

*Demurrer to second defence overruled.  
Demurrer to third defence allowed.*

## Landed Estates Court

Reported by C. J. Manning, Esq.

[BEFORE JUDGE HARGREAVE.]

ESTATE OF CHARLES THOMAS M'ALLISTER, OWNER;  
W. P. FLETCHER, PETITIONER.—Nov. 8, 15, 1865.

*By a decree in a cause of M'Allister v. Walsh, certain properties which were recovered in the suit by a personal representative were expressed to be charged with the costs incurred by such personal representative in recovering those properties. Question—Whether the solicitor of the personal representative who acted for him in the cause in which the decree was made, and to whom the costs are due, can raise the amount of the charge by a petition in his own name in this Court for sale of the property so recovered. Held, that though the personal representative might himself apply to the Court to have the property sold to pay the costs, yet the solicitor had not the power to proceed as petitioner in his own name for that purpose; but that if the solicitor were to call on the personal representative, to proceed to a sale of the lands for payment of the costs, and the latter declined to do so, the Court would then consider the solicitor himself authorised to present a petition for sale in the name of the personal representative.*

THE case was argued on the 8th November, and judgment given on the 15th November, 1865. The facts sufficiently appear from the judgment.

Rogers, Q.C., for petitioner.

Flanagan, Q.C., and F. Walsh, Q.C., for D. M'Allister.

HARGREAVE, J.—This case raises a question of some novelty, and the facts also are a little peculiar.

It appears that in the year 1842, one Wm. M'Allister, as administrator of his mother and of his three aunts and his uncle, filed a bill in Chancery, the object of which was to obtain equitable relief in respect of a certain lease of 1786, which it was alleged was a graft on a former lease of 1783, and that in consequence of such graft the plaintiff, as administrator of the above parties, was entitled to five-sixths of it. There was a decree in 1845 establishing the graft, but the suit subsequently abated by the death of the plaintiff, and was ultimately brought to a conclusion by Charles Thomas M'Allister, who represented as administrator of two of the above parties (Patrick and Charlotte Cassidy), the legal title in two-sixths. The final decree, made in 1859, finds the shares and interest of the parties taking under the equitable title thus established, and declares Charles Thomas M'Allister entitled to his own costs, and those of the previous plaintiff not provided for by the first decree; and the decree also declares that his own costs as administrator of Patrick and Charlotte Cassidy were well charged upon their two-sixths of the lease. The petitioner in this matter was the solicitor for the original plaintiff and for Charles Thomas M'Allister, and the question which I have now to consider is, whether he personally is an incumbrancer on these shares of the lease, so as to enable him to sell them in this Court. Cause is shown on behalf of Daniel M'Alister, who has an interest in these sixths, inasmuch as he represents his father and uncle, who were two of the next of kin of Patrick and Charlotte Cassidy. The first question is, whether these costs are a charge on these shares of the lease. Now, no doubt an administrator incurring costs in recovering the intestate's chattel leases from a third party would be entitled to recoup himself such costs (if properly incurred,) out of the intestate's assets, more particularly out of the chattel actually recovered. This right cannot properly be called a charge or incumbrance; but if under such circumstances the administrator, as owner of the chattel lease, should come to the Court to assist him in settling and representing to the Court that the costs were unpaid, and that there was no means of paying

them except by a sale of the lease, and that therefore a sale was necessary, I think this Court would lend its assistance to him. It would be open to the next of kin to show that the property could have been recovered without suit, or that some or all of the costs were unnecessarily incurred, or to set up any other equitable defence. But the question is materially different when the Court is set in motion by the solicitor who acted in the cause for the plaintiff, and who claims to come in as an incumbrancer, alleging an equitable charge upon the property. It has never been considered that a solicitor recovering an estate for a client by action against an adverse party, thereby acquired an equitable charge upon the estate for his costs, so as to enable him to proceed to sell it to realise such costs. The decree of 1859 recognizes Charles Thomas M'Alister's title to the costs out of the property recovered, so far as such title could be recognized in a suit to which the next of kin were not parties, but that does not authorize the solicitor to take the administration of the estate out of the hands of the administrator, and sell the property himself by force of any title of his as an incumbrancer. The case of *Simpson v. Protheroe* (8 Jur. N.S. 711) to which I was referred, merely establishes that a solicitor who would have a lien on a judgment if recovered by his client at law, had a similar lien where the damages were paid into Chancery in a suit which stopped the action at law. The petitioner's position is a difficult one, but I think if he were to call upon Charles Thomas M'Allister to proceed to a sale of these two-sixths in order to raise a fund to pay the costs, and if he refused to adopt that course, this Court would consider the solicitor authorised to file a petition for sale in the name of the administrator. The next of kin might then show cause, if they have any ground for disputing their costs as due to the administrator; and if the administrator made any complaint, the Court would probably consider him sufficiently protected by an indemnity against costs. This petition, however, cannot be sustained as to these two sixths, and the cause must be allowed with costs.

END OF REPORTS.

# Law and Equity Index

TO

## THE IRISH JURIST,

INCLUDING

A DIGEST OF THE CASES DECIDED IN THE COURTS OF COMMON LAW AND EQUITY IN IRELAND, AS REPORTED IN THE SEVENTEENTH VOLUME OF THE IRISH JURIST (THE TENTH OF THE NEW SERIES,)

AND IN THE

FIFTEENTH VOLUME OF THE IRISH COMMON LAW AND CHANCERY REPORTS.

\* \* The letters at the conclusion of each paragraph indicate the titles of the Reports digested, and the names of the respective Courts, thus:—*Ir. Jur. Irish Jurist. Ir. C. L. R. Irish Common Law Reports. Ir. Ch. R. Irish Chancery Reports. H. L. House of Lords. C. Chancery. R. Rolls. Q. B. Queen's Bench. C. P. Common Pleas. Exch. Exchequer. Cir. Cas. Circuit Cases. Ex. Cham. Exchequer Chamber. Reg. C. Registry Cases. Crim. Ap. Court of Criminal Appeal. L. E. C. Landed Estates Court. Adm. Admiralty Court. M. O. Master's Offices. Consol. Cham. Consolidated Chamber. Bank. Bankrupt Court.*

ACCOUNT (*See DECREE TO ACCOUNT*).

ACCOUNT STATED (*See GUARANTEE*).

### ADMIRALTY.

In a collision suit where the promovent pleads one state of facts, and proves another, his petition will be dismissed; and under ordinary circumstances dismissed with costs, but if the impugnant vessel has pleaded a defence, which is at variance with the proofs at the hearing, the case will be dismissed, and each party will be left to bear their own costs. *The Lioness*, 10 *Ir. Jur. N. S. 30, Adm.*

### ADVANCEMENT.

A father who had Government stock standing in his own name, in the year 1838, transferred all, except a small portion, into the joint names of himself and his son A. He also, in the year 1856, deposited moneys in a bank in their joint names. Small purchases of stock in their joint names were made at intervals to 1861; and the joint deposits were made at intervals, to the father's death in 1862. These investments constituted the bulk of the father's property. No definite provision had been made for A by the father, but the other children, of whom there

were seven, lived away and were provided for. A was married, but lived mainly with his father, and assisted him in his business. The father during his life received all the dividends on the stock, and the interest on the deposit receipts, and also drew small portions of the principal money deposited. By the practice of the bank on every occasion of drawing the interest, new deposit receipts were issued. On the occasion of the joint lodgment, it was explained to the father by the bank manager that the effect would be to enable the son to draw the money after his death. The father then, and on a subsequent occasion, intimated that he intended he should do so without expense. There was evidence that the father, eighteen months before his death, stated to a third person that he did not mean all his property to go to his son A after his death; and a short time before his death he refused to allow his son to meddle with the stock certificates and deposit receipts; evidence of testamentary intentions in favour of the other children was also given. *Held* (reversing the decree of the Lord Chancellor), that there was an advancement for A to the extent of the joint investments and profits. *Fox v. Fox*, 15 *Ir. Ch. Rep. 89, Ch. App.*

*Semble*—The re-issue by the bank, according to its practice, of new deposit receipts, did not amount to a new investment. *Id.*



AMENDMENT (*See PRACTICE; VERDICT.*)APOTHECARY (*See COVENANT, 1.*)

## APPEAL.

1. *Appeal in Chancery on question of fact.*
2. *Costs of appeal from Petty Sessions.*

1. *Appeal in Chancery on question of fact.*

The Court, adopting the rule at law on a motion to set aside a verdict as against the weight of evidence, will not on appeal reverse the Master's decision on a question of fact, or direct a further inquiry, merely because a doubt may exist that the decision was right. *Gillespie v. Croker*, 15 Ir. Ch. Rep. 182, R.

2. *Costs of Appeal from Petty Sessions.*

The respondent in a case stated from Petty Sessions, applied to have the case struck out, as the conditions precedent of 20 & 21 Vict., c. 42, s. 2, had not been complied with; and also for the costs of the motion. *Held*, that the first part of the application being granted, the Court had no jurisdiction as to costs. *Richardson*, app., *Conway*, resp., 15 Ir. C. L. R. app. v., s.c. 9 Ir. Jur. N.S., Q.B.

Where the appellant omitted to set down a case stated for argument, the Court on the application of the respondent, ordered it to be set down. *Carnegie*, app., *Umphreys*, resp., 10 Ir. Jur. N.S., 133, C.P.

APPRENTICE (*See COVENANT, 1.*)ARRANGEMENT (*See BANKRUPTCY, 7. 8.*)

## ARREST.

1. *Effect of discharge from arrest under fiat, on proceedings.*
2. *Privilege of party attending hearing of civil bill from arrest.*

1. *Effect of discharge from arrest under fiat, on proceedings.*

Where a party who has been arrested under a judge's fiat is discharged from custody, the proceedings ought not to be set aside, but it may be different in a case in which the party obtaining the fiat has been guilty of misrepresentation. *Howard v. Archer*, 10 Ir. Jur. N. S. 119, C. P.

2. *Privilege of party attending hearing of civil bill, from arrest.*

The plaintiff in an action having been arrested for the costs of it, in his affidavit to support an application to be discharged from custody, deposed that from the 23rd of March to the 3rd of May he was attending certain works in Monasterevan, and that he came up to Dublin for the sole purpose of attending a civil bill process brought against him in the Recorder's Court, and was arrested on the 4th of May, on which day the civil bill process was in the Recorder's list, but was not heard. The Court ordered him to be discharged. *O'Reilly v. Mercer*, 10 Ir. Jur. N. S. 231, C. P.

*See FIAN.*

## ASSAULT.

To an action of assault and battery, a certificate

under the 24 & 25 Vict. c. 94, s. 44, may be pleaded, together with a plea that the assault was committed to prevent a breach of the peace. *Lawler v. Kelly*, 15 Ir. C. L. R., App. i., E.

## ATTORNEY AND SOLICITOR.

1. *Duty of attorney.*
2. *Country and city licence.*

*Lien for costs* (*See BANKRUPTCY AND INSOLVENCY, 8.*)

1. *Duty of attorney.*

Duty in an attorney in respect to a mistake committed by an opposite party's attorney—Undertaking to appear and defend—Costs. *Power v. Beale*, 10 Ir. Jur. N. S. 50, C. P.

2. *Country and city licence.*

An attorney who resided in Parsonstown, and ordinarily carried on business there, though he transacted business in Dublin through his son, who resided in his own house in Dublin, and who was not an attorney, was held not to be liable to pay a city licence under 5 & 6 Vict. c. 82, s. 16. *Stubber v. Hanrhan*, 10 Ir. Jur. N. S. 190, C. P.

## BANKRUPTCY AND INSOLVENCY.

1. *Act of bankruptcy.*
2. *Final examination.*
3. *Fraudulent preference.*
4. *Rights under bills of lading.*
5. *Warrants of attorney.*
6. *Vesting of lease in assignees.*
7. *Effect of protecting order under s. 343 of 20 & 21 Vict. c. 60, upon subsequent judgment mortgage.*
8. *Effect of arrangement proceedings on.*
9. *Vexatious litigation.*
10. *Bankruptcy of Railway Company.*
11. *Rights of assignees to equitable mortgage.*

1. *Act of bankruptcy.*

Where an assignment of a trader's property must result in the stoppage of his business and prevent him from paying other creditors, such assignment is an act of bankruptcy. Excepting from an assignment of a trader's chattels all the book debts due to him, but still leaving him in possession of the other chattels assigned, is not such an exception as to prevent the assignment from being an act of bankruptcy; and all the property purporting to be assigned by such a bill of sale passes to the assignees. *In re Lilburn*, 10 Ir. Jur. N. S. 99, Bankr.

2. *Final examination.*

Where a mercantile house in extensive trade keeps books accurately, and is, therefore, aware every year of its real condition, which shows a rapidly increasing state of insolvency, and accumulating debts, such accurate accounts strengthen the charge of reckless trading. It is highly criminal, in a mercantile point of view, to go on trading and drawing accommodation bills when a trader knows that he is in a state of insolvency, and that his difficulties are increasing every year, and it increases the enormity of the offence where a trader thus circumstanced, permits a member of another firm to accept bills in their names, without the knowledge or consent of his partners, such bills

being for the accommodation of the insolvent trader, even though some trivial accommodation was given to the solvent firm. *Re Asken Morrison*, 10 Ir. Jur. N. S. 197, Bankr.

Although books be accurately kept, and that there is no charge against a bankrupt for not having fairly accounted and vouched his schedule, yet where his conduct has been so reckless as a trader, and where he had carried on a system of manufacturing accommodation bills, the Court will adjourn the examination *sine die*. *Ib.*

The Court of Bankruptcy has no power to adjourn the final examination of a bankrupt *sine die*, where it is admitted that the bankrupt has laid a full and true declaration of all his estate and effects before the Court. *Re Morrison*, 10 Ir. Jur. N.S., 410, Ch. App.

### 3. *Fraudulent preference.*

Where a trader makes an absolute bill of sale of two ships in payment of advances made him by the party to whom he assigns, and who raises this money on bills discounted in a bank; and it appears that it was at the instance of the bank manager the bill of sale was effected, such transaction will not be held to be a fraudulent preference; and although the ships still remain in possession of the assignee, they will not come under the reputed ownership clause. Assignees will not be allowed to stand as specific creditors instead of a mortgagee in respect of sums advanced to pay off the mortgage. Although a party may establish his claim, costs will not be given where private transactions demand investigation. *Re Peter Curran*, 10 Ir. Jur. N. S. 59, Bankr.

### 4. *Rights under bills of lading.*

Where goods have been shipped to be conveyed to a certain port, for a freight agreed upon, bills of lading having been signed, in case of the subsequent bankruptcy of the shippers, his assignees cannot, before the sailing of the ship, insist upon having the goods re-delivered without paying the freight that would become due at the port of destination, and indemnifying the master against any claim in respect of the bills of lading. And the possession of such goods acquired by the messenger in consequence of a search-warrant granted by the Court, in no way changes the onus of proof, or entitles the assignees, where the goods have been re-delivered to the master by the Court, to cast upon him the duty of impeaching the title of the holders of the bills of lading at the port of destination. *Quære*, has the Court of Bankruptcy jurisdiction to issue a search warrant with respect to goods on the premises of a third party in England? *In re Webster*, 10 Ir. Jur. N. S. 17, Bankr.

### 5. *Warrants of attorney.*

A and B, traders, on the first of March, executed to C their bond with warrant of attorney to confess judgment thereon. The warrant was not filed until the 30th of March following, when judgment was marked thereon, and on same day duly registered in the judgment office. There was no affidavit filed verifying the date of the execution of such bond and warrant. A and B were adjudicated bankrupts on the 16th April following. C, prior to such bankruptcy levied by seizure and sale a considerable amount of his judgment debt, which by consent of the

parties was lodged in the Bankrupt Court, subject to their rights. *Held*, that the warrant of attorney was a warrant to confess judgment in a personal action, within the meaning of the 334th section of the Bankruptcy and Insolvency Act, 1857, and not having been filed or its execution verified in manner provided by that Act, the judgment entered thereon was null and void as against the assignees, and that they were entitled to money levied thereon. *Re Sheil and Lyons*, 10 Ir. Jur. N. S. 80, Bankr.

### 6. *Vesting of lease in assignees.*

The 268th section of the Irish Bankruptcy and Insolvency Act does not vest the lease of a bankrupt in the assignees, so as to make them liable to its covenants and conditions previous to election, even though in possession, and the Irish Landlord and Tenant Act, 23 & 24 Vic. c. 154, ss. 14 & 15, does not apply. Section 271, whilst it regulates the liability of the bankrupt, also recognises the obligation of the assignees, and is the protecting section for the landlord. *In re Ellis*, 10 Ir. Jur. N. S. 19, Bankr.

### 7. *Effect of protecting order under s. 343 of 20 and 21 Vict. c. 60, upon subsequent judgment mortgage.*

On the 19th of April, 1864, the Court of Bankruptcy and Insolvency made an order, under the 343rd section of the 20th & 21st Vict. c. 60, protecting R. K. (who was a trader unable to fulfil his engagements with his creditors) his person and property from all process. Before the making said order, one of the creditors, J. K., caused a writ of summons and plaint to be issued against said R. K., and on the 21st of April following, while said order was in full force and effect, said J. K. obtained judgment by default against R. K., whose estate and effects were in the possession of the official assignee since the said 19th April. On the 14th June following, Judge Lynch confirmed a proposal made to and accepted by three-fifths of the creditors, whereby it was agreed to take 10s. in the £, secured by the joint promissory notes of J. K. and another. On April 23rd, J. K. caused said judgment to be registered as a mortgage against certain leasehold premises of R. K. On the 11th of October, after the confirmation of said proposal, said J. K. presented a petition on foot of said judgment mortgage in the Landed Estates Court, and thereupon Judge Longfield, on the 16th of January, 1865, made an absolute order for the sale of said leasehold premises. *Held*, that as at the time of the registration of the said judgment as a mortgage, the estate was in the possession of the official assignees, and under the protection of the Court of Bankruptcy, the order for the sale of the said estate should be set aside. *In re Kennedy's estate*, 10 Ir. Jur. N. S. 213, Ch. App.

### 8. *Effect of arrangement proceedings on liens.*

Where a trader petitions the Court under the arrangement clauses, and the usual protection is granted, and order made for the assignee to receive and possess the trader's estate, such trader cannot, even by special agreement with his attorney, lodge with him or transfer to him any portion of his assets as security for his costs so as to create a lien in favour of such attorney. *Re North*, 10 Ir. Jur. N.S., 297, Bankr.

Where an attorney voluntarily hands over to the official assignee in an arrangement matter certain

scrip or railway shares deposited with him by the trader who is his client, he will have no equitable claim on foot of these shares for costs due to him by his client. An attempt to establish a special title or lien on the assets of a trader which the attorney has got possession of by special contract as security for his costs, such assets being bound by an order of the Court procured by that attorney, must fail, as it would be against the rights and equities of the several creditors bound by the vesting order. *Ib.*

Where proceedings are taken (although *bona fide*) without the authority of the Court or sanction of the assignees, the attorney is not entitled to any lien for costs, but where the assignees concede the right of proving for these costs the Court will sanction it. *Ib.*

Where there are transactions between an arranging trader and a third party, and a mistake as to the amount is made against that third party, who gives up certain railway shares in ignorance of that mistake no lien will follow the property thus given up. *Ib.*

#### 9. *Venationis litigation.*

Where a plaintiff brings an action for an alleged libel with a view to vindicate her character against an imputation of perjury, and where, before bringing the action, she submits a case to counsel, who says that "the article in question unmistakably imputes the commission of perjury, and that such imputation is a gross libel," still if, in the opinion of the judge of the Insolvency Court, the action was not brought *bona fide* with the legitimate object of protecting her character, but that the opportunity was snatched at for other and not legitimate ends, the Court will give a short remand in order to mark its sense of the impropriety of such action where the plaintiff is wholly unable to pay costs. *Re Travers*, 10 Ir. Jur. N.S., 360. Bankr.

#### 10 *Bankruptcy of Railway Company.*

(See RAILWAY COMPANY.)

#### 11. *Rights of assignees to equitable mortgage.*

G. purchased from T. a lease, and obtained a conveyance. The lease and assignment to T., which were the only title deeds, were in the hands of K. K. was sub-agent of the petitioners (the Bank of Ireland), and supposed the deposit of deeds was to secure a balance due to the bank by T. K. also had a private dealing of his own with T., and lent him £300 on a note, in which V. joined as security. T., having thus contracted with the bank to give them security by depositing the deeds, and availing himself of K.'s peculiar position, also agreed with V. to counter-secure him by depositing the deeds with K. The Court held that the deeds were in K.'s hands, as agent of the petitioners, and to secure a debt due from T. to them, and that G., knowing where the title deeds were, and not having enquired of K. for what purpose they were in his hands, was bound by notice of the petitioner's equitable mortgage. *Toner's estate*, 10 Ir. Jur. N.S., 378, L. E. C.

T. afterwards became bankrupt. The petitioners filed a petition for sale of the lease treating T.'s assignees in Bankruptcy as the owners, not, however, impeaching the sale to Gillan, but relying on their equitable title and Gillan's notice of it. Petitioners prayed their debt in the Bankruptcy Court as upon bills of exchange, and not claiming any equitable or

other mortgage, or any other security. The bankruptcy terminated in an arrangement under the 149th section of the Bankruptcy Act, under which the creditors were to receive 10s. in the pound from the owner's future profits in a specified manner. *Held*, that the proof and the subsequent arrangement taken together, were conclusive against the petitioners setting up the mortgage, or any security of a specific nature. *Ib.*

P. T. being indebted to the Bank of Ireland in a sum of £450, did in December, 1862, by way of equitable mortgage, lodge with said bank certain title deeds of his to certain premises in the city of A. Afterwards, on the 14th of April, 1863, said P. T. conveyed to G. said premises (G. having knowledge of said outstanding equitable mortgage to said bank.) On the 12th of May, 1865, P. T. was declared a bankrupt, and the bank when offering proof of said debt, inadvertently alleged that said £450 was secured to them by the bills of exchange of P. T., and they omitted all mention of said equitable mortgage. Finally, on 27th June, 1864, the bankruptcy terminated in an arrangement whereby 10s. in the pound was secured to the creditors under the 149th section of the Bankruptcy Act by said P. T. On the 21st of February, 1865, a petition having been filed for the sale of the estate of P. T. by said bank as equitable mortgagees, Judge Hargreave while he held that the bank were equitable mortgagees, nevertheless allowed the case to stand over until a motion then pending before the Court of Bankruptcy for liberty to the said bank to amend their proofs was disposed of, which motion on coming to be heard was, at that late stage of the proceedings, refused by said last mentioned Court. Thereupon on this case being re-entered for argument in the Landed Estates Court, Judge Hargreave by his order dated 25th May, 1865, dismissed said petition. *Held*, affirming the order of Judge Hargreave, that the petition was rightly dismissed. *Toner's estate*, 10 Ir. Jur. N.S., 403, Ch. App.

### BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Defences to actions on.*
2. *Summary procedure on.*

#### 1. *Defences to actions on*

To an action by indorsee against acceptor of a bill of exchange for £97 4s. 9d., payable three months after date, the defendant pleaded that said bill was passed to secure, amongst other things, a sum of £39 8s. 3d. due by T. C. before he was discharged as an insolvent, to plaintiff, which debt afterwards duly appeared on the insolvent's schedule, together with interest up to passing said bill to plaintiff; that T. C. was afterwards duly discharged from said sum by virtue of the proceedings in the said insolvency, of which the plaintiff, at the time of drawing, &c. said bill, had notice; and also to secure £30 advanced by plaintiff to defendant, at the time of the acceptance and indorsing of said bill; that save said £30 there was no consideration for the acceptance, &c. of said bill; that since said bill became due, defendant had paid £5 parcel thereof to plaintiff. Averment of payment into Court of £30. *Held*, on demurrer, that

the suspension of the plaintiff's remedy to proceed against the after-acquired property of his debtor, in the Insolvent Court, was a sufficient consideration for the indorsement of the bill to make him a holder for value; and that his right to recover against the acceptor was not affected by the 230th section of the Irish Bankrupt and Insolvent Act, 1857, notwithstanding that the bill had been in part passed to secure the schedule debt of the drawer. *Bernal v. Croker*, 15 Ir. C. L. R. 194, C. P.; s. c. 9 Ir. Jur. N. S. 31.

*Held* (per Monahan, C. J.) that this result equally followed, whether the bill in question was to be regarded as having been accepted for the accommodation of the drawer or not. *Ib.*

*Held* (per Christian, J.) that the defence sufficiently shewed that the indorsing of the bill was part of the original transaction, and that the bill had not been accepted for the accommodation of the drawer. *Ib.*

On an application to be allowed to plead to an action on a bill of exchange grounded on affidavit. *Held*, that a covenant between indorser and indorsee, that latter should not sue till prior parties to a bill have been exhausted, is ground for granting motion. *McGrath v. Semple*, 10 Ir. Jur. N. S., 398, Exch.

#### 2. Summary procedure on.

It is not competent to a defendant against whom an action has been brought under the Summary Bills of Exchange Act, to file a demurrer, any more than to plead a defence of fact without the leave of the Court. *Magrath v. O'Gorman*, 10 Ir. Jur. N. S. 115, C. P.

### CERTIORARI.

#### Costs.

Conviction quashed, as being made out of Petty Sessions. On making up the order in the office, it was found that costs would go against the defendants. On a subsequent application by the defendants, this Court gave the prosecutor the option of losing his costs in this proceeding, or accepting them on the terms of not bringing an action for the illegal conviction. *The Queen, at prosecution of Donohoe, v. The Justices of Longford*, 15 Ir. C. L. R. App. vii. Q. B.

### CHARGE (CREATION OF).

S. being indebted to E. in the sum of £15,000, and having covenanted to secure it on land, agreed to purchase lands from E., and, for part of the consideration, to give a mortgage of those lands, "subject however to a prior mortgage for £15,000." *Held*, that these words did not charge the £15,000 debt upon the purchased lands. *Eyre v. Sadleir*, 15 Ir. Ch. Rep. 10, Ch. App.

### CHARITY.

1. *Jurisdiction of Court of Chancery in cases of charities.*

2. *Validity and construction of bequests to charitable uses.*

1. *Jurisdiction of Court of Chancery in cases of charities.*

The Court of Chancery has not jurisdiction to release the Commissioners of Charitable Donations and

Bequests from trusts imposed upon them by Act of Parliament, and to appoint new trustees in their stead. *The Commissioners of Charitable Donations and Bequests v. The Attorney-General; In re Fanring's Charity*, 15 Ir. Oh. Rep. 384; s. c. 9 Ir. Jur. N. S. 146, Ch.

2. *Validity and construction of bequests to charitable uses.*

Testator, who died 18th July, 1864, by his will made within three months previous to his death, having acknowledged that he held in trust a sum of £7,650 for the convent of Glasnevin, charged his Gort estate therewith, which estate he directed to be sold, and the money to be raised out of the produce thereof, as also out of certain other funds. *Held*, that inasmuch as the testator was a debtor to said convent, such a bequest was not within the meaning of the 7 & 8 Vict., c. 97, s. 16. *Sherlock v. Blake*, 10 Ir. Jur. N. S., 351, Oh.

Testator by his said will directed his Rockfield property to be sold, and gave out of the produce of his Fountain Hill and Rockfield properties a sum of £2,000 for certain charitable purposes. He also directed his Fountain Hill property to be subject to a perpetual annuity of £100, which, with two acres of land, he bequeathed for other charitable purposes, viz., for the support of certain Roman Catholic Schools. He also gave £1,000, part of the produce of his estates, to a Roman Catholic school at Dalkey. *Held*, that these bequests were bad within the meaning of the 16th section of said Act, the will being made within three months previous to testator's decease. *Ib.*

### COMPANY.

1. *Liability of company incorporated by registration.*

2. *Remuneration of directors.*

1. *Liability of company incorporated by registration.*

A company incorporated by registration is not bound by a deed of agreement entered into by its directors, as the trustees for or on behalf of the company, which is not under the seal of the company. *McArdle v. The Irish Iodine Company*, 15 Ir. C. L. R. 146.

2. *Remuneration of directors.*

By the articles of association of a joint-stock bank, it was provided that the directors should be entitled to set apart and receive for their remuneration in each and every year, commencing from the incorporation of the company, a sum not exceeding £4,000, and to divide the same among them as follows—namely, three-fourths to be paid to and divided amongst the directors forming the board in London, as they shall from time to time determine, and the remaining one-fourth thereof shall be allowed and divided amongst the directors forming the said board in Dublin, as they may from time to time determine. The defendant was appointed a Dublin director, and acted as such for two years, and at the time of his appointment a deed of covenant was entered into between him and the company, by which he covenanted "to act and fill the position of one of the local board of

directors in Dublin, at the scale of remuneration provided by the terms and articles of agreement of the said company." There was one other director of the Dublin board. The board of directors never set apart any sum for the remuneration of directors. An action having been brought against defendant, for a debt alleged to be due by him to the company, he set off his claim for remuneration of his services as a director. *Held*, that there having been no setting apart of a fund for this purpose, said claim did not arise. *The English and Irish Banking Company (Limited) v. Gray*, 15 Ir. C. L. R. 538, C. P.

#### CONDITION.

The plaintiff being possessed of a term of years in certain premises, demised to the defendant, by lease containing a condition of re-entry in case certain sums of money thereby covenanted to be expended in the erection of buildings in the manner therein provided, were not so expended. Some months subsequent to the execution of the lease, the plaintiff, on being informed that defendant was desirous of subletting certain portions of the said demised premises for building ground, but had a difficulty in making sufficient marketable title on account of the existence of said condition, agreed to provide against that difficulty, and thereupon, by a writing under his hand and seal, and indorsed upon the back of the lease, covenanted with respect to any person who should become tenant for any portion of the demised in manner therein provided, that, in case the estate of the lessee should incur a forfeiture, such forfeiture "shall not in any manner whatever affect the interest or interests, or property of such person, &c. so as in any manner to deprive such person or persons, or any of them, of the full benefit and advantage of their respective buildings and holdings upon the said premises. And it is hereby further covenanted and agreed that, in case of any such penalty or forfeiture as aforesaid, being incurred, and that any proceedings be taken and rendered effectual on account thereof by said W. C. Colville, his executors, &c., then in such case he, the said W. C. Colville, instead of said James H. Hall, his executors, &c. shall be entitled to recover and receive the rents to be payable by such person or persons so becoming tenant or tenants to said premises in manner aforesaid, and that such person or persons so becoming tenant or tenants to such premises as aforesaid, shall not be rendered or become in any manner liable to pay any greater sum or sums than the yearly ground rent or rents, to be reserved and made payable respectively to said James H. Hall, his executors, &c. anything to the contrary of these presents or any portion thereof notwithstanding." The lessee having failed to perform the said building covenant, the plaintiff brought an action of ejectment on the title for condition broken. *Held*, per Deasy, B., Hughes, B., and Fitzgerald, J. (affirming *Doe v. Bateman* (2 B. & Ald. p. 168), that a lessee for years, who had had his whole interest, subject to a right of re-entry on breach of condition, might enter for condition broken, notwithstanding that he has no reversion in him. *Colville v. Hall*, 10 Ir. Jur. N. S. 169, Exch. Ch.

(Per Hayes, J.) that the receipt of rent subsequent to a breach by a receiver appointed by the Court of

Chancery at the suit of the plaintiff, did not necessarily amount to a receipt of rent by the plaintiff himself, and did not operate as a waiver of the forfeiture. *Ib.*

(Per Curiam) that the objection now raised, that no re-entry by the plaintiff had been proved at the trial, not having been there made, could not be relied on in the Court above. *Ib.*

That the endorsement upon the lease amounted to a release of the condition of re-entry, first (per Fitzgerald, B., O'Brien, J., and Pigot, C.B.;—*dissentientibus* Deasy, B., Hughes, B., Fitzgerald, J., and Hayes, J.) on the ground that the condition not being apportionable, and the words being sufficiently large and clearly intended to amount to a release of part, the apparent intention of the parties that the release should be limited in its operation should not be allowed to control a well settled rule of law to the contrary. Secondly (per Lefroy, C.J.)—That another construction would lead to multiplicity of suits and circuity of action. *Ib.*

(Per Deasy, B., Hughes, B., Fitzgerald, J., and Hayes, J.: *dissentientibus* Fitzgerald, B., O'Brien, J., Pigot, C.B., Lefroy, C.J.)—That the endorsement amounted merely to a covenant not to sue, on the ground that it simply purported to be such, and that such construction would best carry out the object of the parties. *Ib.*

*Quære*—1. Where a termor purports, in the premises of a deed to convey his whole interest, by words which, taken alone, would clearly operate as an assignment, but in the *habendum* reserves to himself a reversion of twenty-one days, shall the latter words so restrict the operation of the former as to reduce the instrument to a sub-lease? 2. Has it become necessary since the passing of the Common Law Procedure Act, 1853, to prove actual re-entry in ejectment on the forfeiture. *Ib.*

#### CONSIGNOR AND CONSIGNEE.

The consignor, in a bill of lading, loses his right of stoppage *in transitu*, upon the insolvency of the consignee, when, prior to the insolvency, the bill of lading has been transferred, by indorsement, to a purchaser for value, *bona fide*, and without notice of the consignee's insolvency. 18 & 19 Vict. c. 111. *Kemp v. Canavan*, 15 Ir. C. L. R. 216, Exch.

#### CONTRACT.

Plaintiff, wishing to sell his cattle at Huntingdon Market, entered into a contract at Kells with defendants that they should carry the cattle by their train to Dublin, and thence to Holyhead (to catch the train for Huntingdon) by one of their steamers, which was advertised to sail at a certain hour (which would have brought the cattle to Huntingdon in time), defendants did not send the cattle by that steamer, but by another, which sailed subsequently, and thus the cattle were late for the market, and had to be sold at a loss. At the trial the jury found for the plaintiff with substantial damages. *Held*, on motion to change the verdict into one for defendants, or else into one of nominal damages pursuant to leave reserved at the trial, that the conditional order obtained for that purpose must be discharged, and that the question as to the contract

and the amount of damages was rightly left to the jury, although plaintiff was aware of a sailing bill of defendants, whereby they alleged that they would not be responsible if, owing to want of room, cattle did not go on by the first boat, and had to wait for another. *Mathews v. The Dublin and Drogheda Railway Co.* 10 Ir. Jur. N.S., 396, Exch.

### CORPORATION.

The entry of a resolution in the minute-book of a corporation, accepting a proposal for a lease of part of the corporate property, was partially erased. *Held*, in the absence of evidence to the contrary, that the erasure must be presumed to have been made before the book was signed by the chairman of the meeting at which the resolution was passed. *Stevens's Hospital v. Dyas*, 15 Ir. Ch. Rep. 405, R.; s.c. 8 Ir. Jur. N.S. 411.

If there has been part performance of a contract for a lease by a corporation, the Court will decree a specific performance of it, though the contract was not under the seal of the corporation. *Ib.*

A corporation were empowered by statute to make leases of the corporate property under their common seal, for a certain term in possession, and at the highest rent; and the statute provided that all leases made in any other manner should be null and void. *Held*, that they were not precluded by the statute from entering into an agreement for a lease, provided it was carried into effect without delay, by the execution of leases in compliance with the statute. *Ib.*

### COSTS.

#### I. EQUITY.

1. *Costs of counsel on motion.*
2. *Priority of unpaid costs.*
3. *Out of what fund payable.*

#### 1. *Costs of counsel on motion.*

On taxation of costs, only two counsel shall be allowed on a motion except under very special circumstances. *Re Grady, a lunatic*, 10 Ir. Jur. N.S., 49, Ch.

#### 2. *Priority of unpaid costs.*

Unpaid costs have the same priorities as the demand, in establishing which the costs were incurred. *In re Hawksworth's estate*, 10 Ir. Jur. N.S., 255, Ch. App.

3. *Out of what fund payable.*—*See WILL (CONSTRUCTION.)*

#### II. LAW.

1. *Principles of taxation.*
2. *Costs of motion to amend where preliminary notice served.*
3. *Costs of motion to set aside judgment.*
4. *Action for contract or for wrong disconnected with contract.*
5. *Residence of parties in same civil bill jurisdiction.*
6. *Costs of Registry Appeal.*
7. *Costs of interpleader order.*
8. *Costs of Appeal from Petty Sessions.*
9. *Costs of Certiorari.*

#### 1. *Principles of taxation.*

On motion that it be referred back to the Taxing Master to re-consider his taxation of certain bills of costs, it appeared that after the trial of an action con-

sisting of eight different counts had been held at Nisi Prius, and had after lasting for eleven days, resulted in a disagreement of the jury, it had been referred to arbitrators to adjudicate upon the several differences existing between the parties; that the arbitrators had made an award, the terms of which were construed by the Court to amount to a decision that the costs of the respective parties should be taxed as if the defendant had succeeded upon the trial upon five of the counts specifically mentioned, and as if the plaintiff had succeeded upon all the other counts, and had obtained a general verdict, and that the difference between the amounts should be paid to the party entitled thereto. The Taxing Master had, upon the one hand, disallowed the plaintiff the costs of those portions of the briefs and pleadings, which were exclusively applicable to the issues upon which he had failed, and also such portion of the fees and refreshers to his counsel at the trial, as he considered would not have been incurred if the counts upon which the plaintiff failed had never been introduced into the writ of summons and plaint; and upon the other hand had allowed the defendant the costs of the entire of those portions of his briefs and pleadings as were exclusively applicable to the issues upon which he succeeded, as well as all that portion of the fees and refreshers to his counsel, which he considered would not have been incurred, had the issues which were found in his favour never been introduced into the writ of summons and plaint. *Held 1*—that where on a trial by jury, certain issues are found for the plaintiff, and certain issues for the defendant, and a general verdict is given for the plaintiff, the general rule since the passing of 16 & 17 Vict. s. 113, c. 60, as well as before that statute, has been, that the plaintiff should be declared entitled to all the costs which were not ascertained to be exclusively applicable to the issues upon which he had failed, while the defendant is only entitled to the costs ascertained to be exclusively applicable to the issues upon which he had succeeded; but in no such case can the defendant be entitled to an apportionment of any costs, unless the taxing officer has within his reach reasonable and satisfactory means of ascertaining the costs exclusively applicable to the portion of the case upon which he has succeeded. *Morgan v. Gray*, 10 Ir. Jur. N.S., 336, Exch.

2. That in such a case the taxing officer has a reasonable and satisfactory means of ascertaining the portion of the costs of the briefs, the pleadings, and the fees to counsel on the trial, as well on the side of the plaintiff as of the defendant, which are exclusively applicable to the issues upon the parties respectively succeeded; but that he has no such means of apportioning the amount of the refreshers, payable either to plaintiff's or defendant's counsel at the trial, which are exclusively applicable to the issues upon which each party succeeded, and there can therefore be no apportionment thereof. *Ib.*

The amount of the plaintiff's fees to counsel on the trial that should be disallowed when some of the issues are found against him, is found by subtracting the fees that would have been payable thereon, if the writ of summons and plaint had not contained the counts on which he failed, from the actual fees payable thereon. *Ib.*

The amount of the defendant's fees to counsel, on

the trial that should be allowed to him when he has succeeded on some of the counts and failed on others and had the general verdict against him, is to be ascertained by deducting the fees that would have been payable thereon, had the summons and plaint originally contained only those counts on which the defendant had failed, from the sum that would have been payable, supposing him to have succeeded on all the counts which the summons and plaint actually did contain. *Ib.*

2. *Costs of motion to amend where preliminary notice served.*

In an action brought for injury to the wall of a dwelling-house, and for the erection of a nuisance, the plaintiff's counsel, after notice of trial had been served, deemed it necessary to have the summons and plaint amended, by adding to it several counts; and a notice was served on the defendant's attorney, requesting him to sign a consent to have such counts added, and undertaking to pay the costs incurred by such amendments, and requesting him, if he required any other terms, to state them, in order to avoid the necessity of an application to the Court. The defendant's attorney replied that he could not advise his client to sign the consent. Upon motion by the plaintiff to amend the summons and plaint, the Court made the order, and refused to give the defendant the costs of appearing on the motion.—(Christian, *J. dissente*). *Smith v. Delacherois*, 10 Ir. Jur. N. S., 357, C. P.

3. *Costs of motion to set aside judgment.*

Plaintiff in an action of assault marked judgment against defendant by default. On motion to set aside the judgment grounded on affidavit by defendant that the default was occasioned by mistake on his part, *Held*, that the judgment should be set aside, and that as plaintiff ought not to have opposed the motion, he should not have the costs of the motion. *Reddy v. Dalton*, 10 Ir. Jur. N. S., 398, Exch.

4. *Action for contract, or for wrong disconnected with contract.*

A summons and plaint contained two counts framed in contract, for non-delivery of certain cattle. It also contained a count for trover, and a count for detinue of cattle. Defendants traversed the contracts alleged in the first and second counts, and paid £14 2s. 6d. into Court upon the other two. Issues were taken on the contracts and on the sufficiency of the money paid into Court. The jury found for the plaintiff upon one of the counts in contract, with £14 5s. damages, but found for the defendant upon the issue as to the sufficiency of the lodgment in Court. *Held*, by Lefroy, C.J., and Fitzgerald, J., that the plaintiff was entitled to half costs only, he having recovered less than £20 in an action of contract, and that he could not call the money lodged in Court upon the counts in tort in aid of the sums recovered by verdict on the counts in contract.

*Held*, by O'Brien and Hayes, J., that the whole summons and plaint should be considered as one action; that that action was not for a wrong disconnected with contract, and, therefore, that the plaintiff having recovered in all over £20 was entitled to his full costs. *Devine v. The London and North Western Railway Company*, 10 Ir. Jur. N. S. 27 Q. B.

5. *Residence of parties in same civil bill jurisdiction.*

Plaintiff, whose residence was within the civil bill jurisdiction of the city of Dublin, brought an action upon a bill of exchange in the Superior Courts, and obtained a verdict for a sum of under £20 against the defendant, who was an attorney at-law, and whose residence was in the country, and within a civil bill jurisdiction different from that in which the plaintiff resided.—Defendant had an office or registered place of business in the city of Dublin, but the license which defendant had was that of a country practitioner, which license, by the provisions of 5 & 6 Vict. cap. 82, s. 16, Schedule, in fact prevented him living for a longer term than forty days in the year within the limits of the said city. *Held*, that an attorney who had a country license, but who had a registered place of business in the city of Dublin, was not a resident in said city, within the meaning of the 97th section of the Common Law Procedure Act of 1856. *Tudor v. Lawson*, 10 Ir. Jur. N. S. 36, Exch. s. c. 15 Ir. C. L. R. 144.

Plaintiff sold and delivered goods to the defendant in one civil bill jurisdiction, namely, that of the city of Dublin, and applied for payment and was refused in another jurisdiction, viz., that of the county of Dublin, in which latter county both parties in fact resided. Plaintiff thereupon brought an action in the Superior Courts, and obtained a verdict for a sum under £20. On taxation of costs, the Taxing Master, having regard to the 97th section of the Common Law Procedure Amendment Act, 1856, declined to allow the plaintiff any costs whatsoever on the ground that the cause of action, to wit, the refusing to pay, arose in the same civil bill jurisdiction in which both the parties resided. The Court however held that the cause of action arose at the time of the sale and delivery of the goods, and that same was in a jurisdiction different from where the parties resided, and that the plaintiff was entitled to half costs. *Enright v. Kavanagh*, 10 Ir. Jur. N. S., 79; Exch. s. c. 15 Ir. C. L. R., 142.

The plaintiff, in an action brought to recover the sum of £66 2s., the rent of a mill situate in the East Riding of the county of Cork, recovered the sum of £1 18s. 8d. The defendant resided within the East Riding of the county of Cork. The plaintiff, who was the Clerk of Appearances and Writs in the Court of Chancery, resided for the greater part of the year in Pembroke-place, Dublin, but had a residence within the East Riding of the county of Cork to which he resorted in the long vacation. Upon appeal from the decision of the taxing master, *Held*, that the plaintiff was entitled to half costs. *Moffatt v. M'Ternan* (6 Ir. Jur. 177) followed; *Dawson v. Coleman* 10 Ir. Jur. N. S. 75, C. P., s. c., 15 Ir. C. L. R., 509.

6. *Costs of Registry Appeals.*—See FRANCHISE I. 6.

7. *Costs of Interpleader order.*—See INTERPLEADER.

8. *Costs of Appeal from Petty Sessions.*—See APPEAL, 2.

9. *Costs of Certiorari.*—See CERTIORARI.

COVENANT.

1. *Breach of.*

2. *Construction.*

1. *Breach of.*

By indenture between the plaintiff and defendant.



the defendant covenanted to teach the plaintiff the art and mystery of an apothecary. At the time of the indenture being executed the defendant kept a shop, making up his own prescriptions and those of other medical men. The defendant subsequently closed his shop, and confined his business to that of a general practitioner, making up his own prescriptions, but not those of other medical men. *Held*, that this did not disqualify the defendant from teaching the plaintiff the art and mystery of an apothecary, so as to entitle the latter to a direction in an action brought by him for breach of the covenant in the indenture. *Batty v. Monks*, 10 Ir. Jur. N. S. 1; s. c. 15 Ir. C. L. R. 388, C. P.

Action by lessor against lessee on covenant to repair. The lease of L. excepted "all timber and timber-like trees, now standing and growing thereon," and contained the usual covenant to keep in repair. The summons and plaint set out the covenant, assigning as breaches that defendant suffered said premises, and the fences thereof, to be out of repair, and cut down, and allowed to be cut down from off the said lands, a great number of large and valuable trees, &c. At the trial defendant's counsel objected to evidence as to the value of the trees cut down, on the ground that they were out of the demise. Verdict for the plaintiff, £10 for the general neglect, and £60 for the trees cut down. The Court was now moved to reduce the verdict by the latter sum. *Held*, that the cutting down the trees excepted was not an act of waste, and therefore was not a breach of the covenant to repair. *Allen v. Carver*, 15 Ir. C. L. R., 544; a. c. 8 Ir. Jur. N. S. 149. Q. B.

*Held* also, that on the pleading as framed, the defendant was not called on to raise the question as to the exception of the trees, &c. before the trial. *Ib.*

## 2. Construction.

Lessor, being seised in fee of certain lands, situate and lying on both sides of Alma-road, in the County of Dublin, by indenture bearing date the 11th June, 1855, demised the lands lying on the west side of said road to J. S., his executors, &c. for a term of years, and he thereby covenanted with the said J. S. that he the said lessor would not convert, or permit or suffer to be converted, any portion of the ground opposite to said premises thereby demised, or any part thereof, or any dwelling-house or building to be erected thereon, "for any purpose whatsoever, save and except and other than as a private dwelling-house to be erected and built," in the manner in lease provided. Lessor subsequently, on 19th June, 1860, leased to W. C. the lands lying on the east side of said road, and opposite to the premises demised to J. L.; forthwith W. C., having built a dwelling-house on the lands so leased to him, proceeded to build stables on one side of his said house, and opposite to and fronting the said premises of J. S. Upon application for an injunction to prevent the erection of said stables, it was *Held* (W. C. having notice of the covenants in the lease from lessor to J. S.) that the expression "dwelling house" included stables, and that as the building of stables was not provided against by the words of the instrument, the injunction must be refused. *Smith v. Crowe*, 10 Ir. Jur. N. S. 105. Ch.

## CRIMINAL LAW.

1. Uttering forged orders for payment of money.
2. Offences committed on boundaries of counties.
3. Evidence.
  - (a) Admissions.
  - (b) Admissibility of depositions.
4. Bail.

1. Uttering forged orders for payment of money. V. abstracted a number of forms of post office orders from a local post office, filled them up for various amounts, and signed them "G. J., pro-postmaster." He uttered those orders in payment for goods, and signed them as having received the amounts. *Held*, that although no letters of advice had been forwarded the orders were orders for the payment of money, and V. might be indicted for uttering forged orders for the payment of money. *The Queen v. Vanderstein*, 10 Ir. Jur. N. S. 314, Cr. App.

At the time of the uttering of the orders by V., H. and S. remained in a cab outside the shop in which V. uttered them, and assisted V. in taking away the goods which he had purchased, but they were not in the cab for the purpose of taking part in, or aiding, or assisting in the actual uttering. H. and S. were indicted with V. for the uttering, and were convicted. *Held*, that the conviction was right. *Ib.*

## 2. Offences committed on boundaries of counties.

Ir. an indictment under the statute 9 G. 4, c. 54, s. 26, enacting that offences committed on the boundaries of counties may be tried in either, it is not necessary that the county in which the offence was actually committed should be stated in the indictment, with an averment that such offence took place within 500 yards of the county within which the indictment was laid (Hayes, J., *dissentiente*). *The Queen v. King*, 10 Ir. Jur. N. S. 308, Cr. App.

*Regina v. Brown*, 1 Cr. & Dix. Abr. Notes of Cases, 46, overruled (Hayes, J., *dissentiente*). *Ib.*

## 3. Evidence.

### (a) Admissions.

M. J. suspected of having committed felony, was followed and stopped by a constable in plain clothes. The constable having told M. J. what he was, and that she (M. J.) was charged with felony, proceeded to put several questions to her, relative to a parcel in her hand, which contained the goods supposed to have been stolen. At the time he asked the questions, the constable had not told M. J. that she was under arrest, "but he would not have let her go." He did not expressly hold out any threat or inducement to M. J., nor did he, before she answered him, give her any caution. M. J. having answered the questions, the constable then told her she was not bound to say anything that would criminate herself; and said he should bring her to the police office. *Held*, by eight judges, that the conversation between M. J. and the constable was receivable in evidence; and by three judges, that it was not so receivable. *The Queen v. Johnston*, 15 Ir. C. L. R. 60, Cr. App.

Cases on this point generally reviewed. *Ib.*

### (b) Admissibility of depositions.

In a trial for manslaughter the deposition of the deceased was offered in evidence by the Crown. The deposition had been taken, not in the form of a deposition, but in the form of a statement.

in the schedule to the stat. 14 & 15 Vict. c. 93, but in the form A. a. It had no caption, and it appeared that no statement of any particular charge against him had been made to the prisoner previously to the deposition being taken. The deposition itself however shewed that the prisoner had stabbed the witness. *Held* (Christian, Hayes, and O'Hagan, JJ., and Hughes, B., dissenting) that the deposition was not admissible in evidence. *The Queen v. Galvin*, 10 Ir. Jur. N. S. 325, Cr. App.

#### 4. Bail.

Motion to admit prisoners to bail refused under the circumstances of the case (Hayes, J. dissentiente). *The Queen v. McCormick and others*, 10 Ir. Jur. N. S. 127, Q. B.

### DAMAGE.

In an action for false imprisonment it appeared that the defendant gave the plaintiff into custody on a charge of larceny; that thereupon the plaintiff was taken to the police office, and there stripped and searched in accordance with what was proved to be the practice of the police in such cases. The jury found for the plaintiff with £100 damages. Upon motion for a new trial on the ground that the evidence of searching was inadmissible, or that, if at all admissible it should have been alleged as special damage in the summons and plaint, and also on the ground that the damages were excessive, *Held* (O'Brien, J., dissentiente), that the evidence was rightly admitted, and that the verdict should stand. *Dunphy v. Moore*, 10 Ir. Jur. N. S. 235, Q. B.

### DECREE TO ACCOUNT.

By a decree to account, made by the Court of Equity Exchequer in 1786, in a suit in which the inheritance was represented by the first tenant in tail, a sum was declared to be a charge on certain lands. The tenant in tail afterwards died without issue, and the next tenant in tail in remainder was made a party by a bill of revivor; and there was a report of the sum due, and a final decree for a sale in 1773. In a suit to raise the charge by a sale of the lands, *Held*, that the decree to account gave a good title to a charge on the lands, though there was error in the subsequent proceedings, the bill being continued by bill of revivor only. *Bolton v. Fairclough*, 15 Ir. Ch. Rep. 229, R.

The Court of Equity Exchequer, in 1786, made a decree to account, in a suit in which the first tenant in tail who represented the inheritance was before the Court. Afterwards the said tenant in tail died without issue, and the next tenant in tail was made a party by a bill of revivor (and not by a supplemental or original bill). In 1793 there was a report of a sum due, and a decree for a sale. In a suit to raise the charge by a sale of the lands, it was *Held* (affirming the decision of the Master of the Rolls), that the decree to account gave a good title to the charge on the lands, although in the subsequent proceedings the suit was erroneously continued by a bill of revivor only. *Faircloth v. Bolton*, 10 Ir. Jur. N. S., 201, Ch. App.

### DEED.

1. Construction and operation of.
2. Execution.

#### 1. Construction and operation of.

A, being seised of lands, covenanted with B (his intended son-in-law) to give them to B as a portion with his daughter; and it was further covenanted by A and B that the lands should be to the use of A's daughter (B's intended wife) during her life, then (subject to an equivocal limitation in favour of B) to the use of the "issue," A reserving to himself a life use, and a provision for his wife in case she should survive him. This deed was executed in 1760. By a subsequent deed A assigned to B all his estate in the lands, to hold during his (the assignor's) life; this deed was executed in 1766. In 1768 A and B executed a third deed for the express purpose of explaining and confirming the deed of 1760, whereby they conveyed their respective interests to a trustee, limiting certain interests to themselves and to their respective wives, with an ultimate limitation to the "issue" of B, omitting words of inheritance. This deed also gave B and his wife a power of appointment to and amongst the "issue." *Held*, that the legal reversion in fee remained still vested in A, notwithstanding those several deeds, but that the beneficial interest should be deemed to have become altogether vested in B and his issue, and that this construction should still be acted upon, notwithstanding the time which had elapsed, the enjoyment having been always hitherto in accordance with it. *In re Given's estate*, 15 Ir. Ch. Rep. 328, L. E. C.

The legal estate and the beneficial interest having, however, become vested by descent in the last owner, the question as to whether there was not a merger of the latter was reserved for further argument. *Id.*

By indenture of mortgage of September 1, 1847, between A and B of the first part, C and D of the second part, and E of the third part, A and B conveyed certain lands to E in consideration of a loan of £2,000. The mortgage contained covenants on the part of A and B to repay the loan, and recited a collateral bond executed by them, and also recited a bond executed by C. and D. to secure the payment of the interest on the principal sum. In the latter bond, which was of even date with the mortgage, the personal covenants in the mortgage were not recited, nor the collateral bond executed by A and B, but the loan and conveyance were recited, and the bond proceeded in these terms, "Whereas C and D agreed to secure the punctual payment of the interest thereon, so long as the said sum of £2,000 shall remain outstanding. Now, the condition, &c. is, that if C and D, &c. do and shall, so long as the said principal sum of £2,000 sterling, or any part thereof, shall be permitted to remain upon the said security, pay interest for the said sum of £2,000, then the foregoing obligation to be void," &c. A subsequently filed a petition in the Incumbered Estates Court to sell the lands assigned to E, and on being sold they proved insufficient to pay E the principal. An action having been brought by E against C and D to recover the interest due, *Held*—1. That there was not a latent ambiguity in the bond which would render evidence admissible

to explain it. 2. That C. and D were liable. *Fleming v. Greene*, 10 Ir. Jur. N. S. 77, C. P.

A deed entered into by C, the trustees of the Corporation, Town Commissioners, and Grand Jury of Drogheda, and B, a contractor, for the purpose of building a new bridge over the River Boyne in that town, contained a clause "that all materials brought and left upon or about the said works by the contractor or by his orders for the purpose of being used in and about the carrying on the said works, should from time to time of their being so brought be considered as the property of and belong to the said C. as such trustee," &c. D, a creditor of B, subsequently seized in execution materials furnished by B. Upon the trial of an interpleader issue between C and D, it appeared that a portion of the materials seized was then in a yard and office hired by the contractor, on the South Quay of Drogheda, situate in the neighbourhood of the site of the proposed bridge, another portion on the South Quay (which appeared to be a public quay), at a distance of more than 120 feet from the site of the bridge and another portion on an open piece of ground also hired by the contractor, and distant about 849 feet from the site of the bridge. *Held* (following *Montgomery v. Middleton*, 8 Ir. Jur. N. S. 230), that the question whether the materials seized were "upon or about the said works," was a question for the jury. *Chadwick v. Daly*, 10 Ir. Jur. N. S. 288, C. P.

A previous clause in the same deed provided that if B. should become insolvent, or for any such reason should omit to continue the works, it should be competent to C to serve a notice on him requiring him to continue them; and that in default of his doing so within ten days after such notice, the materials should become the property of C, and he might employ others in the execution of the works. *Held*, that this did not operate to prevent C from obtaining in the materials as soon as they were deposited upon the works such a qualified property as prevented the sheriff from seizing them at the suit of a creditor; and that after a ten days' notice he acquired a different sort of property in that in which he had a qualified property before. *Id.*

By a settlement executed on the marriage of B and C, reciting that B (the wife) was entitled to the lands of X under a will, and was entitled under the same will to a part of the lands of Y, as having survived her sister, and of the lands of Z in remainder, and as also entitled to a sum of £600; that it had been agreed that the properties before mentioned should be vested in a trustee upon certain trusts, i.e., in trust, in the first place, to secure a jointure for her, B conveyed the lands of X and Y to the use, as to X, of C for life; remainder to the use of B for life; remainder in trust for the issue of the marriage; and it was agreed that B was to have all the property that C might have or be entitled to during her natural life, and that C would not sell or mortgage any of the properties during the life of B without her consent and approbation first had and obtained under her signature. *Held*, first, that there was a resulting trust as to the lands of Y for B and C in her right; secondly, that C was entitled to the lands of Z for life, with

remainder to B for life. *Elliott v. Kempston*, 15 Ir. Ch. Rep. 120, B.

A being seized in fee of certain estates subject to a charge of £200 for his sisters B and C, to be divided equally between them, on the occasion of their respective marriages, gave a judgment, dated Hilary Term, 1802, and Easter Term, 1802, to secure portions of £1000 and £2000 for them respectively. In 1809, A executed a voluntary post nuptial settlement, whereby after reciting that he was seized in fee of the said estates, subject to a jointure of £600 for his wife, and subject also to certain charges, amounting in the whole to £3000, principal money, with which his said estates stood charged for the use of his sisters, as expressed in their several marriage settlements, and reciting that from the love and affection which he bore his wife and children, he was anxious to settle and assure the inheritance of his said estates in order to secure for his family the most certain and liberal provision which the nature and value of his estates would admit of, he settled the lands on himself for life, with remainders over in strict settlement. A subsequently contracted debts, which were secured by judgments on his life estate. On the marriage of his eldest son in 1831, A executed a deed by which he adopted and confirmed the limitations in the deed of 1809. The judgment of Easter Term, 1802 was paid off out of the rents and profits of the life estate of A, who died in 1861. *Held*, that there was no intention shown by the deed of 1809 to operate A's life estate with the judgment of Easter Term, 1802, and that therefore the judgment creditors on the life estate were entitled to raise out of the inheritance the amount paid out of the life estate on foot of this judgment. *Dolphin v. Aylward*, 15 Ir. Ch. Rep. 583, Ch. App., s.c. 9 Ir. Jur. N. S. 141.

Ejectment on title, for the mountain of S. By fee farm grant, one of the defendant's granted certain lands to the plaintiff, "together with the mountain and common therewith, held and enjoyed before the time of the making of a certain lease." By patent of 1689, Charles the Second granted lands, of which the lands in fee-farm grant formed part, to the ancestors of G, "with a proportional part of the unprofit-lands belonging to the said towns and lands, according to the number of profitable acres adjudged by Commissioners' certificate." *Held*—that the words in the fee-farm grant granted an undivided proportional share in the mountain, in the proportion that the lands in the fee-farm grant bore to the lands in the patent. *Poole v. Griffith*, 15 Ir. C. L. R. 238, s.c. 9 Ir. Jur. N. S. 201.

J. P. was entitled under a sub-lease of certain lands for the lives of himself and wife, the reversion of which sub-lease was in C., and C. was entitled under a lease in *quasi fee*, the reversion of which lease was in J. P. J. P. by indenture of mortgage, bearing date 30th September, 1841, conveyed the lands in fee with all his "estate and interest therein" to the mortgagees, the petitioners. Petitioners insisted that a general grant of this kind will carry every interest of the grantor, and consequently that the sub-lease was conveyed and granted by said deed of mortgage. *Held*, that the general words of a deed will pass the

entire estate of the grantor, unless it shall appear by other parts of said deed that it was the intention of the parties that same should not pass. *Lanauze v. Reynolds*, 10 Ir. Jur. N. S. 353, Ch.

## 2. Execution.

A deed executed by A on behalf of B, must, in order to bind B, be executed by A in the name of B, or by A in his own name, with such words as show that he is acting solely as the agent of B in such execution. *McArdle v. The Irish Iodine Company*, 15 Ir. Q. L. R. 146, Exch.

## DEFAMATORY WORDS.

1. *Where they are the subject of a criminal information.*

2. *Privileged occasions.*

1. *Where they are the subject of a criminal information.*

Defamatory words spoken of and to the mayor of a borough in the execution of his office, while presiding at a meeting of the town council, are properly the subject of a criminal information. So *Held*, per Lefroy, C. J., and Hayes, J. (*dissentientibus* Fitzgerald and O'Brien, JJ.) *The Queen v. Rea*, 10 Ir. Jur. N. S. 219, Q. B.

2. *Privileged occasions.*

To an action for slander, which complained that the plaintiff being the servant, and in the employment of C. R., the defendant spoke and published of him that he, the plaintiff, was inducing the defendant's servant to rob him by carrying his victuals out of his house, and was hanging about the defendant's house for the purpose of committing a felony, whereby the plaintiff lost his situation of head nursery man, which he then held under the said C. R., the defendant pleaded that before and at the time, &c., the defendant had, as a domestic servant, one J. L., who told him, the defendant, that the plaintiff had previously debauched her, and subsequently threatened to do her personal violence, and had incited her to steal from the defendant's house some meat and bread for the plaintiff's use, which the said J. L. did at such solicitation, while the plaintiff was loitering about the defendant's house, in the truth of which statements the defendant believed, and that the said J. L. had urged the defendant to request of the said C. R. to prohibit the plaintiff from further visiting her, and that for the purpose, not only of carrying out the said wishes of the said J. L., but likewise of causing the plaintiff's said master to prevent the plaintiff from further molesting the said J. L., or coming again to the defendant's house, or again inducing the said J. L. to steal the defendant's goods and chattels, the defendant, in conversation with the said C. R. spoke and published the words complained of. Upon motion for judgment *non obstante veredicto*. *Held*—that this plea disclosed a privileged occasion. *Cassidy v. Kincaid*, 10 Ir. Jur. N. S. 176, C. P.

Plaintiff was a carrier of goods to a railway company, and sent his agent to meet objections which had been raised against the validity of a claim made by plaintiff of half a crown extra for the carriage of the goods, and defendant, as chairman of the said company, being the proper person to determine as to

the validity of said claim, spoke the following words—"While I am chairman of the company, not one farthing of that half-crown shall Mr. Fishbourne get. If it cost me £500 I will contest it with him before I submit to such a swindle and imposition." The agent then remarked, that plaintiff had had dealings with different railway companies, and that that was the first time such language had been used of him. In answer to which defendant said—"Well, all I can say is, he has been a damned lucky man not to be found out before." To an action brought for these words defendant pleaded justification, and privilege on the grounds of his interest in the subject-matter. *Held*—on demurrer (*Fitzgerald, B. dissentiente*), that as defendant had only pleaded to the words spoken before the agent's remark (which were admitted to be privileged) and not to the subsequent words which imputed general misconduct to plaintiff, his defence was demurrable. *Fishbourne v. Lord Lucan*, 10 Ir. Jur. N. S. 209, Exch.

See LIBEL.

## DETINUE (ACTION OF).

1. *Payment of money into Court.*

2. *Election in.*

1. *Payment of money into Court.*

To an action of detinue the defendant cannot plead payment of money into Court in satisfaction of the value of the goods. *Moore v. The Dublin and Meath Railway Co.* 15 Ir. C. L. 140, Exch.

2. *Election in.*

In an action of detinue, alleging no special damage, the Court will compel the plaintiff to elect whether he will stay all proceedings on delivery of the chattel in dispute on payment by the defendant of nominal damages, and of all the costs of the action, or will proceed for greater damages at the risk of all costs. *Lyons v. Keller*, 15 Ir. C. L. R. App. i.; s. c. 9 Ir. Jur. N. S. 381, Exch.

## DISMISSAL.

A suit brought by a judgment creditor on behalf of himself and the other judgment creditors on the life estate of X, to which a trustee for all the judgment creditors was a party, was dismissed on the merits at the hearing. One of the other judgment creditors, who was not a party to the former suit (save so far as he was represented by the trustee), subsequently instituted a suit for a similar purpose, which relied upon different equities, and put forward additional facts supported by new evidence. *Held*, that the dismissal of the first suit was not an absolute bar to the prosecution of the second. *Dolphin v. Aylward*, 15 Ir. Ch. Rep. 583, Ch. App. s.c. 9 Ir. Jur. N. S. 141.

## DISTRESS.

A warrant "to enter and distrain all that and those the plot of ground, &c.; and the distresses to take, &c.; and the same to dispose of according to law, to satisfy the sum of, &c. due and payable out of said premises by M. M. O., H. J., and J. K., the tenants thereof," &c. is not informal under 9 & 10 Vict. c.

111, s. 12. *O'Reilly v. Mercer*, 10 Ir. Jur. N. S. 149, C. P.

### DOWER.

A widow's claim to dower does not in the absence of an assignment of dower give the widow an immediate estate in the lands; and an ejectment is maintainable against her without a demand of possession. *McEnally v. Wetherall*, 15 Ir. C. L. R. 503.

### ECCLESIASTICAL LAW.

#### Dilapidations.

Dilapidations resulting not from wilful default on the part of the late dean, but from natural decay, charged on the benefice, and not on the executors of the late dean. *In re the Dilapidations of the Deanery House, St. Patrick's, Dublin*, 10 Ir. Jur. N. S. 38, Cons.

*Contra*, as to those resulting from such wilful default. *Ib.*

Folding doors introduced by the late dean into the wall of the parlour is waste, and their removal and the restoration of the wall charged against the executors of the late dean, the value of the doors being allowed for. *Ib.*

A gate house removed by the late dean, with the assent of the dean and chapter, but without any faculty, held waste, and the amount necessary to rebuild it charged against the executor of the late dean. *Ib.*

Suggestions on the present law of dilapidations, and for its improvement. *Ib.*

### EJECTMENT.

The plaintiff in an ejectment claimed the premises in dispute under a conveyance of 20th May, 1861, from one W. G. and a lease subsequently made by himself, the lives in which had expired. The case made by the defendant at the trial was, that in 1831 possession of the same premises by sod and twig was given to her father by W. G. on the occasion of his marriage with the daughter of the said W. G. It did not appear that in 1831 W. G. had any greater interest in the premises than a tenancy at will. Evidence of the continuance in possession by W. G. and of possession by the father of the defendant and his family having been given on both sides respectively, the judge put to the jury the following question—Did W. G. transfer to J. S. the actual possession of the premises, and did J. S. retain such possession? and the jury answering the question in the affirmative, he directed a verdict for the defendant. *Held*, that this was a misdirection. *Latouche v. Penninck*, 10 Ir. Jur. N. S. 273, C. P.

A tenant in common has no right to use the name of his co-tenant in common as a co-plaintiff in an action for non-payment of rent without his consent; and the Court will, on motion, at the instance of the party whose name is employed, direct the name to be struck out, and the plaintiff's attorney to pay the costs. *Stubber v. Roe*, 15 Ir. C. L. R. 506, C. P.

### ELECTION.

Though knowledge of the law is imputed to every person, yet knowledge of the law of equity as to the doctrine of election is not. Election is a question of

intention, and is generally to be inferred only from a series of unequivocal acts. Thus, where S. continued in the possession and enjoyment of settled estates till his death, but he had mortgaged the lands to H. in fee-simple, these facts did not prove an intention to elect under the settlement; nor, on the other hand, did the facts that S. had disentailed the estates and mortgaged them afford proof of an intention to take against the settlement. *Spread v. Morgan*, 10 Ir. Jur. N. S. 341, H. of L.

If a party, who is bound to elect between two estates, continues, without being required to elect, in possession of both, such possession and enjoyment, inasmuch as it affords no proof of preference, cannot be held to be an election to take one and reject the other. *Ib.*

N., the devisee in trust under will of S., who had been bound to elect between two estates, and continued in possession of both till his death, instituted a suit to ascertain which of the estates of S. were charged with debts and legacies, and A. consented to a decree. *Held*, (reversing the order of the Irish Court of Chancery), that A's consent to such a decree did not impliedly admit that S. had power to devise all the estates which his will purported to devise, but that it merely admitted the validity of the will and of the trust so far as there were means of carrying it into execution. *Ib.*

*Semble*, a party having an equity to compel an election, does not forfeit that equity by delay in enforcing it: (per Lord Chelmsford.) *Ib.*

*See WILL.*

### EQUITY.

#### *Ignorance of law.*

When money has been paid or a conveyance executed in ignorance of a point of law, relief may be granted by the Court of Chancery; but relief will not be given when it would be against good conscience that the party who made the mistake should be freed from the consequence of his own error. *Cooper v. Phibbs*, 10 Ir. Jur. N. S. 239, Ch.

### ESTATE PUR AUTRE VIE.

1. *As to necessity of words of inheritance to pass absolute estate in.*

2. *Barring estate tail in.*

By a marriage settlement the equitable interest in a moiety of lands held for lives renewable for ever was conveyed to trustees, in trust, after the decease of the wife, in case there should be any issue of the said intended marriage, to pay and apply all and singular said full moiety, or one-half of said estates and properties, amongst said children, share and share alike; the yearly rents, issues and profits, and the interest and produce thereof, to be paid to and amongst them until the youngest of said children should attain the age of twenty-one years, and then to divide all and singular the said moiety, or one-half of said estate and property, and principal sum and sums of money equally between and amongst them. *Held*, that an only child took an estate for life only. *Brenan v. Boyne*, 15 Ir. Ch. Rep. 189, R.

In a deed, words of limitation are necessary to pass the entire estate in a lease for lives renewable for

ever, whether the estate conveyed be legal or equitable. *Ib.*

Words of inheritance in a deed not necessary to pass the absolute interest in an estate *pur autre vie*. *Brenan v. Boyne*, 10 Ir. Jur. N. S. 63, Ch. App.

P. W., who was seised for an estate for lives renewable for ever in the lands of Derrreen, had two daughters, E. and C. Upon the marriage of C. with B. a settlement was executed, whereby the said father, P. W., granted said lands to trustees upon trust, after the decease of C., in case there should be any issue of the said intended marriage, to pay and apply all and singular said full moiety or one half of said estates and properties amongst said children (without adding any words of limitation). The deed then provided that if C. died without issue, then the trustees, their heirs, &c. shall stand seised and possessed of all and singular the moiety of the lands of Derrreen "for the sole exclusive use and benefit of the said P. W. his heirs," &c. C. had one child, K. *Held* (reversing the decision of the Master of the Rolls), that in a deed words of limitation are not necessary to pass the entire estate in a lease for lives renewable for ever, and that K. took an absolute estate in said lands, and not an estate for life merely. *Brenan v. Boyne*, 10 Ir. Jur. N. S. 63, Ch. App.

## 2. Barring estate tail in.

J. R. by his will made in 1807, charged certain estates *pur autre vie*, of which he was seised, with several annuities and other incumbrances, and subject thereto he devised said estates to trustees to permit his son James to receive the rents, &c. for his life, and on failure of issue of said James, remainder to his son John for life; and on failure of issue of said John, to his daughters Eliza and Ellen, and to his grandson, J. N. B. as tenants in common in *quasi tail*.—By indenture of 20th January, 1827, the said James and John assigned to P. O. as much as in them, or either of them lay, the said lands upon the trusts therein declared. Subsequently P. O., then owner of the mere legal estate, by indenture of marriage settlement bearing date the 22nd October, 1837, conveyed said lands to trustees upon trust for P. O. for life, remainder to his daughter for life, with remainder over to the children of the marriage.—J. N. B., who was equitable tenant in *quasi tail* in remainder to one-third of said lands under said will, was an executing, though not a granting party to this settlement. *Held*, that P. O., the owner of the legal estate, and J. N. B., the equitable tenant in *quasi tail* of one-third of said lands in remainder having joined in said conveyance, same was a sufficient bar of the *quasi entail* of said one-third, and that J. N. B., who was an executing, though not a granting party to said deed, had conveyed thereby his estate as effectually as if he had been a granting party. *Bonyng v. Finucane*, 10 Ir. Jur. N. S. 141, Ch.

## ESTOPPEL.

S. agreed with E. for the purchase from him of lands sold in the Incumbered Estates Court, but not yet conveyed. Part of the consideration for the purchase was to be a bill of exchange accepted by the T. Bank. S. forged a conveyance from the Incumbered Estates Court to persons from whom he had

traced title to himself, and executed a conveyance to W. reciting the forged conveyance as if genuine. Afterwards, the Incumbered Estates Court executed a conveyance to S., reciting the purchase-money to be E's. *Held*, that under the genuine deed, an interest in the land passed by estoppel to W. That E. had not a lien for the amount of the bill. *Egry v. Sulley*, 16 Ir. Ch. Rep. 1, Ch. App.

## EVIDENCE.

1. Acts of ownership.
2. Ancient documents and records.

### 1. Acts of ownership.

A policy of insurance against fire effected by one of the parties in an ejectment is not admissible in evidence to show an act of ownership over the premises in dispute. *Latouche v. Penninck*, 10 Ir. Jur. N. S. 273, Q. P.

### 2. Ancient documents and records.

Where on the trial of this issue, whether the lands were plaintiff's lands, as alleged, the plaintiff had given *prima facie* proof of a tenancy from year to year subsisting in him, and the defendant for the purpose of displacing that case, and showing that the interest of the former tenant, under whom the plaintiff claimed, had expired with his life, having first proved that A (the former tenant) had entered into possession at a certain period twenty-eight years before, and during her life paid a certain rent, tendered in evidence a document purporting to be a proposal, bearing the said date, for the holding of the premises for the term of her natural life, at the said rent, and purporting to have affixed thereto said A's mark, and duly accepted by the then landlord; and although evidence had been given of the deceased landlord's signature, and that the said documents were found among his papers, yet as none had been given of said A's mark, and said evidence was received at the trial, subject to objection. *Held*, that such document was not admissible as evidence for the defendant, either as an ancient document or as a declaration against interest, and a new trial was therefore granted. *Mognahan v. Barry*, 10 Ir. Jur. N. S. 136, Exch.

*Quare*—If evidence had been given to show the impossibility of proving the document by living testimony, would the document have then been admissible? *Ib.*

*Held*, that a map made in the year 1609 of the six escheated counties of the province of Ulster, by virtue of a commission issued by the Crown under the Great Seal of Ireland, dated the 21st of July, in the 7th James I. and which map was preserved in the State Paper Office in London, was properly receivable in evidence. *Staples v. Harpur*, 10 Ir. Jur. N. S. 121, Ch.

The book of distributions is evidence of title. *Poole v. Griffith*, 15 Ir. C. L. R. 238, Ex. Ch. ac., 9 Ir. Jur. N. S. 201.

See CRIMINAL LAW, 3.

## EXCEPTIONS (CONSTRUCTION AND VALIDITY OF).

Demise of the whole territory or precinct of land, commonly called A, containing in itself, by estimation, thirty-two poles of land, more or less; the whole ter-

ritory or precinct of land, commonly called B, containing in itself, by estimation, six poles of land, more or less; the whole territory or precinct of land, commonly called C, containing in itself, by estimation, two poles of land, either more or less, being, in all, forty poles of land, save and except two poles of G, situate, lying, and being in the manor of A. *Held*, that the exception was good. *Ellis v. The Lord Primata*, 15 Ir. Ch. Rep. 237, R.

Demise of the whole territory or precinct of land commonly called Termon, containing in itself by estimation 40 poles of land, save and except 2 poles of Gortaquil, situate and being in the manor, &c. *Held* (affirming the order of the Master of the Rolls), that the exception of said 2 poles is good. *Ellis v. The Lord Primata*, 10 Ir. Jur. N. S. 61, Ch. App.

A mere mistake of the conveyancer shall not entitle a party to relief in equity. *Ib.*

Lessor granted certain lands in fee-farm to lessee and his heirs, "excepting the use and benefit of all mines and minerals that might be found in and upon the said granted premises." Upon and under said lands a certain "fire clay" was found to exist. On cause petition for an injunction to restrain the lessees from taking said clay from out of said lands or any part thereof, it was *Held* that, while the surface clay was not excepted by the reservation in said lease, the clay which was got out from a depth in the ground by mining apparatuses was excepted, and that therefore the injunction must be granted, restraining the lessees from taking the clay from beneath the surface, and refused so far as the surface clay was concerned. *Staples v. Harpur*, 10 Ir. Jur. N. S. 121, Oh.

#### EXECUTOR.

1. Power of sale by.
2. Devastavit.

##### 1. Power of sale by.

A will contained a direction that part of the testator's property should be sold or disposed of except the interest in a certain house, for ten years only, if thought advisable on the part of the executors, and bequeathed the property to his son who was a minor. The executors sold the whole interest in the house to the respondent, who had notice of some restriction on the executors' power to sell. There were no debts. *Held*, in a suit to impeach the sale, that the sale being a breach of trust, the respondent was bound to prove that the sale was at the full value. *M'Mullen v. O'Reilly*, 15 Ir. Ch. Rep. 251, R.

A testator devised to his brother all his estate, by discharging all his bequests and just debts; if not, the estate was to be sold by auction, at the discretion of his executors; and he wished them to discharge his just debts. *Held*, that the executors took no interest in the testator's real estate, but had merely a power to sell. *Thompson v. Todd*, 15 Ir. Ch. Rep. 337, R.

There is no Irish statute corresponding with the 21 Henry 8, c. 4 (Eng.) Therefore if two executors have a power to sell real estates, and one of them renounce, the power cannot be exercised by the other. *Ib.*

*Quere*—Whether a power to sell real estate is suf-

ficient to entitle a party to sue for specific performance of an agreement for a partition of it. *Ib.*

##### 2. Devastavit.

A sale or mortgage of a leasehold estate by an executor is not impeachable unless the mortgagee is privy or party to a fraud or devastavit by that executor. *In re Johnston's estate*, 10 Ir. Jur. N. S. 139, L. E. O.; s. c. 15 Ir. Ch. Rep. 260.

It is a devastavit when an executor or an executrix deals with assets for any purpose not connected with the administration of the testator's estate. *Ib.*

An executrix cannot carry on a partnership business with her testator's assets, nor can she raise capital for that business by mortgaging her deceased husband's property. Such a proceeding constitutes a devastavit, and the Court will dismiss a petition filed by a mortgagee to raise his charge. *Ib.*

#### FIAT.

Affidavit to ground a judge's fiat, made before any writ issued, and so without title of cause, or the Court in which it was sworn. *Held*, that the fiat issued thereon was good, the writ having been issued before the fiat. *Enright v. Enright*, 15 Ir. C. L. R. App. xiv.; s. c. 10 Ir. Jur. N. S. Q. B.

*See* ARREST.

#### FISHERY.

1. Construction of grant of.
2. Appeals under st. 26 & 27 Vict. c. 114.
  - (a) Fixed net legally erected, &c. within s. 4.
  - (b) Partial abatement.
  - (c) Meaning of "land adjoining" in s. 19 of stat. 6 & 6 Vict. c. 106.

##### 1. Construction of grant of.

The O'N.s claimed the fisheries in the river Bann under royal letters patent of 19th Charles 2, which letters granted said fisheries in said river to the parties in that patent mentioned. At that time the waters flowed in a circuitous course from a point on Lough Neagh to a point on Lough Beg. At a subsequent period said two points were connected by a right line called "the new cut," through which cut a great portion of the waters thenceforward flowed, and in this cut now, though not at the time of the patent, called the Bann, the M'E.s fished. The Master of the Rolls restrained by injunction, bearing date the 5th of November, 1864, the M'E.s from fishing in the river Bann "within the limits of the several fishery granted" by the aforesaid letters patent. *Held*, that the injunction ought not to have been granted, inasmuch as the place in which the M'E.s fished did not form any part of the river in which the several fishery was created by said letters patent. *M'Erlane v. O'Neill*, 10 Ir. Jur. N. S. 233, Ch. App.

*See* LANDLORD AND TENANT, 4.

##### 2. Appeals under st. 26 & 27 Vict. c. 114.

- (a) Fixed net legally erected, &c. within s. 4.

A fixed net erected in 1854, but unused from 1867 to 1863, and of which during the open season of 1862, only some gye-poles remained standing, is not a "fixed net legally erected for catchingsalmon or trout during the



directors in Dublin, at the scale of remuneration provided by the terms and articles of agreement of the said company." There was one other director of the Dublin board. The board of directors never set apart any sum for the remuneration of directors. An action having been brought against defendant, for a debt alleged to be due by him to the company, he set off his claim for remuneration of his services as a director. *Held*, that there having been no setting apart of a fund for this purpose, said claim did not arise. *The English and Irish Banking Company (Limited) v. Gray*, 15 Ir. C. L. R. 538, C. P.

#### CONDITION.

The plaintiff being possessed of a term of years in certain premises, demised to the defendant, by lease containing a condition of re-entry in case certain sums of money thereby covenanted to be expended in the erection of buildings in the manner therein provided, were not so expended. Some months subsequent to the execution of the lease, the plaintiff, on being informed that defendant was desirous of subletting certain portions of the said demised premises for building ground, but had a difficulty in making sufficient marketable title on account of the existence of said condition, agreed to provide against that difficulty, and thereupon, by a writing under his hand and seal, and indorsed upon the back of the lease, covenanted with respect to any person who should become tenant for any portion of the demised in manner therein provided, that, in case the estate of the lessee should incur a forfeiture, such forfeiture "shall not in any manner whatever affect the interest or interests, or property of such person, &c. so as in any manner to deprive such person or persons, or any of them, of the full benefit and advantage of their respective buildings and holdings upon the said premises. And it is hereby further covenanted and agreed that, in case of any such penalty or forfeiture as aforesaid, being incurred, and that any proceedings be taken and rendered effectual on account thereof by said W. C. Colville, his executors, &c., then in such case he, the said W. C. Colville, instead of said James H. Hall, his executors, &c. shall be entitled to recover and receive the rents to be payable by such person or persons so becoming tenant or tenants to said premises in manner aforesaid, and that such person or persons so becoming tenant or tenants to such premises as aforesaid, shall not be rendered or become in any manner liable to pay any greater sum or sums than the yearly ground rent or rents, to be reserved and made payable respectively to said James H. Hall, his executors, &c. anything to the contrary of these presents or any portion thereof notwithstanding." The lessee having failed to perform the said building covenant, the plaintiff brought an action of ejectment on the title for condition broken. *Held*, per Deasy, B., Hughes, B., and Fitzgerald, J. (affirming *Doe v. Bateman* (2 B. & Ald. p. 168), that a lessee for years, who had had his whole interest, subject to a right of re-entry on breach of condition, might enter for condition broken, notwithstanding that he has no reversion in him. *Colville v. Hall*, 10 Ir. Jur. N. S. 169, Exch. Ch.

(Per Hayes, J.) that the receipt of rent subsequent to a breach by a receiver appointed by the Court of

Chancery at the suit of the plaintiff, did not necessarily amount to a receipt of rent by the plaintiff himself, and did not operate as a waiver of the forfeiture. *Ib.*

(Per Curiam) that the objection now raised, that no re-entry by the plaintiff had been proved at the trial, not having been there made, could not be relied on in the Court above. *Ib.*

That the endorsement upon the lease amounted to a release of the condition of re-entry, first (per Fitzgerald, B., O'Brien, J., and Pigot, C.B.;—*dissentientibus* Deasy, B., Hughes, B., Fitzgerald, J., and Hayes, J.) on the ground that the condition not being apportionable, and the words being sufficiently large and clearly intended to amount to a release of part, the apparent intention of the parties that the release should be limited in its operation should not be allowed to control a well settled rule of law to the contrary. Secondly (per Lefroy, C.J.)—That another construction would lead to multiplicity of suits and circuity of action. *Ib.*

(Per Deasy, B., Hughes, B., Fitzgerald, J., and Hayes, J.: *dissentientibus* Fitzgerald, B., O'Brien, J., Pigot, C.B., Lefroy, C.J.)—That the endorsement amounted merely to a covenant not to sue, on the ground that it simply purported to be such, and that such construction would best carry out the object of the parties. *Ib.*

*Quære*—1. Where a termor purports, in the premises of a deed to convey his whole interest, by words which, taken alone, would clearly operate as an assignment, but in the *habendum* reserves to himself a reversion of twenty-one days, shall the latter words so restrict the operation of the former as to reduce the instrument to a sub-lease? 2. Has it become necessary since the passing of the Common Law Procedure Act, 1853, to prove actual re-entry in ejectment on the forfeiture. *Ib.*

#### CONSIGNOR AND CONSIGNEE.

The consignor, in a bill of lading, loses his right of stoppage *in transitu*, upon the insolvency of the consignee, when, prior to the insolvency, the bill of lading has been transferred, by indorsement, to a purchaser for value, *bona fide*, and without notice of the consignee's insolvency. 18 & 19 Vict. c. 111. *Kemp v. Canavan*, 15 Ir. C. L. R. 216, Exch.

#### CONTRACT.

Plaintiff, wishing to sell his cattle at Huntingdon Market, entered into a contract at Kells with defendants that they should carry the cattle by their train to Dublin, and thence to Holyhead (to catch the train for Huntingdon) by one of their steamers, which was advertised to sail at a certain hour (which would have brought the cattle to Huntingdon in time), defendants did not send the cattle by that steamer, but by another, which sailed subsequently, and thus the cattle were late for the market, and had to be sold at a loss. At the trial the jury found for the plaintiff with substantial damages. *Held*, on motion to change the verdict into one for defendants, or else into one of nominal damages pursuant to leave reserved at the trial, that the conditional order obtained for that purpose must be discharged, and that the question as to the contract

brought to the postmaster. *Wynne's case*, 15 Ir. C. L. R. 359, Reg. App.

An objector gave in evidence a notice of objection, duly stamped by the postmaster, with the name and address of the voter objected to indorsed upon it. The duplicate notice of objection, undorsed, was delivered by post to the voter in an envelope directed to the same address as the indorsement of the stamped notice. *Held*—that the notice served was not a "duplicate," and was not duly "directed" to the party objected to. (*Fitzgerald, B. and Deasy, B. dissentientibus.*) *Id.*

### (c.) Effect of service of.

A voter whose name appeared upon the registry refused to prove his right to vote on the mere proof of service of a notice of objection upon him. The chairman thereupon expunged his name. *Held*—that the chairman had not sufficient evidence before him to warrant his decision. *Carroll's case*, 15 Ir. C. L. R. 374, Reg. App.

### 5. Evidence, who judge of admissibility of.

The chairman is the sole judge of the admissibility of evidence tendered; therefore an appeal upon the ground that the chairman had admitted the probate of a will as evidence of a devise, was dismissed. *Fisher's case*, 15 Ir. C. L. R. 369, Reg. App.

### 6. Costs of appeal.

Although an appeal be dismissed, the Court will not give costs, if in their opinion there has been a miscarriage in the case. *Carmichael's case*, 15 Ir. C. L. R. 371, Reg. App.

## II. MUNICIPAL.

### 1. In Dublin.

A man who being rated for premises in the city of Dublin, which include a "house, warehouse, counting-house, or shop," and having the other necessary qualifications, parts with the possession of the whole or of a part of such premises other than the "house, warehouse, counting-house, or shop," does not thereby disentitle himself to have his name inserted in the burgess roll. *Johnson v. The Lord Mayor of Dublin*, 15 Ir. C. L. R. 1, Q. B.; s.c., 9 Ir. Jur. N.S. 324.

### 2. In boroughs other than Dublin.

A burgess of a borough (other than Dublin) in Ireland, is disentitled to have his name retained on the burgess roll, if the rate-book, for the time being in force, does not evidence that the very premises, in respect of which he claims a right to the municipal franchise, were, during the twelve months prior to the last day of August, preceding the revision, rated to the relief of the poor, at the annual rated value of not less than £10. *The Queen v. Mayor of Belfast*, 15 Ir. C. L. R. 164, Q. B.; s.c., 8 Ir. Jur. N.S. 27.

## GARNISHMENT ORDER.

See PRACTICE (Law), 13.

## GUARANTEE.

A guarantee was entered into in the following terms: "R. M. and Son, gentlemen, considering that

you have employed W. F. as your agent, I hereby agree, and bind, and oblige, as cautioner for the whole intromissions, actings, and doings of the said W. F., as your agent, it being understood, however, that the above cautionary obligation is not to exceed the sum of £100 sterling. I am, gentlemen, your obedient servant, F. H. W." *Held*—first, that the consideration disclosed on the face of the guarantee was a concurrent, and not a past consideration, and that, therefore, the contract was a valid one.

Secondly, that though in the terms of the Scotch law, it was yet sufficiently intelligible of itself without words to interpret it. *Gorris v. Woodley*, 10 Ir. Jur. N.S., 146, Q. B.

The parties to whom the guarantee was given were named as "R. M. and Son." In the summons and plaint the plaintiffs were described as "W. G., O. H. and J. P., trading as R. M. and Son." *Held*—that the names of the plaintiffs sufficiently appeared on the face of the guarantee. *Id.*

The defendant gave to the plaintiff the following guaranty:—"Gentlemen, you will please to credit Mr. A. to the extent of £30 monthly, from time to time, and in default of his not paying, I will be accountable for the above amount." *Held*, that the words "for the above amount" did not confine the defendant's liability on foot of the guaranty to the sum of £30, but that he was responsible for all goods supplied by the plaintiff to A. to the extent of £30 monthly. *Tenant v. Orr*, 15 Ir. C. L. R., 397, C. P.; s.c. 9 Ir. Jur., N.S., 131.

The defendant undertook to see the plaintiff paid for certain goods supplied by him to A., at the defendant's request. After the goods had been supplied, and A. had made default in payment, the defendant acknowledged his liability under the guarantee, and promised to pay the plaintiff the price of the goods. Neither the guarantee nor the subsequent promise was in writing. *Held*, that the plaintiff was entitled to recover on an account stated. *Wilson v. Marshall*, 15 Ir. C. L. R., 467, C. P.

## HABEAS CORPUS.

A writ of habeas corpus granted to issue on the civil side of the Court. *In re Moylan*, 10 Ir. Jur. N.S., 269, Q. B.

## HUSBAND AND WIFE.

1. Liability of husband for wife's contracts.
2. Pin money and separate property.
3. Effect of husband's will upon wife's rights under settlement.

### 1. Liability of husband for wife's contracts.

The question whether a wife, living with her husband, has authority to bind him by her contract for necessities, is a question of agency. She is presumed to have the authority, but the presumption may be rebutted by circumstances showing that her agency is at an end. *Moylan v. Nolan*, 10 Ir. Jur. N.S., 279, Q. B.

A allowed his wife £5 a week for the supply of necessities for the family, and forbade her to contract any debts for those necessities. The wife, for a series of years, obtained goods on credit from the

plaintiff's goods were entirely consumed in A's family and partly by A himself; but for all that appeared, A had no reason to suppose that the goods had been obtained otherwise than for cash. The plaintiff never, until just before the action, sent in any account to A, and on two occasions he took bills from the wife, payable at his (the plaintiff's) residence, and he admitted that this was done in order to conceal the extent of the wife's dealings from A. The learned judge before whom the case was tried, told the jury that the question for them to consider was, whether the goods were obtained on the credit of the husband or on that of the wife. The jury found for the plaintiff. *Held* (Fitzgerald, J. *dissentiente*) that the verdict should be set aside, and that there should be a new trial. *Id.*

### 2. *Pin money and separate property.*

The rule of the Court, that an arrear of a wife's separate estate or pin-money cannot be recovered against the husband, being founded on the presumption that it has been applied to the maintenance of the wife, or to the general purposes of the family, with the assent of the wife, does not apply where there is a receiver over the property liable to it. Nor has it any application against a purchaser for valuable consideration of the separate estate or pin-money. *Foss v. Foss*, 15 Ir. Ch. Rep. 215, R.

The rule of the Court is, that only one year's arrear of pin-money can be recovered against the husband, which rule is founded on the presumption, that any arrear, beyond that of a year, has been applied to the maintenance of the wife, or to the general purposes of the family, with the assent of the wife. This rule, however, does not apply where the pin money has been assigned for valuable consideration to a third party, or where there is a receiver over same. *Foss v. Foss*, 10 Ir. Jur. N.S., 301, Ch. Ap.

Two sums of money, the property of a wife, were left by her to her husband, who gave her a cheque for one sum, and for the other a letter acknowledging the receipt of it, and placing it to her credit in his firm. *Held*, that she was entitled only to one year's interest on the sums, against her husband's assets. *Mackey v. Maturin*, 15 Ir. Ch. Rep. 150, R.

### 3. *Effect of husband's will upon wife's rights under settlement.*

By a marriage settlement, property of the wife was conveyed to trustees in trust to pay the interest to the husband for life; and after his death to the wife for life; and after the death of the survivor, to pay the principal to the child or children of the marriage, as the wife should appoint, and in default of appointment amongst the children, share and share alike; and in case of failure of issue of the marriage, to the wife. There was one child of the marriage, who died an infant; and afterwards the husband, who had received the bulk of the trust funds from the trustees, made his will, by which he made certain devises and bequests to his wife, and directed that they should be in lieu and bar of all her claims under the marriage settlement, to anything comprised therein; and that, if she should elect to take under the settlement, then the devises and bequests should be void, and the subject of them comprised in the general

devise of his property; and he devised all the rest of his real and personal property to trustees. *Held*, that the wife who survived the husband was barred by the will from claiming any portion of the principal of the funds comprised in the settlement. But, *Held* also, that she was entitled to the interest of the funds during her life. *Mackey v. Maturin*, 15 Ir. Ch. Rep. 150, R.

## INCUMBERED ESTATES COURT.

### *Setting aside sale in.*

In 1858, the estate of S D, to which certain equities were attached, was sold in the Incumbered Estates Court, discharged of said equities. *Held*, (no conveyance thereof having ever been made,) that an application to set aside said sale, which was refused with costs by Judge Dobbs, ought to have been allowed. *In re Devereux's Estate*, 10 Ir. Jur. N.S., 101, Ch. App.

## INCUMBRANCER'S SUIT.

A defendant in an incumbrancer's suit is not, before decree, in priority with the rents received by the receivers, though he files an answer claiming a charge on the land. *Foss v. Foss*, 15 Ir. Ch. Rep. 215, R.

## INFANT

See PRACTICE (LAW), 3; PUBLIC COMPANY.

## INJUNCTION.

Demise of a plot of ground particularly described in the map drawn in the margin of the lease, with a covenant by the lessee to build and keep in repair, &c., and a covenant by the lessor that the lessee should enjoy vistas through the adjoining trees as on the map on which two points were marked A and B, with a note that between those points a vista was to be maintained, the trees in it not to exceed a height of fourteen feet. A hedge and a space of five feet on other lands of the lessor adjacent to the boundary of the demised lands were marked on the map, with a note—"This hedge to be maintained by the grantor;" which note was not signed or incorporated by a reference in the lease. The lessor subsequently demised the adjacent land to C, who cut down the hedge and erected a wall between it and the boundary. The lessee filed a petition for an injunction to restrain C from destroying the hedge, and from erecting the wall or any building inconsistent with the hedge being maintained for the benefit and advantage of the lands demised. *Semble*—There was no covenant by the lessor to maintain the hedge; but *Held*, that the Court would not decree the specific performance of such a covenant, as being too vague, and in the nature of a covenant to repair. *Armstrong v. Courtney*, 15 Ir. Ch. Rep. 138, R.

*Held* also, that parol evidence was not admissible in an injunction suit to prove that the contract was that the hedge should be maintained as an ornament. *Id.*

See COVENANT, 2; PRACTICE (EQUITY), 5.

## INSURANCE (POLICY OF).

See LANDED ESTATES COURT, 1.

## INTEREST.

See MORTGAGE, 1.

## INTERPLEADER.

1. *Suit in Equity.*2. *Costs of sheriff obtaining interpleader order.*1. *Suit in equity.*

In order to support an interpleader suit there must be conflicting claims. Therefore, where a reversion subject to a lease for years was devised, and the heir-at-law of the testator did not claim the rent, although there was a question whether the devise was not void for remoteness, a petition of interpleader by the tenant was dismissed with costs against the heir-at-law. *Elliott v. Kempston*, 15 Ir. Ch. Rep. 120, R.

A and B, a married woman and her husband C, were entitled to the reversion and rent reserved by a lease. A was entitled to one moiety; but a question arose between B and C on a settlement, whether B was entitled to the other moiety to her separate use. A B and C brought an ejectment for non-payment of rent; and the lessee filed a petition of interpleader. *Held*, that the petition should be dismissed against A. *Id.*

*Semble*—If several are entitled to the rent, and all concur in demanding it, though there be conflicting claims between them, the tenant cannot maintain an interpleader suit. *Id.*

2. *Costs of sheriff obtaining interpleader order.*

Upon the bankruptcy of a debtor, before the sale of his goods by the sheriff, who had obtained an interpleader order, the sheriff cannot obtain his costs of the order, although therein declared to be entitled to them. *M'Donnell v. Doherty*, 15 Ir. C. L. R. App. iii. E.

## INTERROGATORIES.

See PRACTICE (LAW), 5.

## JOINT TENANTS.

*Exclusive possession—Statute of Limitations.*

In ejectment by the survivor of two joint tenants against the devisee of the other, it appeared that, about twenty-seven years before the bringing of the ejectment, the plaintiff and the defendant's testator, who were joint tenants under a lease, made an equal partition of the demised premises by parol, and that the moiety allotted to the defendant's testator, and which was the subject of the ejectment, had been in the exclusive occupation of the defendant's testator, and afterwards of the defendant, from the date of the partition until the bringing of the ejectment. *Held*, that the exclusive occupation of the defendant and his testator for such a length of time had barred the plaintiff's right under the joint operation of the 2nd, 3rd, and 12th sections of the Statute of Limitations (8 & 4 W. 4, c. 27). *Murphy v. Murphy*, 15 Ir. O. L. R. 205, C. P.; s.c. 9 Ir. Jur. N. S. 290.

The 12th section of the Statute of Limitations ap-

plies not only to the case where one of several joint tenants has been in possession of "the entirety" of the whole of the lands held jointly, but also to the case where such tenant has been in possession of "the entirety" of any portion of such lands; and this words in that section, "or more than his or their undivided share or shares of such land," apply as well to the case where one of several joint tenants has been in possession of more than his undivided share in any portion of the lands held jointly, as to the case where he has been in possession of more than his undivided share in the whole of such lands. *Id.*

The case of *Tidball v. James*, 29 L. J. N. S. 160, 91, observed on and explained. *Id.*

## JUDGMENT.

1. *Entering satisfaction on.*2. *Priority as between redocketted and unredocketted judgments.*3. *Effect of non-registry.*1. *Entering satisfaction on.*

The defendant petitioned the Bankrupt Court under the arrangement clauses of the Bankrupt Act, 1837, and protection was given on the 15th April, 1838. The plaintiff's attorney was cautioned against proceeding against the defendant for the amount of his claim; but he did proceed, and the defendant gave a consent for judgment, which on the 21st May, 1838, the plaintiff registered as a mortgage against the lands of the defendant which had been previously mortgaged to the Ulster Bank, and were afterwards sold. Promissory notes for the amount of the composition agreed on were tendered to the plaintiff. The defendant obtained his certificate on the 11th October, 1839. The Court declined to grant a motion made on behalf of the Ulster Bank that a memorandum of satisfaction might be entered upon the judgment with a view to making title to the lands against, which the plaintiff had registered it. *Longmans v. Wallace*, 10 Ir. Jur. N. S. 191, C. P.

2. *Priority as between redocketted and unredocketted judgments.*

A prior unredocketted judgment is not postponed to a subsequent redocketted judgment, in consequence of the existence of a mortgage pious to the redocketted judgment, if the owner of the mortgage makes no claim upon foot of it, even though his omission to claim may be in consequence of an agreement with the owner of the unredocketted judgment, made after the institution of the proceedings on which the question was raised. *Woodroffe v. Greene*, 15 Ir. Ch. R. 176, Ch. App.; s.c. 9 Ir. Jur. N. S. 378.

3. *Effect of non-registry.*

In 1844, before the passing of the Judgment Act, 13 & 14 Vict. c. 29, s. 3, a judgment was entered up as a security collateral with a mortgage, against J. P. whose interest in a sub-lease J. R. had purchased prior to the passing of said Act. *Held*, applying *Hickson v. Colles* (10 L. E. R. 447), that J. R. had no protection against said judgment, though not registered within five years from 1850. *Lanauze v. Reynolds*, 10 Ir. Jur. N. S. 353, Ch.

## JUDGMENT MORTGAGE.

1. *Registering judgment as mortgage against railway company.*

2. *Sufficiency of affidavit to register.*

3. *Effect of protecting order under s. 343 of 20 & 21 Vict. c. 6, upon subsequent judgment mortgage.—See BANKRUPTCY, 7.*

4. *Registering judgment as mortgage against railway company.*

Where the creditor of a railway company sues the company for a debt due to him as a contractor for the execution of railway works and obtains a judgment against them, and registers that judgment as a statutable mortgage under the Judgment Mortgage Act, 13 & 14 Vict. cap. 29—if the company then are declared bankrupt the Court will declare such statutable mortgage a valid charge upon the lands and premises of the company purchased for the purpose of constructing a railway thereon. *In re the Bagnalstown and Wexford Railway Company*, 10 Ir. Jur. N. S. 156, Bankr.

Although the Judgment Mortgage Act uses the word "person" as owner of property to be affected by a judgment mortgage, yet as all the Judgment Acts are *in pari materia*, and to be read as one code, the property of a body corporate is, as regards a judgment mortgage, to be treated as the property of an individual. The remedy of judgment creditors in England by elegit is analogous to that in Ireland by judgment mortgage. *Id.*

On appeal from an order made by the Court of Bankruptcy—*Held* (affirming said order), that a judgment may be registered as a mortgage against an incorporated railway company, under the provisions of the Judgment Mortgage Act, 13 & 14 Vict. c. 29. *In re the Bagnalstown and Wexford Railway Co.* 10 Ir. Jur. N. S. 253, Ch. App.

*Held* also, that where, in the affidavit to register said judgment as a mortgage, the said company is described as a "railway company," it is unnecessary further to set forth the trade of the company, inasmuch as the description "railway company" clearly imports that the trade of the company is that of common carriers. *Id.*

*Held* also, that in the description of the lands in the affidavit, sought to be affected by the judgment mortgage, no minute geographical description than the name of the townlands need be set forth. *Id.*

2. *Sufficiency of affidavit to register.*

The roll of the judgment stated that £2 2s. 8d. damages were recovered, together with £1 as and for costs of registration. The affidavit which registered this as a mortgage stated that £3 2s. 8d. costs were recovered. *Held*, that there was no variance. *Edgworth's case* (11 Ir. Ch. Rep. 293) followed. *Allen v. Walsley*, 10 Ir. Jur. N. S. 53, O. P.

In an affidavit filed under the provisions of the 6th section of the 13 & 14 Vict. c. 29, for the purpose of converting a judgment into a mortgage, a description of the defendant's last known place of abode as "formerly of Ballina Park, in the County of Wexford, and now in the city of Dublin," *Held* insufficient, the Master of the Rolls, however, disapproving of the de-

cision in *Fitzgerald's estate*, 11 Ir. Ch. R. 278, which constrained his Honor so to hold. *Thorpe v. Browne*, 10 Ir. Jur. N. S. 166, R.

## LANDED ESTATES COURT.

1. *Jurisdiction.*

2. *Specific performance in.*

3. *Right of solicitor to sell for costs charged by decree.*

4. *Practice—Changing solicitor.*

5. *Effect of injunction to put purchaser into possession.*

1. *Jurisdiction.*

In 1840, P. C. L. mortgaged to an insurance company certain estates of which he was seized, for a sum of £5,500, and as collateral security, a policy of insurance on his own life was assigned by P. C. L. to said company. From 1857 to 1863, the annual premiums payable on the policy were paid out of the rents of said estates by a receiver under the Court of Chancery, and the premium of 1864 was paid out of the proceeds of the sale of the aforementioned estates. P. C. L. in 1860, mortgaged to R. C. his equity of redemption in said lands, and as a collateral security assigned to R. C. said policy of insurance, subject to the mortgage to the said company. In March, 1864, said company was fully paid off out of the proceeds of the sale of said lands. Said policy having been lodged in the Landed Estates Court, it was ordered by that Court that same should be sold, and that the proceeds of the sale thereof were chargeable with the premiums paid out of the fund in Chancery. *Held*, (affirming the order of Judge Hargreave) that the Landed Estates Court had jurisdiction to sell said policy under the peculiar circumstances of the case. *In re Lynch's Estate*, 10 Ir. Jur. N. S., 217, Ch. App.

2. *Specific performance in.*

An order for sale of certain lands having been made, the owner accepted a private offer "subject to the approbation of the Court," but subsequently discovered that the yearly rental of the lands, in respect of which the offer had been made, had been considerably undervalued. He therefore sought to have the approbation of the Court withheld; whereas the person by whom the offer had been made sought to be declared the purchaser of the lands, or at least to have the sale of them postponed, there being other lands ordered to be sold in the same matter, and fully adequate to discharge the incumbrances. *Held*, that this was not a case in which the Court had power to enforce specific performance; but it would exercise its discretion to postpone the sale of the lands in question, upon the express understanding that *bonâ fide* proceedings should be instituted upon the private contract. *In re Tottenham's Estate*, 15 Ir. Ch. Rep. 308, L. E. C.; s.c., 10 Ir. Jur. N. S., 378.

3. *Right of solicitor to sell for costs charged by decree.*

By a decree in the cause of *M'Alister v. Walsh*, certain properties which were recovered in the suit by a personal representative were expressed to be charged with the costs incurred by such personal representa-

tive in recovering those properties. Question—Whether the solicitor of the personal representative who acted for him in the cause in which the decree was made, and to whom the costs are due, can raise the amount of the charge by a petition in his own name in this Court for sale of the property so recovered. *Held*, that though the personal representative might himself apply to the Court to have the property sold to pay the costs, yet the solicitor had not the power to proceed as petitioner in his own name for that purpose; but that if the solicitor were to call on the personal representative, to proceed to a sale of the lands for payment of the costs, and the latter declined to do so, the Court would then consider the solicitor himself authorised to present a petition for sale in the name of the personal representative. *M'Allister's Estate*, 10 Ir. Jur. N.S., 419.

#### 4. Practice: changing solicitor.

A client may at any time during the progress of a suit in the Landed Estates Court, change his solicitor. *In re Bracken's Estate*, 10 Ir. Jur. N.S., 166, Ch. App.

#### 5. Effect of injunction to put purchaser into possession.

The fee of the lands of which one J. P. was seised, having been set up and sold in the Landed Estates Court to one J. Reynolds, and one O. the tenant, refusing to attorn, an injunction was granted by the said Court to put J. Reynolds into possession.

*Held*, following the case of *Fitzpatrick v. Hughes* (12 I. C. L. 488) that the injunction against the tenant for not attorning did not cause said tenant to lose his said lease. *Lanauze v. Reynolds*, 10 Ir. Jur. N. S. 353, Ch.

### LANDLORD AND TENANT.

#### 1. Eviction by title paramount.

##### 2. Surrender.

##### 3. Subletting and assigning.

#### 4. Landlord and Tenant Act, 23 & 24 Vict. c. 164.

##### 5. Notice to quit.

#### 1. Eviction by title paramount.

In an ejectment for non-payment of rent brought to recover the slobes of Lough Foyle, the defendant pleaded that before and at the time of the making of the lease in the summons and plaint mentioned to the lessees, whose assignee the defendant was, divers persons, to wit, T. S., D. K., and others, were and from thence hitherto had been seised in their demesne as of fee, and in the lawful possession and enjoyment of divers, to wit, several thousand acres, parcel of the demised premises, whereby the lessees or the defendant did not and could not enter into possession of the said parcel or any part thereof, but from the same had been kept wholly excluded from the time of the said demise. The plaintiff replied that the defendant ought not to be admitted to plead this defence, because the lease in question was a lease by indenture. Upon demurrer by the defendant—*Held*—that the indenture constituted an estoppel (Christian, J., *dissentiente*.) *Irish Society v. Tyrrell*, 10 Ir. Jur. N. S. 367, C. P.

*Held*, that the being kept out of possession, though

not eviction by title paramount, was equivalent to it, and must be attended with the same results (Christian, J. *dissentiente*). *Ib.*

*Held*, that the ejectment was not maintainable under the 44th section of the Landlord and Tenant Law Amendment Act (Christian, J. *dissentiente*). *Ib.*

*Held*, that this was a case in which, under the 81st section of the Common Law Procedure Act, 1853, the Court had power to give judgment according to the very right, and would do so by declaring the plaintiff entitled to an apportioned rent, and desiring a jury to ascertain the amount of it (Christian, J. *dissentiente*). *Ib.*

And (per Christian, J.) that to constitute estoppel, possession of the thing demised was essential, and that, though *nil habuit in tenementis* be a bad plea, coupled with a negation of possession, it is a good plea. *Ib.*

And, that eviction by title paramount was entirely out of the case. *Ib.*

And, that there being no estoppel, the case was governed by *Neale v. Macdonald*, 1 M. & W. 740, and the rent suspended. *Ib.*

And, that though otherwise the case were a fit one for apportionment, the facts in the plea applied to the plaint showed a fatal misdescription of the tenancy, and rendered the ejectment unsustainable. *Ib.*

In an ejectment for non-payment of rent brought to recover part of the lands of Ballyfermott, the annual rent of which was £61 15s., the defendant pleaded as to £1 14s. portion of this sum, that as and before the making of the indenture which had been assigned to him, a portion of the premises amounting to two roods and twenty-six perches, or thereabouts, was and thence hitherto had remained the absolute property in fee of the G. C. Company, and neither the lessor nor the plaintiff had, at the time of the making the demise, or thence hitherto, any right or interest in said portion of the premises, and neither the lessee nor the defendant had ever obtained possession or enjoyment of said premises, but same had always, since the making of said demise, remained in the exclusive possession of said G. C. Company, and that said portion was worth annually the sum of £1 14s., and as to the residue the defendant pleaded a previous tender and payment into Court. Upon demurrer by the plaintiff—*Held*, that the indenture operated to estop the defendant from denying the title of the lessor, but that the inability to get possession was equivalent to eviction by title paramount; that the case was governed by *M'Loughlin v. Craig* (8 Ir. Jur. 328), and that the demurrer ought to be overruled. *Domville v. Ward*, 10 Ir. Jur. N. S. 367, C. P.

And (per Christian, J.) that the demurrer ought to be overruled, for reasons different from those given by the majority of the Court, and to be found in the judgment in *The Irish Society v. Tyrrell*. *Ib.*

#### 2. Surrender.

Upon the surrender to the head landlord of a farm held under a lease for lives, upon the day of surrender, he informed the defendant, a sub-yearly tenant of a house upon the farm, of the surrender by his immediate lessor, and the defendant acquiesced in it. The defendant, who was ploughman, at weekly wages to the landlord, agreed to continue in possession of the

house as caretaker, until some other house could be procured for him by the landlord. No demand of possession was made by the plaintiff, nor was rent paid by the defendant, who received his weekly wages, and twice inquired if another house had been prepared for him. Upon the defendant's refusal to accept a house offered to him by the plaintiff, the latter dismissed him from his employment. Upon an ejectment on the title by the plaintiff, *Held*, that the agreement entered into by the parties amounted to a surrender in law by the defendant, his occupation of the house being inconsistent with the possession of any estate in the premises. *Lambert v. McDonnell*, 10 Ir. C. L. R. 186, Exch.; s.c. 9 Ir. Jur. N.S. 371.

### 3. *Subletting and assigning.*

A made a lease of certain lands, with a condition against assignment or subletting without the consent of A, under his hand and seal, on breach of which the lease was to be void. The lessee made an agreement for a lease of a part of the lands, with the consent of A by letter, not under seal. B afterwards purchased A's reversion in the Incumbered Estates Court, subject to the agreement. C, the lessee's administrator, applied to B for permission to make a lease in pursuance of the agreement to E, to whom the interest under it had been assigned. B advised and encouraged C to make the lease, stood by while a large sum was expended by E on the lands, and witnessed the execution of the lease, knowing it to be a lease of the lands from C to E. B knew of the clause against subletting, but did not know that the consent of A was not valid in law, not being under seal, and swore that he had no intention at the time of taking advantage of a forfeiture. B afterwards brought an ejectment for the forfeiture. *Held*, that the Court had power to relieve the tenant, notwithstanding the condition in the lease against assigning or subletting, and the provisions of the Subletting Act (2 Wm. 4, c. 17). *Burke v. Prior*, 15 Ir. Ch. Rep. 196, H.

In 1804 Lord Mountjoy, the owner in fee, made a lease for three lives, with covenant for perpetual renewal, to J. N., of ground in Dorset-street, upon which houses were subsequently built. By marriage settlement of date 10th of May, 1822, F. N. in whom the interest of the lease had vested, demised the ground to two trustees for 999 years, provided her interest should so long continue. At this time two of the lives in the lease were in being. In 1831, there being only one in being, a renewal of the lease was obtained from the representatives of Lord Mountjoy. One of the two trustees died; and on the 7th June, 1855, the surviving one made a lease of portion of the premises to M. for three lives, reserving rent. An ejectment for non-payment of rent having been brought against M. by the trustee's administrator—*Held*, that though the term in the trustees was created by marriage settlement, and no rent reserved, it was, nevertheless, a sub-lease within the provisions of 5 Geo. 2, c. 4. *Boulger v. McCann*, 10 Ir. Jur. N. S. 96, C. P.

The defendant was tenant from year to year of a quarry, under a demise, by one of the Masters in Chancery, which contained an agreement by the te-

nant not to sublet or assign, or part with the possession thereof without the consent of the said Master. The defendant assigned the quarry to one Butler, by a bill of sale. The plaintiff subsequently seized the quarry under an execution, against the defendant. An interpleader issue having been tried—*Held*, that the interest in the quarry remained in the defendant, and was liable to the execution—that the effect of the clauses against subletting or assigning, without consent, in the Landlord and Tenant Amendment Act was to confine the right to take advantage of them to the landlord only; and that though the assignment might have been validated subsequently to the execution, it could not, in the event of the rights of third parties, having been altered in the meantime. *Smith v. Bernal*, 10 Ir. Jur. N. S. 94, C. P.

### 4. *Landlord and Tenant Act, 23 & 24 Vict. c. 154.*

A, as assignee of the original grantor of a fee-farm grant, sued B, the assignee of the original grantee, for a breach of covenant to repair committed before the passing of the Landlord and Tenant Law Amendment Act, 1860. The defendant having demurred to the summons and plaint, the Court of Exchequer (Pigot, C. B. *dissentiente*) *held* that the action lay. On a writ of error the Court of Exchequer Chamber reversed this decision, holding that the action did not lie.—*Busteed v. Chute*, 10 Ir. Jur. N. S. 363, Exch. Ch.

An action was brought for the interruption and hindrance of the plaintiff in his fishery, &c. which had been let him by the defendant by parol for a year. The defendant having traversed the fact of the letting of the fishery to the plaintiff. *Held* (Christian, J. *dissentiente*) that though an incorporeal hereditament, there was such an agreement by the plaintiff to hold what was equivalent to land, under the defendant, in consideration of a rent for a period not exceeding a year, as would by the continued operation of the 3rd and 4th sections of the Landlord and Tenant Law Amendment Act (Ireland) 1860, create the relation of landlord and tenant, and that the action was maintainable. *Bayley v. The Marquis of Conyngham*, 15 Ir. C. L. R. 406, C. P.; s.c. 8 Ir. Jur. N. S. 212.

*Held*, per Christian, J. that the 2nd section of the Statute of Frauds, 7 W. 3, c. 12 (Ir.) prevented the application of the above Act to the present case, and that the action did not lie. *Ib.*

### 5. *Notice to quit.*

Where a notice to quit was signed by C. the mortgagor of certain lands, which were held by W. the appellant, as tenant from year to year, and where the deed of mortgage, dated 20th May, 1857, contained provisions "that if the mortgagor should pay the interest regularly within two months after the days appointed for payment, the mortgagee should not proceed to call in the money, and also that until default of payment of principal or interest, it should be lawful for the mortgagor to hold and receive the rents." C. accordingly (no default in payment of principal or interest having occurred) did continue to hold and receive said rents, and while so holding and receiving same, he signed said notice to quit, which was then



served upon W. *Held* (reversing the decree of the Chairman), that under the third section of the 23 & 24 Vict. c. 154, the relationship of landlord and tenant existed between the mortgagee and W. the appellant, and that therefore the notice to quit was defective in not being authorised by the said mortgagee. *Wilson v. Crofton*, 10 Ir. Jur. N. S. 200, Assiz.

### LEASE.

See BANKRUPTCY, 6.

### LEGACY (VESTING OF).

A legacy of a defined fund vested absolutely, is payable at twenty-one, notwithstanding payment is further postponed by the will. *Kearney v. Savage*, 10 Ir. Jur. N. S. 384, Ch.

Testator bequeathed considerable personal estate, consisting of Government three per cent. stock, &c. to his executors upon trust, amongst others to apply the dividends arising therefrom to the maintenance of his two infant children, J. K. and E. K. during their respective minorities, and also to transfer to said J. K. two-thirds of said stock at the following intervals, viz., £500 on his attaining 21 years of age, £500 thereof on his attaining 24 years, and the residue thereof on his attaining 28 years of age, or such larger portion of said stock at such earlier intervals as my trustees shall, in their discretion, think advisable for his advancement in life; and should any dividends be due on said portion of stock on his son attaining 21 years, to pay over the same to the said J. K., and from time to time to pay the dividends to accrue on such stock to his said son, J. K. *Held*—that although the payment of a portion of the said stock was, by the terms of the will, postponed until the legatee reached 24 and 28 years of age, yet, nevertheless, the Court would order payment of same on J. K.'s attaining twenty-one. *Id.*

### LIBEL.

A. wrote a letter to the Poor Law Commissioners complaining of the conduct of B. a collector of poor's rate. The Commissioners forwarded the letter to the Board of Guardians in whose service B. was; and subsequently, on the occasion of a meeting of the Board, the letter was read by the clerk of the Union at the request of the chairman—*Held*—that this did not amount to a publication by A. so as to make him answerable in an action of libel at the suit of B. *Pope v. Coates*, 10 Ir. Jur. N. S. 804, Exch. Ch.

See PLEADING, 4.

### LIEN (EFFECT OF ARRANGEMENT PROCEEDINGS ON.)

See BANKRUPTCY, 8.

### LIMITATIONS (STATUTE OF).

1. Setting up bar of statute.
  2. What within meaning of statute.
  3. Acknowledgments, &c. to take case out of statute.
  4. Appropriation of payments.
- See PLEADING, 5; JOINT TENANT.

1. Setting up bar of statute.

A defendant in ejectment who does not at the trial

set up a title under the Statute of Limitations, cannot rely on the Statute upon the argument of a new trial motion. *Latouche v. Penning*, 10 Ir. Jur. N. S. 273, C. P.

### 2. What within meaning of statute.

A Welsh mortgage is within the meaning of the Statute of Limitations, 3 & 4 Wm. 4, c. 27. *In re Pennefather's estate*, 10 Ir. Jur. N. S. 359, L. E. C.

### 3. Acknowledgments, &c. to take case out of statute.

An acknowledgment by a tenant for life of a settled estate of an arrear of interest due on a mortgage affecting the inheritance is binding, after the death of the tenant for life, on the person entitled in remainder, to save the bar of the 3 & 4 Wm. 4, c. 27, s. 42. *In re Fitzmaurices, minors*, 15 Ir. Ch. Rep. 445, R.

An acknowledgment signed by the solicitor of the administrator of the debtor in 1862, *Held*, to save from the bar of the Statute of Limitations a debt accrued before the passing of the Mercantile Law Amendment Act (1856). *Archer v. Leonard*, 15 Ir. Ch. Rep. 267, R.

The solicitor for the administrator, who had been furnished with several bills of costs by T. A., who had been solicitor for the intestate, by notice required him to tax any bills of costs properly payable out of the assets, the administrator thereby undertaking to pay any sum which might be found due on foot of said costs (after all fair credits), when same should be taxed and certified, and said credits given, less the costs of taxation, if one-sixth should be taxed off, and requiring to be furnished with a requisition for taxation. *Held*, that the notice saved the bar from the Statute of Limitations, *Id.*

Execution of, and payment of rent under lease, raises presumption of possession under such lease, so as to bar the Statute of Limitations. *Pools v. Griffith*, 15 Ir. C. L. R. 238, Exch. Ch.

Per Pigot, C.B., if a lessee allows his right against trespasses to be barred by the Statute of Limitations, such right may be revived by fee-farm grant on the expiry of the lease. *Id.*

### 4. Appropriation of payments.

A minor's estate was subject to a mortgage on which more than six year's interest was due. On a reference to the Master to inquire what charges affected the minor's estate, and the principal and interest due thereon, it appeared that certain payments had been made for interest generally. *Held*, that the payments should be appropriated to the interest which accrued within six years. *In re Fitzmaurices, minors*, 15 Ir. Ch. Rep. 445, R.

### LUNACY.

1. Taking account of deceased lunatic's estates by consent.

2. Venue in commissions of lunacy.

1. Taking account of deceased lunatic's estates by consent.

J. R., a lunatic having died intestate, a reference was made to the Master to inquire and report the nature and amount of the property possessed by the lunatic at the time of his death, to inquire who was his heir-at-law, and who his next of kin, to take an ac-

count of his debts, funeral expenses, and the money expended on his maintenance; and to take other accounts of a complicated nature. The sole parties interested in the assets of the lunatic having entered into a consent whereby provision was made for the distribution of the assets among the persons entitled, without taking the accounts directed, and without any report of the Master, the Lord Chancellor made this consent a rule of Court, and made an order in the terms of the consent. *In re Roules, a lunatic*, 15 Ir. Ch. Rep. 562, Ch.

### 2. Venue in commissions of lunacy.

Although a commission of lunacy is generally executed in the county where the supposed lunatic resides, yet it is perfectly competent to the Court to change the venue, when such change is manifestly a saving of costs to the estate of said supposed lunatic; and the Court, on these grounds, changed the venue in this case from Ennis, to which place the Commission originally sped, to Dublin. *Re Creagh*, 10 Ir. Jur. N. S. 412, Ch.

## MAGISTRATES' LAW.

The appellant was summoned to answer a complaint that he being a person licensed to sell beer by retail had consumed off the premises, persons were found harboured in his house and place of business who appeared to be, or to have been, recently drinking or tipping beer therein, contrary to 27 & 28 Vic. c. 35. It being proved that persons were found upon the appellant's premises under the circumstances charged, and that the person who usually attended the shop was present, though the appellant himself was not, the Dublin divisional magistrates convicted the appellant. Upon a case being stated for the opinion of the Court, *Held* that the conviction was right, the words of the 6th section of 27 & 28 Vic. c. 35, including the case of harbouring persons tipping beer. *Graham, app.; Fords, resp.*, 10 Ir. Jur., N. S., 67, C.P.

The complainant summoned the defendant for overholding premises, before the divisional magistrate, who issued a warrant for their recovery. Subsequently to the date of the warrant the defendant caused a writ of *certiorari* to be issued from the Court of Common Pleas. The Court, upon motion by the complainant, quashed the *certiorari*. *Nagle v. Murray*, 10 Ir. Jur. N. S. 149, C.P.

*See Arran*, 2.

## MANDAMUS.

Application for a mandamus to F., an arbitrator appointed pursuant to the Railway Act (Ireland) 1861, to award compensation for injuries to H.'s land, occasioned by certain works of the Q. & Y. Railway Co. F. duly made his final award as to said works in July, 1859. The particular works affecting H.'s property were completed in August, 1860. H., though duly notified of the arbitrator's proceedings, made no claim for compensation till Nov. 1862. *Held*, that H.'s *laches* precluded the Court from exercising any discretion in his favour.

*Held also* (*hesitante* Fitzgerald, J.), that an arbitrator cannot be compelled to amend or supplement

his award after it has been finally made up pursuant to the statute. *The Queen at pros. of Thornhill v. Fieldbourne*, 15 Ir. O. L. Rep. 431, Q.B.

*See* PUBLIC COMPANY; RAILWAY COMPANY.

## MARSHALSEA.

L. M. being a prisoner in the Four Courts Marshalsea, an order was made by one of the judges of the Court of Bankruptcy and Insolvency for his attendance in Court in order that he might be examined in an insolvent matter then pending. He attended twice in custody in pursuance of the order. On the first day he was not examined, and was sent back to the Marshalsea. The next day he was examined, and when his examination was over he was again sent back to the Marshalsea. He protested against being sent back, on the ground that after what had occurred, his further imprisonment was illegal. A writ of *habeas corpus* having been obtained, and the discharge of L. M. having been moved for, it was *held* that the custody was legal, and that he could not be discharged (*O'Brien, J. dubitante*). Notwithstanding the st. 5 & 6 Vict. c. 95, a prisoner committed to the Four Courts Marshalsea remains in the legal custody of the sheriff, though in the actual custody of the marshal. *In re Moylan*, 10 Ir. Jur. N. S. 267, Q.B.

## MASTER AND SERVANT.

In an action against a master by a servant for injuries sustained by reason of the incompetency of a fellow-servant, or the negligence of the master, there must be more than some evidence of negligence. Mere conjecture and facts consistent with pure accident, and with an error of judgment, as well as with negligence, should not be sent to the jury. *Murphy v. Pollock*, 15 Ir. Q. L. R. 224, Exch.

## MERCANTILE LAW AMENDMENT ACT.

*Quære*, does the word "goods" in sec. 1 of 19 & 20 Vict. c. 97, (the Mercantile Law Amendment Act) include chattels real, so as to protect an assignment thereof made *bona fide* for value, and without notice, against a writ of *levi facias* lodged with the sheriff, previously to and executed after the assignment? *O'Brien v. Murray*, 10 Ir. Jur. N. S. 185, Q.B.

## MERCHANT SHIPPING ACT.

On the 19th July, 1864, L., who was the consignee of a ship which was expected to arrive at B., became the equitable assignee of the freight of said ship, and he also had acquired an equitable charge on the ship's cargo. Afterwards, on the 4th August, 1864, the M. I. Co. became mortgagees of the ship for a sum of £6,500. On the 13th of September following, the ship arrived at B., and the cargo was stored in L.'s name with the B. harbour commissioners. On the 15th October the M. I. Co. caused a notice to be served on the harbour commissioners of their claim to the freight, and the harbour commissioners accordingly refused to give up the property to L.; thereupon L. brought an action in trover and detinue for the cargo against said commissioners, who then applied on motion, under the Interpleader Act, to the Court of Common Pleas, in which Court the action was pending, to

stop said action. On the hearing of that motion it was insisted by the M. I. Company that under the 68th section of the Merchant Shipping Amendment Act, notice being given to the harbour commissioners, who were wharfingers, and on whose wharf the goods were stowed, it was their duty to retain the property until the lien which the M. I. Company had upon them was discharged, and that it was no case for interpleader. The Court of Common Pleas made no rule on this motion. *Held*, that the Court of Chancery was not precluded from entertaining the case by the decision of "no rule" arrived at by the Court of Common Pleas. *Belfast Harbour Commissioners v. Louth*, 10 Ir. Jur. N. S. 204, Ch.

*Held also*, that this was not a case within the 68th section of the Merchant Shipping Amendment Act, which had reference merely to acts between the owner of the ship and the owner of the goods, and not to the rival claims of the mortgagee and mortgagor of the ship. *Id.*

### MERGER.

See DEED, 1.

### MORTGAGE.

1. Interest on, from when to be calculated.
2. Mortgagee in possession; wilful default.
3. Equitable mortgage.
4. Inquiries to be made by mortgagees.
5. Notice to quit signed by mortgagor.
6. Welsh mortgages.

#### 1. Interest on, from when to be calculated.

A mortgagee presented a petition in the Landed Estates Court for the sale of a minor's estate, which he did not proceed upon. A reference was afterwards made to the Master to inquire what charges affected the minor's estates, and the principal and interest due thereon. *Held*, that the mortgagee was entitled to six years' interest from the date of filing his charge under the order, and not from the date of filing his petition in the Landed Estates Court. *In re Fitzmaurices, minors*, 15 Ir. Ch. Rep. 445, R.

#### 2. Mortgagee in possession; wilful default.

By a deed reciting A.'s title to several real estates, and that on a general settlement of accounts under a deed of submission and an award made thereon, A. was found indebted to B. in a certain sum, which was to bear interest at £6 per cent., and that A. had agreed to grant a reutcharge to pay off the debt so due to B., A. conveyed the said estates to C. for 100 years (if A.'s estate should so long continue) in trust, to pay the head-rents and reimburse himself all costs, &c.; and in the next place to pay B. a certain reutcharge towards payment and satisfaction of his debt, and upon further trust to pay the surplus of the rents to A. A. covenanted with C. to pay the reutcharge; and the deed also gave a power to C. to distrain for the reutcharge, and contained a clause of re-entry, a covenant for further assurance, a covenant to insure the life of the surviving *cetui que vie* of one of the estates for the benefit of B., and a proviso that the deed should not prejudice certain securities which B. held, and to which it was intended to be collateral; a clause of ceaser, on the payment of the debt, by per-

ception of the reutcharge, and a proviso for reduction of the interest on the debt if the gales of the reutcharge were paid within twenty-one days after they fell due. *Held*, that the deed created the relation of debtor and creditor as well as that of trustee and *cetui que trust*; and therefore that B., who had gone into possession, was chargeable in a redemption suit with wilful default, although no such case was made by the petition. *O'Connell v. O'Callaghan*, 15 Ir. Ch. Rep. 31, R.

*Held also*, that B. was chargeable with the wilful default of a puisne incumbrancer, who went into possession with his assent. *Id.*

### 3. Equitable Mortgage.

W. R. P. being seized under a lease of lives renewable for ever of certain premises in the city of Dublin, and being indebted to petitioner, E. F., in the sum of £448, in order to secure the repayment thereof executed a power of attorney, whereby he authorized said E. F. to mortgage, &c. said premises, and which power of attorney he declared to be "irrevocable until the said E. F. should have received the whole of his account against the said W. R. P., or payment of any bill, promissory notes, or bills of exchange for which W. R. P. is now or shall become liable to or on behalf of E. F." *Held* (reversing the order of Judge Dobbs), that the said power of attorney constituted an equitable mortgage of the said premises. *In re Parkinson's estate*, 10 Ir. Jur. N. S. 82, Ch. Ap.

### 3. Inquiries to be made by mortgagees.

By a will bequeathing legacies, and containing a direction for payment of debts and legacies, H., a minor, was made residuary legatee, and also executor with E. The testator died in 1833, and E. obtained probate, saving the right of H., took the accounts of the personal estate, and in 1834 invested the ascertained residue in the purchase of real estate, which was then conveyed to E., in trust for H., by a deed showing on the face of it that the lands were purchased with the residuary personal estate. The deed reserved to E. a lien on the lands in case the residue should not amount to the then estimated sum. H. came of age in 1837, obtained a grant of probate, and entered into possession of the purchased lands, and so continued until 1858, when he took a conveyance of the legal estate from E. by a deed reciting the conveyance of 1834, and that the residue amounted to more than the estimated sum. H. dealt with the lands as absolute owner, and after 1858 granted mortgages of the lands as such by deed reciting that he was seized in fee free from incumbrances. The mortgagees had no notice save that appearing on the deeds that the lands were purchased with assets, or that any legacies were unpaid. It subsequently appearing that H., after he came of age, received and wasted the personal estate, the legatees filed a cause petition to raise their legacies out of the lands in priority to the mortgages. *Held*, that the mortgagees were not bound to inquire whether the legacies were paid, and the petition was dismissed as against them. *Williams v. Massey*, 15 Ir. Ch. Rep. 47, Ch.

### 5. Notice to quit signed by mortgagor.

See LANDLORD AND TENANT, 5.

**6. Wells, mortgages, see LIMITATIONS (STATUTE)**

**NEGLIGENCE.**

In an action against a railway for damages for the death of a child aged 14—*Held*, that the jury are to consider whether there was a reasonable probability of future pecuniary benefits to the parents, or else has there been past pecuniary benefit; these being the only ground for damages. The service to be rendered under Lord Campbell's Act, must be substantial, not as in case of seduction. *Condon v. Great Southern and Western Railway Co.*, 10 Ir. Jur. N.S. 194, C.P.

Action under Lord Campbell's Act. Plaintiff: That defendant undertook to carry one M. B. in a certain omnibus safely, &c., but by reason of the negligence, &c., of the defendant said omnibus was precipitated into a lock of a certain canal, and the said M. B. was thereby deprived of existence. Defence: That said M. B. was not deprived of existence by being precipitated into the said lock, or by any negligence of the defendant, after said omnibus was so precipitated, but by the act of a third person not authorized or employed by the defendant, or under his control, who, after said omnibus was so precipitated, wilfully let the water into said canal. Replication: That the precipitating the said omnibus into the said lock, through the negligence of the defendant, materially contributed to the event whereby, &c.; and the said M. B. would not have been deprived of existence except for such precipitation. Demurrer thereto. *Held*, that although the death of M. B. was not caused immediately by the act of the defendant, it was such a consequential result of that act as entitled her representative to maintain an action. *Byrne v. Wilson*, 15 Ir. C. L. R. 332, Q.B.

*Held* by O'Brien, J. that allegation in replication that the negligence, &c. materially contributed was no departure from the plaint. *Id.*

*See MASTER AND SERVANT.*

**NOTICE TO QUIT.**

*See LANDLORD AND TENANT, 6.*

**NUISANCE (ACTION FOR).**

To an action against the defendants for having caused to be erected a common nuisance, and for having caused quantities of scaffolding to be placed along the highway for the purpose of being used in the erecting of the nuisance, and for having caused a machine called a shearlegs to be employed in and about the said erection, whereby the plaintiff was crushed and struck down, the defendants pleaded that they contracted with one M. M. to erect the structure; that M. M. had the entire control of the erection; that the defendants did not retain any control; that M. M. and his servants erected the structure and placed the scaffolding, and did also cause the machine called a shearlegs to be employed; and that the defendants did not, save as aforesaid, erect the structure or scaffolding, or cause the said machine called a shearlegs to be employed; and that the injuries complained of were occasioned solely by the negligence of M. M.

and his servants in this, &c. Upon demurrer by the plaintiff, *Held*, a bad plea. *Ellis v. Sheffield Gas Co.* (2 El. & Bl. 767) followed. *Crawford v. Lord Mayor of Dublin*, 10 Ir. Jur. N. S. 109, C.P.

**OTHER ACTION PENDING (PLEA OF).**

To an action of debt upon a judgment, the defendant pleaded that the plaintiff had issued a writ in England against the defendant then and now residing in England, for the same cause of action, and that the said action was pending. *Held* a bad plea upon general demurrer. *Harris v. Dickie*, 10 Ir. Jur. N. S. 189, C. P.

**PARTICULARS.**

*See PRACTICE (LAW), 7.*

**PARTIES.**

*See PRACTICE (EQUITY, 1.)*

**PARTNERSHIP.**

A., who was the proprietor of a wholesale woollen and cloth establishment in Dublin, entered into an agreement with B. to become the managing partner in a separate and large concern in the same trade in Huddersfield, which had been previously conducted by B., the sole owner. B. having offered to become a partner in the Dublin establishment of A., it was arranged, though upon no definite or conclusive agreement, that B. should superintend the Dublin concern, with the object of testing its capacity and ascertaining whether it was sufficiently profitable to be continued. It was further agreed that at the expiration of a year B. should have the option of entering into a partnership in the Dublin business, and should be entitled to a share of the profits of that year, but should not receive any remuneration, or any portion of the profits if at the end of that time he elected not to become a partner. B. came to Dublin, and for some time took part in the superintendence and management of the Dublin establishment. He never exercised, however, his option of becoming a partner; but having apparently abandoned all interest in the concern died before the expiration of the year of trial. *Held*, that a partnership in the Dublin business did not exist between A. and B., and that consequently a claim made by the executors of B. to be admitted as creditors of the estate of A. on his bankruptcy for goods sold and cash supplied by the Huddersfield house to the Dublin concern should be allowed. *In re Hall*, 15 Ir. Ch. Rep. 287; Ch. App. S. O. 9 Ir. Jur. N. S. 321.

**PETTY SESSIONS.**

*See APPEAL, 2; MAGISTRATES' LAW; CERTIORARI*

**PLEADING.**

1. Count not authorised by Common Law Procedure Act, 1853.
2. Meaning and effect of defence.
3. Traverse of *virtute iuris*.
4. Embarrassing defences.
5. Motion for liberty to plead.
6. Defence in ejectment.

### 1. Count not authorised by Common Law Procedure Act, 1853.

The Common Law Procedure Act, 1853, does not authorize the insertion of an *indebitatus* count for damages in a writ of summons and plaint. *Inglis v. McBlain*, 10 Ir. Jur. N. S. 119, O.P.

### 2. Meaning and effect of defence.

To an action for the diversion of a water course, where the defendant sought leave to plead, among other defences, that no sensible injury to the defendant's right, uses, and enjoyment of the stream or water was occasioned by reason of the diversion of the waters, the Court considered that this issue was sufficiently raised by pleading that the defendants did not divert the stream in manner and form as in summons and plaint alleged. *Arnold v. The Dublin and Meath Railway Co.*, 10 Ir. Jur. N. S. 54, Exch.

### 3. Traverse of virtute cūjus.

A summons and plaint in an action against a sheriff contained two counts, the first for not levying under a writ of *fi. fa.* "whereby plaintiffs were delayed in recovering their money, and were likely to lose the same;" the second for a false return of *nulla bona*, "whereby plaintiffs were deprived of the means of obtaining their money, and the same was still unpaid, and was likely to be lost to the plaintiffs." Defences simply pleading that it was not by reason of the matters stated in the counts respectively that the plaintiffs suffered the damages averred in each count respectively were held bad. *McSwiney and Delany v. Wilson*, 10 Ir. Jur. N. S. 388, Q.B.

### 4. Embarrassing defences.

The plaint alleged the printing and publishing certain libellous words. The defendant pleaded that the said words were part of two separate articles published in the defendant's newspaper, and that "the said articles were, and each of them was and is, a *bona fide* comment," &c. Held bad; the defendant allowed to amend, "and the said words were," &c. *Travers v. Potts*, 15 Ir. C. L. R. App. xi, Q.B.

In an action brought by a chemist's boy against his master for wrongful dismissal, plaintiff averred that it was agreed that he should be in defendant's employment for a year certain, on the terms that he should not engage in any other employment for himself, or for any other person, and to use his best exertions; and that defendant wrongfully dismissed him. Defendant pleaded that plaintiff did not use his best exertions for defendant's sole benefit, and thereupon defendant dismissed him. Held, that this defence should be set aside, with costs, as vague, embarrassing, and double. *Hunter v. Kane*, 10 Ir. Jur. N. S. 231, Exch.

To a summons and plaint which stated that the defendant had covenanted with the plaintiffs for good title to convey certain premises, and that it should be lawful for the plaintiffs, &c. to enter upon and enjoy the said lands, and that the plaintiffs were willing to enter, but that one J. B., under a demise heretofore made to him by the defendant, entered, and before the execution of the indenture of conveyance to the plaintiffs, and since continued in possession, and excluded, and still excludes, the plaintiffs, the defendant pleaded that he did not commit the breaches of covenant com-

plained of, or any of them. This plea was set aside as embarrassing. *Midland Great Western Railway Co. v. Nugent*, 10 Ir. Jur. N. S. 192, C. P.

Where a summons and plaint contained two counts—one in trespass for breaking and entering, &c., and the other in trespass *de bonis assortatis*, and different dates were laid in each count, Held, that the summons and plaint disclosed two different causes of action on different days, and hence that one plea, purporting to be pleaded to the two counts and stating as a justification that the plaintiff was the landlord of the premises, and that, quarter year's rent being due, he entered the premises on a certain day (being a different date from either of the dates in the summons and plaint) and took the goods on the premises for a distress for the rent, "which are the trespasses complained of," was improper and embarrassing, because it did not show that the trespasses in the summons and plaint complained of and in the defence mentioned were one and the same transaction and took place on one and the same occasion; and because it attempted to restrict the plaintiff to trespasses committed on one day, although the plaintiff complained of different trespasses on different days. *Gentleman v. Sullivan*, 10 Ir. Jur. N. S. 55, Exch.

On motion to set aside defences on ground of embarrassment, where in an action for breaking and entering a dwelling-house, and taking away the goods of the plaintiff, and for excessive distress, and where defendants pleaded that they did not break and enter the dwelling-house, but did not plead as to the *assortavit*, and did not aver that the outer door was open at the time of entry, and traversed plaintiff's possession of dwelling-house. Held, that defendants should amend generally, and pay the costs of the motion. *Creden v. McGrath*, 10 Ir. Jur. N. S. 173, Exch.

Plaintiff sued defendant for £30. Defendant pleaded a set-off in these words:—"Defendant says that before and at the time of the commencement of this suit, the plaintiff was indebted to the defendant in the sum of £40 sterling, being so much money lent by the defendant to the plaintiff, and which sum, or a sufficient portion thereof, the defendant is ready to set off against the said claim of the plaintiff." Held—that plea should be set aside, because defendant had not used the words—"Plaintiff was and still is indebted to defendant;" but that defendant should be allowed to amend, and that the costs should be costs in the cause. *Smith v. Fottrell*, 10 Ir. Jur. N. S. 232, Exch.

To a summons and plaint which complained of a common nuisance, and proceeded to state in what the nuisance consisted, the defendants pleaded a plea which admitted the facts in the summons and plaint, and denied that they constituted a nuisance. On application by the plaintiff, the Court declined to set aside the defence, but gave the plaintiff leave to reply and demur. *Crawford v. Lord Mayor of Dublin*, 10 Ir. Jur. N. S. 107, C. P.

A defence to an action on a cheque that it was drawn by defendant, as chairman of a certain company, to be paid out of the funds of the said company, and not out of the funds of defendant; nor was the defendant to be liable in his individual capacity for the

payment of said cheque, of which plaintiff had notice, was directed to be amended. *Palliser v. Redmond*, 10 Ir. Jur. N. S. 133, C. P.

In an action upon a guaranty the first count of the summons and plaint, after setting out the guaranty stated, that after said promise the said J. F. for the carrying on of his aforesaid house of business, gave orders to the plaintiffs to supply to him certain goods for his said house of business; that is to say, certain teas, grocery, and other goods, at certain prices, amounting in the whole to £190 ls. 9d. to be paid at the expiration of the period of credit usual in the trade in respect of such goods, and according to the usual course of such trade and such payments, till the expiration of such period of credit, to be secured by such bills of exchange or promissory notes as in such trade usual in respect of such goods; and afterwards, whilst the said guaranty and promise was in force against defendant, and before the same was recalled, the plaintiff under the aforesaid promise, supplied the said goods to the said J. F. upon the aforesaid terms; and although the aforesaid periods of credit have expired, and although all things have happened, &c. necessary to entitle the plaintiffs, &c., yet the said J. F. has not, nor has the defendant, paid the said sum, &c. The fifth defence pleaded by the defendant was as follows:—That after such goods were supplied respectively as alleged, it was agreed by and between said plaintiffs and said J. F. without the consent or knowledge of the defendant, for good and valuable consideration to the plaintiffs in that behalf, that the plaintiffs should give time to the said J. F. for payment of the prices thereof respectively, and forbear to sue him for the said prices; and each of them for a certain time, in respect of each of them respectively agreed or between them, such time of forbearance in respect of each of them being longer than the plaintiffs ought to have given the said J. F. for the payment of said prices respectively, according to the meaning of defendant's alleged property and guaranty; and in pursuance of the said agreement, and without the consent or knowledge of the defendant, the plaintiffs gave time to the said J. F. and forbore to sue him for the prices of said goods, or any of them, during the times respectively so agreed on as aforesaid. Upon application by the plaintiff to set aside this defence, the Court made no rule on the motion. *Woods v. Armstrong*, 10 Ir. Jur. N. S. 134, C. P.

In an action to recover £105 10s. the summons and plaint contained the usual counts for money had and received, and on an account stated; defendant traversed these, and pleaded set-off, accord, and satisfaction, and that there was an award; plaintiff replied to these pleas, and at the same time applied to have them set aside on the grounds of embarrassment, and that they consisted partly of pleas in bar and partly of pleas against the further maintenance of the action. *Held*, that there be no rule on the motion, defendant consenting that plaintiff shall be at liberty to confess said defences against the further maintenance, defendant paying the costs hitherto incurred; and that the action should be stayed notwithstanding the pleas in bar. *Dunbar v. O'Brien*, 10 Ir. Jur. N. S. 263, Exch.

Where the summons and plaint, in addition to the

averment of the performance of conditions precedent, averred readiness and willingness in the plaintiff, the Court refused to set aside a defence which traversed the readiness and willingness generally. *Millward v. Robinson*, 10 Ir. Jur. N. S. 148, C. P.

In an action by the assignee of a bond against the surety for an administrator *de bonis non*, the second count of the summons and plaint complained that the said J. S., before he became administrator, was himself indebted to the assets of the deceased J. P. in the sum of £200, on foot of a judgment obtained by the administratrix, and that he had not repaid the said sum though required to do so by an order in the cause in the Court of Chancery. The defendant pleaded—“As to the second count, that the sum of £200 in said count mentioned was lent to said J. S. by the said T. P., the administratrix with the will annexed of the said testator while she was such administratrix, and long before the said J. S. became such administrator *de bonis non*, and long before the execution of said bond by defendant; and that said judgment was confessed to said T. P. while she was such administratrix, and long before said J. S. became such administrator, and long before the execution of said bond by defendant; and that said sum of £200 did not come to the hands of said J. S. as administrator of said testator.” A motion to set aside this defence as embarrassing was refused. *Haslett v. Hall*, 10 Ir. Jur. N. S. 50, C. P.

#### 5. *Motion for liberty to plead.*

In an action for the breach of an agreement to execute a lease of lands to the plaintiff, of which he had formerly been in possession as tenant from year to year, and also for false representation and fraudulent concealment, with regard to the existence of a memorandum of agreement for the lease, the defendant, after issue joined, applied to the Court for leave to plead the Statute of Limitations to the first count in addition to the defences already on the file. *Held* (Christian, J., *dissentiente*), that inasmuch as the plaintiff had allowed himself to be evicted without seeking specific performance of the supposed agreement, and that there were counts on the record on which the plaintiff might recover in case the defendant were guilty of actual fraud in the transaction, that the plea ought to be allowed to be pleaded. *Archbold v. The Earl of Howth*, 15 Ir. C. L. R. 420, C. P.; s.c. 9 Ir. Jur., N.S., 247.

*Held* also, that the plea of the Statute of Limitations is a defence on the merits. *Ib.*

*Held*, per Christian, J., that the defendant having lapsed his opportunity of pleading the above defence in the first instance, was not entitled to the favour of the Court. *Ib.*

#### 6. *Defence in ejectment.*

In an ejectment for non-payment of rent, the Court refused to set aside the defence “that the defendant did not, at the commencement of the suit, nor does he now, nor does any other person, hold as tenant or tenants to the plaintiff.” *Dexter v. Lloyd*, 10 Ir. Jur. N. S. 116, C. P.

### POWER OF ATTORNEY.

*See* MORTGAGE, 3.

## PRACTICE (EQUITY).

1. Parties.
2. Enrolling decrees.
3. Proof of debts.
4. Receivers.
5. Injunction suits.
6. Dismissal for want of prosecution.
7. Appeals.
8. Lunacy. See LUNACY.

## 1. Parties.

A fund was vested in trustees, in trust, for A. for life, and after his death in trust for his son B. The trustees allowed A. to receive it. A died, leaving assets; and having by his will bequeathed personal property, far exceeding the trust fund, subject to life interests, to B., and having devised real property to B. expressly in satisfaction of the trust fund claimed by him. B. filed a petition against the trustees to compel them to replace the fund, and claiming a right to elect to take it against the devise. Held, that the personal representative of A. was a necessary party to the suit. *Burrowes v. O'Brien*, 15 Ir. Ch. Rep. 423, R.

In a suit to compel parties to replace a fund wrongfully paid to a person entitled to a life interest in it, he or his personal representative is a necessary party, notwithstanding the 28th Order of the 27th of March, 1843. *Ib.*

## 2. Enrolling decrees.

Although a decree be made by the Court of Appeal in Chancery, the application to enrol same must be made to the Court of Chancery when the appeal is from Chancery. It is otherwise when the appeal is not from the Court of Chancery. See *Sadleir v. McDowell*, 10 Ir. Ch. 461. *Dolphin v. Aylward*, 10 Ir. Jur. N. S. 201, Ch. App.

## 3. Proof of debts.

So long as a fund remains in Court applicable to the payment of debts, a creditor may obtain an order to prove his demand though a final decree has been made in the cause. *Graves v. Davis*, 15 Ir. Ch. Rep. 204, R.

Leave given to a creditor after final decree to prove under circumstances of great neglect on his part. *Ib.*

## 4. Receivers.

In Ireland a creditor having an annuity or a charge on the lands may obtain an order that the receiver should pay him his annuity and interest on his charge, in the proper priority, without filing a petition to extend the receiver. *Foss v. Foss*, 15 Ir. Ch. Rep. 215, R.

## 5. Injunction suits.

Suits for an injunction to restrain waste, when no answer is filed and the account sought is waived, should not be brought to a hearing by the petitioner merely for the purpose of getting his costs of suit. *Harvey v. Ferguson*, 15 Ir. Ch. Rep. 277, Ch.; s.c. 9 Ir. Jur. N. S. 341.

Suits for an injunction to restrain waste should not be brought to a hearing where no account is sought, or the account is waived, if an injunction has been

obtained, and the right to continue it is not disputed. If, however, the case is forced to a hearing by the conduct of the respondent, the petitioner, if successful, will be entitled to his costs of suit. *Dunne v. Dunne*, 16 Ir. Ch. Rep. 278, C.; s.c. 9 Ir. Jur. N. S. 342.

*Semble*—Where in such suits no account is sought, the petitioner should call upon the respondent, by notice, to state whether he disputes the right to have the injunction continued. *Ib.*

## 6. Dismissal for want of prosecution.

Under the 51st General Order of the 19th of May, 1857, if the final order in a cause petition be not obtained within the time limited by the Master, the petition is not dismissed without an order to that effect. *Corker v. Corker*, 16 Ir. Ch. Rep. 304, Ch. Ap.

*Moore v. Keogh* 10 Ir. Ch. Rep., not followed. *Ib.*

Where a petitioner becomes bankrupt before the petition stands dismissed by the 27th General Order of 1851, the suit is not affected by that Order. The proper course in such a case is to move that the petition do stand dismissed unless the assignee should file a supplemental bill within a time to be limited by the Court. *Maxwell v. Reade*, 15 Ir. Ch. Rep. 133, R.

But where a petitioner, *pendente lite*, assigns his property voluntarily, the suit is not thereby abated, and is therefore within the operation of the 27th General Order. *Ib.*

Leave given in the latter case to reinstate the petition on payment of the costs of the motion. *Ib.*

The appointment of a receiver in a mortgage cause does not take the case out of the operation of the 51st General Order of 1843. *Woodroffe v. Grana*, 16 Ir. Ch. Rep. 176, Ch. Ap.; s.c. 9 Ir. Jur. N. S. 370.

An order of the Incumbered Estates Court for sale of lands the subject of a suit in the Court of Chancery did not, without an order of the latter Court, stay the suit, so as to prevent its being dismissed by the 51st General Order of 1843. *Foss v. Foss*, 15 Ir. Ch. Rep. 215, R.

An order appointing a receiver in a suit, praying a sale for the payment of incumbrances did not prevent the suit being dismissed by the 51st General Order of 1843. *Ib.*

## 7. Appeals.

On the hearing of an appeal from the whole of an interlocutory order, the appellant's counsel is entitled to begin. *Skelton v. Flanagan*, 16 Ir. Ch. Rep. 203, Ch. Ap.; s.c. 9 Ir. Jur. N. S. 341.

The appellant having appealed from the order of the Master of the Rolls, and having prayed in his petition "that the order might be varied in conformity with the construction of the will and codicils," the respondent was allowed on the appeal to go into a case showing that the said order was further erroneous in other portions thereof, though respondent had not appealed therefrom, as if the case were at a re-hearing. *Kellett v. Kellett*, 10 Ir. Jur. N. S. 405, Ch. Ap.

See APPEAL, 1.

## PRACTICE (LAW).

## 1. Summons and plaint.

a. Substitution of service of.

b. Adding count to.

c. Renewal of writ.



2. *Venus.*3. *Prochein amy.*4. *New trial motion.*5. *Interrogatories.*6. *Production and inspection of documents.*7. *Particulars.*8. *Reference of matters in dispute to master.*9. *Settling action.*10. *Compromise.*11. *Suggestion.*12. *Impounding money till result of cross-action.*13. *Garnishee order.*14. *Practice in ejectment.*

## SUMMONS AND PLAINT.

1. *Substitution of service of.*

It is not sufficient ground to found a motion for substitution of service on the solicitor of a defendant resident abroad, to show that that solicitor is acting for him in a suit depending in the Landed Estates Court with reference to certain lands, no matter whether he be owner or incumbrancer thereof, nor even if the solicitor be shown to have money of defendant's in his pocket, inasmuch as such facts are not evidence of a general authority in him to act for defendant. *v. Aylward*, 10 Ir. Jur. N. S. 415, Exch.

If an attorney is carrying on proceedings for a party in this country, he will be compelled to accept service of a writ in an action against his client, arising out of the same matter, though he is at the time unaware of his client's whereabouts. *Purser v. Lucanich*, 15 Ir. C. L. R. App. x., Q.B.

2. *Adding counts to.*

To a summons and plaint which contained a count for goods bargained and sold, the Court, on the application of the plaintiff, allowed him to add a count for goods sold and delivered, giving the defendant four days to plead. *Scriber v. McCann*, 10 Ir. Jur. N. S. 114, C. P.

3. *Renewal of writ.*

An application on the 15th December to renew a writ of summons and plaint which issued on the 15th June, is a day late. *O'Leary v. Lord Loftus*, 10 Ir. Jur. N. S. 133, C. P.

2. *Venus.*

A plaintiff moving to change the venue to the place where the cause of action arose, and where the parties and all their witnesses reside, when a trial held in another district has proved abortive, must pay the costs of the motion. *Arkins v. Barnard*, 15 Ir. C. L. Rep. App. ii., Q.B.

The plaintiff in an action of ejectment for non-payment of rent, having *prima facie* satisfied the Court that there was reasonable apprehension that he would not get a fair trial in the county in which the lands were, the Court, upon the motion of the plaintiff, changed the venue. *Stubber v. Roe*, 10 Ir. Jur. N. S. 193, C. P.

3. *Prochein amy.*

The *prochein amy* of an infant suing need not be the father. (Per Christian, J.) *Savage v. Mapother*, 10 Ir. Jur. N. S. 117, C. P.

4. *New trial motion.*

Semble, upon a new trial or non-suit motion, it is not a sufficient reason for rejecting the counsel's certificate, that it contains something that is not in the judge's report. *Fawcett v. Townsend*, 10 Ir. Jur. N. S. 117, C. P.

5. *Interrogatories.*

The jurisdiction conferred upon the Court by the 56th section of the Common Law Procedure Act, 1856, to permit interrogatories to be delivered to the opposite party in a cause, embraces all classes of actions. *Donohoe v. Thompson*, 10 Ir. Jur. N. S. 267, C. P.

The objection to interrogatories, that they tend to expose the party interrogated to a criminal prosecution, is premature if made on an application for leave to deliver them, and must be made by the party himself as a reason for declining to answer a particular interrogatory. *Ib.*

6. *Production and inspection of documents.*

The affidavit upon which the motion is grounded must satisfy the Court that a certain document specifically described is in the possession or power of the opposite party, and that that document, if produced, would help the plaintiff's case. This much is a condition precedent to the discovery of other documents. Therefore a mere statement that a specific document is likely to contain matter that would help the plaintiff's case, is insufficient. *Ellis v. The Dublin Exhibition Palace and Winter Garden Co.*, 10 Ir. Jur. N. S. 55, Exch.

Upon motion made by the plaintiff in an ejectment for non-payment of rent for production of a lease of the lands alleged to be made to the defendant by S. S., and which it was alleged that the defendant had once previously produced before the plaintiff, assenting to the plaintiff's observation that the defendant then held the lands under a lease made to him by S. S., the defendant's affidavit stating that he had no such lease made to him by S. S., and never saw it, and had no recollection of having produced a lease to the plaintiff, but that if he did, it was one which the Court, upon examining it upon the motion, considered the plaintiff had no right to see, the Court made no rule on the motion, and refused upon the same motion to give the plaintiff leave to exhibit interrogatories in reference to the alleged interview, but without prejudice to a subsequent application. *Stubber v. Roe*, 10 Ir. Jur. N. S. 175, C. P.

To an action for breach of promise of marriage the defendant had pleaded a traverse of the contract to marry, and a rescission. The defendant applied to the Court that the plaintiff or her attorney be directed to furnish copies of letters written by the defendant to the plaintiff from November, 1862, to June, 1863, inclusive, or allow the originals to be seen. The affidavit to ground the motion stated that there was a correspondence between the plaintiff and defendant from November, 1862, to June, 1863, consisting of about thirty letters; and that the latter portion of the correspondence contained statements which the defendant was advised and believed were material to his defence; that he never had copies of these letters; that without said letters he could not make a proper

defence to the action; and that he apprehended so much of them only would be produced as would show a contract of marriage.—Motion granted. *Ferguson v. Hely*, 10 Ir. Jur. N. S. 34, C. P.

An affidavit of merits by the defendant is not necessary to support such an application. *Id.*

The plaintiff in an ejectment in which an appeal was pending to the Court of Exchequer Chamber applied to the Court of Common Pleas to obtain a certified copy of a deed which was not given in evidence at the trial, but which was alleged to relate to the subject-matter of the ejectment, and to be in the custody of a person who held it as a trustee for both the plaintiff and defendant. The Court refused the motion. The Court of Chancery alone has jurisdiction to grant inspection by way of anticipation. *Stubber v. —*, 10 Ir. Jur. N. S. 191, C. P.

Upon an application for an order to inspect and take copies of documents relating to the authority by which the guardians of a union opened a sewer, which afterwards polluted a water-course of plaintiff's, and rendered it unfit for use—*Held*, that the order should not be refused, because there might be some remote possibility of defendants being indicted for the nuisance. *McMullen v. The Guardians of the Poor of the Lurgan Union*, 10 Ir. Jur. N. S. 175, Exch.

#### 7. Particulars.

Motion for particulars of occasions of criminal conversation refused. *Echlin v. Brady*, 10 Ir. Jur. N. S. 188, Q. B.

#### 8. Reference of matters in dispute to Master.

The mere existence of one or two items over and above the matters of account constituting a cause of action would not prevent the Court from having the power to refer the case to the Master under secs. 6 & 7 of the C. L. P. Act, 1856—(per Christian, J.) *Blakeney v. Palmer*, 10 Ir. Jur. N. S. 135, C. P.

A brought an action against B. to recover £144 16s. 6d. The case was tried, and by consent referred to the Master to go through accounts and make an award between the parties. The Master found for defendant, and plaintiff moved that the matter be referred back to the Master on the ground that his finding was against evidence and the weight of evidence. *Held*, that the motion should be refused with costs, and that the Court would not interfere except in case of gross mistake. *Wardell v. Hopkins*, 10 Ir. Jur. N. S. 212, Exch.

In an action brought by the proprietor of a hotel against a railway company to recover damages for injuries sustained by the plaintiff by the use of his furniture in aid of sufferers by an accident on the defendants' railway, and also brought to recover the price of the attendance, board and support of the sufferers, and of the board and lodging of the relatives and friends of the sufferers, the defendants disputed their liability to compensate the plaintiff for the damages to his furniture, and disputed their liability to pay for the board and lodging of the relatives and friends of the sufferers, and disputed the amounts charged for the attendance, board, and support of the sufferers themselves, paying into Court a certain sum of money. The Court refused to grant an application by the defendants to have the matter in dispute referred

to the Master of the Court under the fifth and sixth sections of the Common Law Procedure Act, 1856. *Rushforth v. Midland Great Western Railway Co.* 10 Ir. Jur. N. S. 245, C. P.

#### 9. Settling action.

The Court must be perfectly satisfied that there has been collusion between the parties to the action to deprive an attorney of his costs by settling the action, before it will interfere. *Glennon v. O'Donoghue*, 10 Ir. Jur. N. S. 232, Exch.

The plaintiff and defendant having compromised an action of ejectment, and the former having paid a sum of money to the latter, in consideration of which the latter assigned the premises in dispute to the former, the defendant's attorney five days afterwards served a cautionary notice on the plaintiff and his attorney, warning them against compromising without providing for his costs. It appeared that the town-agent of the defendant's attorney was made aware that the compromise was pending before it was completed. The Court refused an application by the attorney that the plaintiff should be required to pay him the amount of his costs. *Colvill v. Hall*, 10 Ir. Jur. N. S. 261, C. P.

#### 10. Compromise.

Motion to set aside judgment on the grounds of compromise pending, breach of faith, and irregularity of writ. A plaint in ejectment described the lands as situate in the "County of Dublin." The venue, when the writ was issued, was "County of the City of Dublin." Subsequently, but before the writ left the hands of the attorney's clerk, this was corrected, and the writ was then re-sealed. The time to plead expired on the 31st of July. Before this a negotiation was going on, and stood over till August 5th, when the defendant's attorney served notice relying on irregularity of writ, and cautioning plaintiff not to mark judgment. *Held*, that the negotiation was put an end to by the defendant's notice. *Hanbury v. Jones*, 15 Ir. C. L. R. 442, Q. B.; *see* 9 Ir. Jur. N. S. 571. *Held* also (*hesitantly* O'Brien, J.) that the writ was not irregular. *Id.*

#### 11. Suggestion.

In an action for the diversion of a water-course, which, by consent at the trial, was referred to arbitrators selected from the jury, and in which the findings of arbitrators were entered up as a verdict of the jury, and £2 10s. damages awarded, the defendant applied for liberty to file upon the record a suggestion that the plaintiff and defendant both resided within the same civil bill jurisdiction in which the cause of action arose. The motion was refused. *Bennett v. Scott*, 10 Ir. Jur. N. S. 31, C. P.

#### 12. Impounding money till result of cross action.

On application by defendant to have a sum of money impounded till the result of a cross action—*Held*, that the application must be refused. *Exposito v. Jeffares*, 10 Ir. Jur. N. S. 395, Exch.

#### 13. Garnishes orders.

The plaintiff obtained a conditional order to attach

sum of money in the Provincial Bank due to the defendant on a deposit receipt, the conditions of which receipt were, that the depositor should deliver it up and give ten days' previous notice before being paid the money. Upon cause being shown, *held*—1. That the Court had power to make absolute the order to attach. 2. That the Court had not power to make absolute the order to pay, the condition in the receipt requiring ten days' notice (*Christian J. dissentiente*). *Payne v. French*, 10 Ir. Jur. N. S. 62, C. P.

*Quere*—Whether the Bank would, under any circumstances, be liable to pay over the money without getting back their deposit receipt? *Id.*

#### 14. Practice in ejectment.

*Edwards*—The 22nd section of the Common Law Procedure Act, 1853, which provides that "a sole defendant, shall shew defendants in ejectment, shall be at liberty to confess the action, as to the whole or part of the property by giving to such plaintiff a consent for judgment," &c. applies to an action of ejectment for non-payment of rent. *Watts v. Brennan*, 10 Ir. Jur. N. S. 116, C. P.

#### PRINCIPAL AND AGENT.

In an action brought to recover an amount due by defendant to the plaintiff for commission, factorage, and agency business, it was proved that at a meeting of masters of vessels in the Whitehaven coal trade held in Dublin in 1858, certain rules were agreed to, and amongst them the following: that an agent should be appointed for the Dublin and Kingstown markets, to be named by the masters and approved of by the owners; that the agency should be under the control of a Whitehaven committee of seven managing owners; and that the agent should receive one penny per ton, register tonnage, from each vessel per voyage. These rules were forwarded to Whitehaven, and a memorandum recommending the plaintiff as a fit person to be appointed agent was there signed by a considerable number of owners. The defendant, who was part owner of certain vessels in the trade, for the tonnage of which, since April, 1860, he was sued in this action, attended the meeting in Dublin and signed the memorandum in Whitehaven. The plaintiff deposed that at a subsequent meeting in Whitehaven, at which he alleged the defendant was also present, he was appointed agent. The judge, with the consent of both parties, left to the jury certain questions, to which they returned for answer that in 1858 the plaintiff was employed as agent with the defendant's sanction, in pursuance of the resolutions; that the committee were still in existence, and had not discontinued the plaintiff's services; and that early in 1860, previously to the arrival of any of the vessels—the subject of the action, the defendant repudiated the plaintiff. The judge directed a verdict for the defendant. Upon motion to turn this verdict into a verdict for the plaintiff, *held*, either that there was no contract entitling the plaintiff to sue the defendant, or that it was terminated when the defendant gave the plaintiff notice. *Tomlinson v. Hewitt*, 10 Ir. Jur. N. S. 271, C. P.

#### PRINCIPAL AND SURETY.

When an indemnity bond, after reciting that A had been taken and admitted into the service of a banking company as a writing clerk, was conditioned for the performance by A of the said service, and all and every other services of the said company wherein he is, shall, or may be employed, *Held*, (*Monahan, C.J. and Pigot, C.B. dissentientibus*.) that the particular words in the recital did not limit the more general words in the condition to the continuance of A. in the service of the company in the capacity of a writing clerk, and that the sureties were not discharged on his promotion to the office of cashier. *Thompson v. Roberts*, 10 Ir. Jur. N. S. 91, Ex. Ch.

#### PROBATE (COURT OF.)

1. *Caveat.*
2. *Proof of execution and of contents of will.*
3. *Evidence of death to ground grant of administration.*
4. *Grant of administration.*
5. *Limited administration.*
6. *Impeaching grant of administration.*
7. *Costs.*
8. *Pleading and other matters.*

##### 1. *Caveat.*

It is irregular to enter a second caveat for the same person after withdrawal of another, unless with leave of the judge or a registrar. In such a case it was set aside with costs. *In the Goods of Howard*, 10 Ir. Jur. N. S. 430, Pr.

##### 2. *Proof of execution and of contents of will.*

Where one attesting witness had gone to America, and had not been heard of for seven years, and the other was in England, but refused to attend to be examined unless on receipt of sixty guineas, the will was established on the evidence of the handwriting of the testatrix and of the two witnesses, and of the due execution of the will, given by a person who was present at the execution, and by evidence of others as to the handwriting. *Cowan v. Rankin*, 10 Ir. Jur. N. S. 38, Pr.

Where the attesting witness, or witnesses, were unable, from recollection or otherwise, to state whether it was mentioned at the time of execution that the paper was a will, or that both witnesses were present together, the defect was supplied by a third person present on the occasion, and it was held legal evidence, but costs were allowed to the defendant. *Commons v. Clark*, 10 Ir. Jur. N. S. 401, Pr.

The production by a testator of his will after its execution to another person, and the declarations of the testator then to such person of the contents of such will, are admissible evidence to prove the contents. *Hanks v. Tottenham*, 10 Ir. Jur. N. S. 277, Pr.

*Sed semble*—Such declarations would not be evidence if the will had not been at the same time produced and shown to such person. *Id.*

### 3. Evidence of death to ground grant of administration.

A bachelor who had in 1836 gone to Australia, had not been heard of for fifteen years. He had corresponded with his family in Ireland regularly up to the year 1849. His father died in 1853, intestate, and administration had been taken to his goods. No advertisements had been had enquiring for the son, but an affidavit was made by a person in Australia rendering it almost certain that he was dead. The Court granted administration of his goods to his brother, one of his next of kin, under the 78th section of the Probate Act, the father's administrator consenting, and did not require advertisements. *In the Goods of Hamilton*, 10 Ir. Jur. N. S. 155, Pr.

### 4. Grant of administration.

The executor of a residuary legatee, who had got a grant of administration with the will annexed, is entitled in priority to the testamentary guardian of a minor, a principal legatee in the will, to a grant *de bonis non*, notwithstanding that in the Court of Chancery the latter would, on the construction of the will, endeavour to make the former account for the greater part of the assets treated by the latter as residuary, and alleged by the former as belonging to him under the bequests in the will. *Goods of Reilly*, 10 Ir. Jur. N. S. 402, Pr.

Where a will was alleged to have been made by the deceased, but it was alleged that it was not duly executed, on a citation by the person entitled in case of intestacy, on all persons interested under it, to propound it, or show cause why it should not be condemned, and on their non-appearance, an order for administration in common form, as in a case of intestacy, was made, the will being lodged in the registry. *Doyle v. Robinson*, 10 Ir. Jur. N. S. 401, Pr.

### 5. Limited administration.

Administration to the goods of the deceased, granted to a creditor, limited to two policies of insurance, and without the will, though a will was in existence, but the widow who had it, when cited, did not lodge it or appear. The next of kin also were cited, but did not appear. There were no other assets. *Costello v. Elliott*, 10 Ir. Jur. N. S. 180, Pr.

Where administration was required merely to make out title to a term, which was vested in the deceased as mortgagee, and there were no other assets, and on the consent of most of the next of kin, the Court gave a grant limited to the premises comprised in such term, although the party was entitled to a general grant. *In the goods of Ward*, 10 Ir. Jur. N. S. 180, Pr.

Where a grant of administration with a will annexed, limited to a portion of the estate of which the testator was at his death possessed, had been ordered by the Court to a creditor having an interest in that part of the assets, such creditor is not bound to file an affidavit and schedule swearing to or accounting for more assets than he would have, under the particular grant, authority over; and the duty payable by him on the grant should be limited accordingly. *In the Goods of Gibson*, 10 Ir. Jur. N. S. 399, Pr.

### 6. Impugning grant of administration.

It is no ground for impeaching a grant of administration, with a will annexed, granted to a residuary legatee on the renunciation of the executor, that the grant was in terms to the residuary legatee, named in the will, the residuary legatee not being specifically named in that exact character; but being in law and construction residuary legatee, and the grant being forty-five years old. *Stubber v. Stubber*, 10 Ir. Jur. N. S. 155, Pr.

Where a grant expires by the death of the administrator, it is unnecessary to apply to revoke it. *Id.*

Where charges of fabrication and fraud were made in a petition and failed, the petition was dismissed, with costs. *Id.*

### 7. Costs.

Where a later will was erroneously introduced before a former one, as appeared from the watermark, a legatee in the former will disavowing the due execution of the later one, was allowed his costs. *Costello v. Rankin*, 10 Ir. Jur. N. S. 38, Pr.

A legatee in a former will, though a next of kin, impeaching, as such legatee, a later will, on the ground of want of capacity or undue influence and failing, is, as a general rule, liable to costs. Next of kin are more favored as regards costs; and in case of three wills written within four days differing from each other, they get costs, though the last will was established. *Doyle v. Leary*, 10 Ir. Jur. N. S. 58, Pr.

An attachment for non-payment of costs ordered to be paid within six days after service of order, will not be granted unless after a personal demand of the costs. *In the Goods of O'Connell*, 10 Ir. Jur. N. S. 184, Pr.

### 8. Pleading and other matters.

Where a will is propounded by one party which the other party impeaches, the latter cannot plead; in addition to the pleas objecting to the validity of the last will, a further plea propounding a former will, though intended only to be used in case any intervenor should propound an intermediate will. *Doyle v. Leary*, 10 Ir. Jur. N. S. 58, Pr.

Where a defendant dies after pleading, a suggestion may be filed by the plaintiff, who desires to proceed, stating the death of the defendant and the grant of administration to his goods. *Casey v. Casey*, 10 Ir. Jur. N. S. 58, Pr.

An intervenor who has appeared to a citation served on him to see proceedings, but who has not pleaded, is not entitled at the hearing of the cause to cross-examine the witnesses or to address the jury. An application on behalf of said intervenor at the hearing for liberty to plead want of capacity and undue influence was refused. *Kelly v. Dunbar*, 10 Ir. Jur. N. S., 16, Pr.

A party in the cause having no interest, in any event, in the real estate, cannot get a receiver, but, on his motion, a nominee of a party who is interested may be appointed. *McCarthy v. McInnes*, 10 Ir. Jur. N. S., 276, Pr.

*Semble*—A gift of residue by a will to a charity by him disposed of in such public or private charities as he should think fit, is void, and could not be carried out either in Chancery or by the Crown, and there-

fore administration, with the will annexed, was given to the next of kin, as beneficially entitled to the residue, on the renunciation of the executors and of A. In *the Goods of Burroves*, 10 Ir. Jur. N. S. 277, Pr. F. The notice to be given under the 46th General Rule of 1865; that the defendant only intends to cross-examine the witnesses to be produced by the plaintiff in support of the will, applies to cases where other pleas besides that of undue execution had been pleaded, such as want of capacity and undue influence. *Murphy v. Murphy*, 10 Ir. Jur. N. S. 154, Pr.

The cause was on a subsequent day heard before the Court itself, and the will was decreed for; and the defendant was excused from costs. His lordship again intimating his opinion that the rule applied to such cases. *Ib.*

The plaintiff, as executor and residuary legatee, propounded a will of 4th November, 1863, and the defendants impeached by their pleas only the residuary and executorial clauses. The intervenient was cited to see proceedings, being a legatee in a former will; and he appeared by solicitor, but did not plead. The question for trial was as to the validity of the will of 1863, or any and what part of it. At the trial the plaintiff and defendants compromised the case; and by consent a verdict was taken in favor of the will, except the residuary and executorial clauses. The jury expressed a strong opinion against the whole will. A carator having been duly appointed for the minor, the Court, on his motion, set aside the verdict as to the rest of the will, and directed a new trial on terms. *Held* also, that the issue should have been amended by confining it to the residuary and executorial clauses. *Kelly v. Dunbar*, 10 Ir. Jur. N. S. 151, Pr.

*Held* also, that a verdict had by consent cannot be set aside on the ground of being against evidence. *Ib.*

Also, that service of a citation on a minor, by serving his father or proper guardian is valid, and will bind the minor. *Ib.*

A memorandum that the domicile of the deceased was Ireland at his death, may, under 21 & 22 Vict. c. 56, s. 14, be written on the grant of probate after it has issued, where assets have since been discovered in Scotland. In *the Goods of Mackay*, 10 Ir. Jur. N. S. 80, Pr.

#### PROCHEIN AMY.

See PRACTICE (Law) 3.

#### PRODUCTION AND INSPECTION OF DOCUMENTS.

See PRACTICE (Law) 6.

#### PUBLIC COMPANY.

*Mandamus to compel registry of transfer of shares.* B., a duly registered shareholder, having paid one call, transferred his shares to C., a pauper. The company refusing to register said transfer, B. applied for a *mandamus*. *Held*, that such transfer, though made to relieve B. from liability, was allowed by the statute, if there was no trust for the benefit of B. *The Queen at prosecution of Crea v. The Midland Counties and Shannon Junction Railway Company*, 15 Ir. C. L. R. 525, Q. B.; s. c. 8 Ir. Jur. N. S. 246.

*Held* also (*dubitante* Fitzgerald, J.) that the facts that C. was a pauper in the employment of B, and that the deed of transfer stated a consideration, though not passed, was not sufficient to render the transfer merely colourable. *Ib.*

*Held* also (*dubitante* Fitzgerald, J.) that though the granting a writ of *mandamus* is discretionary with the Court, the fact that the object of the transfer was to relieve B. from liability, would not justify the Court in leaving C. to his action under the Common Law Procedure Act, 1856. *Ib.*

*Held* also, that the 8 & 9 Vict. c. 16, s. 14, does not render a deed invalid in which a larger consideration is stated than actually passed. *Ib.*

*Held* also, that where untrue consideration is stated in the deed, the fact that no consideration passed will not render the instrument a deed of gift, liable to stamp-duty as such. *Ib.*

B. a shareholder duly registered, having paid one call, transfers his shares to one S. F. an infant. The company refusing to register such transfer, B. applied for a *mandamus*. *Held*, that this Court should not compel the company to register a transfer which might be repudiated hereafter by the transferee. *The Queen at prosecution of Blackburn v. The Midland Counties and Shannon Junction Railway Company*, 15 Ir. C. L. R. 514, Q. B.; s. c. 8 Ir. Jur. N. S. 246.

#### RAILWAY COMPANY.

1. *Repairs and compensation for lands injuriously affected.*

2. *Reasonableness of conditions in contracts by.*

3. *Alteration of time-table.*

4. *Bankruptcy of railway companies.*

5. *Offences against bye-laws.*

6. *Judgment mortgage against railway company.*  
See JUDGMENT MORTGAGE, 1.

1. *Repairs and compensation for lands injuriously affected.*

In order to induce the Court to grant a *mandamus* to compel the arbitrator appointed by the Board of Works to assess compensation for lands injuriously affected by railway works, the party should show that he has delivered to the arbitrators the statement in writing of the nature of his claim, mentioned in sec. 8 of st. 14 & 15 Vic. c. 70 (*O'Brien, J. dissente*). *The Queen v. Fishbourne*, 10 Ir. Jur. N. S. 125, Q. B.

By Act of Parliament a railway company were bound to keep in repair "the immediate approaches" to a certain bridge. The justices of the county made an order on summons, requiring the company to repair "ninety-two perches of the road leading and being the approach to the bridge," &c. *Held*, a bad conviction, for not shewing that this space was "the immediate approaches," which alone the justices had jurisdiction to order to be kept in repair. *The Queen at prosecution of the G. S. & W. R. Co. v. Justices of Cork*, 15 Ir. C. L. R. 448, Q. B.

See MANDAMUS.

2. *Reasonableness of conditions in contracts by.*

A railway company introduced into a special contract for the conveyance of horses at a low rate, a condition

exempting themselves "from all liability in respect of" the horses, "whether in the loading, unloading, or in the transit and conveyance of same, or whilst in" the company's "vehicles, or on their premises." *Held*, that the condition was in itself unjust and unreasonable. *Lloyd v. The Waterford and Limerick Railway Co.* 15 Ir. C. L. R. 37, Q. B.

*Held* also, that it could not be aided by an alternative condition, whereby the company offered to "undertake the risk of conveyance only in consideration of an additional payment of £20 per cent. on the low rate of charge," but refused to entertain any claim for damage sustained by any animal conveyed at such additional rate, unless the injury was "stated and pointed out to the company's agent at the time of unloading," that condition also not being in itself just or reasonable. *Id.*

### 3. Alteration of time-table.

Action for not delivering cattle within a reasonable time. B. booked cattle from D. to L. without inquiring of the company as to the hours of the trains. The cattle arrived at R., some distance from L., in due course at 2.30 a.m., when they were forwarded. On a previous occasion B. had booked cattle for L. which were forwarded from R. at 3 a.m. This train had been discontinued without any public announcement. The company never published time-tables of their goods or cattle trains, their arrangements for those trains being contained in a book only used by the company's servants, and which contained the alteration in question. At the trial the judge told the jury that the company were bound to give the public notice of the change of hours in the departure of their trains. *Held* a misdirection, that the previous dealing, even though coupled with the absence of time-tables, did not make the old arrangement as to the starting of the train from R., an element of the contract. *Bollands v. The Manchester, Sheffield, and Lincolnshire Railway Co.*, 15 Ir. C. L. R. 560, Q. B.

### 4. Bankruptcy of railway companies.

A railway company, incorporated by Act of Parliament, is a joint stock company within the provisions of the Irish Bankruptcy and Insolvency Act, 1857, 20 & 21 Vict. c. 60, and are therefore liable to be made bankrupt. *In re the Bagnalstown and Wexford Railway Co.* 10 Ir. Jur. N. S. 21; s. c. 15 Ir. Ch. Rep. 491, Ch. Ap.

A railway is a joint-stock company established for trading and commercial purposes. Where a railway has been partly made by execution of earth works, although rails have not been laid, and no traffic or trading has taken place, or could take place; it is not necessary to prove trading on the part of the company, and the company may be declared bankrupt as one established for trading and commercial purposes. *Re the Banbridge Extension Railway Company*, 10 Ir. Jur. N. S. 195, Bankr.

An incorporated railway company, whose unfinished line is not as yet opened, in any portion thereof, for the carriage of goods or passengers, is nevertheless liable to be declared bankrupt. *In re the Banbridge Extension Railway Company*, 10 Ir. Jur. N. S. 278, Ch. App.

### 5. Offences against bye-laws.

A railway passenger having duly paid for and obtained his ticket, refused, on arriving at his destination, to give up same to the company's officer, and thereupon, being personally unknown to the officer, was taken into custody for the purpose of being brought before a magistrate. To an action for arrest and false imprisonment at his suit the defendants pleaded—

1. That the plaintiff having been guilty of a breach of one of their bye-laws, was properly arrested under the authority of section 154 of the Railways Clauses Consolidation Act (1845), which provides a summary procedure for bringing to justice certain classes of offenders; and 2. that the plaintiff having been guilty of an offence against the 3 & 4 Vic. c. 97, s. 16, was properly arrested under the authority of, and in the manner provided by that statute. *Held*, on demurrer to the first plea, that the summary procedure provided by the 154th section of the Railways Clauses Consolidation Act (1845) was applicable to the case of an offence against a bye-law, though not expressly purporting so to be, and that therefore the plea disclosed a good defence (Pigott v. C. B. dissentient). *Barry v. Midland Great Western Railway*, 10 Ir. Jur. N. S. 415, Ex.

*Held*, on demurrer to the second plea, that the second plea was bad, inasmuch as the 16th section of the 3 & 4 Vic. c. 97, was conversant with a direct personal obstruction of the company's officer, and was not applicable to a case like the present, where the offence was one of omission only. *Id.*

### RECEIVER.

Purchase by—see VENDOR AND PURCHASER.

Practice as to receivers.

See PRACTICE (EQUITY) 4.

### RECORDER.

This was an application for a *mandamus* to compel inland revenue officers to pay certain salaries to process-servers appointed by the Recorder of Galway. *Held*, that the writ should go, inasmuch as under the Civil Bill Act, recorders had the same rights as to the appointment of process-servers as assistant barristers. *The Queen at prosecution of Gordon and Naughten v. Risson*, 16 Ir. C. L. R. 551; s. c. 7 Ir. Jur. N. S. 381, Q. B.

### REDEMPTION.

Right of creditor.

A petitioner having a charge on the fee of lands ordered to be sold, and also a charge on the life estate in the said lands, is not bound to accept an offer to pay off the amount of his charges on the fee, but is entitled to go on with proceedings to a sale. As between an owner who is tenant for life and a petitioner who has an incumbrance on that life estate, the prior and better right to redeem the charges on the fee belongs to the incumbrancer. *In re Casanville's estate*, 10 Ir. Jur. N. S. 138, L. E. C.; s. c. 16 Ir. Ch. Rep. 313.

A judgment creditor on the life estate having procured an assignment of certain incumbrances on the fee, the tenant for life sought to enforce his right to

redem the fee, as against said creditor. *Held*, affirming the order of Judge Hargreave, that the right of the creditor in this respect was paramount to that of the tenant for life. *In re Queen's estate*, 10 Ir. Jur. N. S. 560, Ch. App.

#### REGISTRY OF DEEDS.

The plaintiff having lodged in the office for the registry of deeds in Ireland, a requisition for a negative search substantially in the form given by the 2 & 3 Will. 4, c. 87, s. 21, for all acts of himself and wife from the affecting premises in Dawson-street, in the city of Dublin, the officer insisted upon charging upon the plaintiff two separate sums of five shillings as being the fees provided by Schedule B. of the above statute for one negative search against names and another against lands, and, upon action brought to recover the second sum of five shillings paid by the plaintiff under protest, it was *held*, first, that the double charge for this "blended" search was rightly made; secondly, that in giving the form of requisition for the "blended" search, the object of the statute was to save the public from the inconvenience of having the information for which they sought involved in a mass of information which was useless to them; thirdly, that the double check obtained by reference to the two sets of books, instead of one, afforded quite a sufficient reason on the part of the Legislature for imposing the double charge. *Wrenfordley v. O'Connell*, 10 Ir. Jur. N. S. 317, Exch.

#### RENEWAL AND RENEWABLE LEASEHOLD.

1. *What amounts to a lease renewable for ever.*

2. *Evidence of lives.*

3. *Interest and renewal fines.*

4. *Who a trustee within s. 17 of Renewable Leasehold Conversion Act.*

1. *What amounts to a lease renewable for ever.*

A lease for lives contained a covenant by the lessor that upon the death of any of the lives he would, at the request of the lessee, his heirs, &c., and on payment of a fine, from time to time and at all times for ever, renew and put in a new life, provided that the life or lives of those that should be renewed be of the issue or posterity lawfully begotten of the lessee; and a clause giving the lessor a right of pre-emption. Several renewals were granted for the lives of persons not issue of the lessee, but subject to the covenants in the original lease, the last of which renewals was made by tenant in fee of the reversion. *Held*, that the lease was a lease in perpetuity and as such within the Renewable Leasehold Conversion Act. *Sherlock v. Kennedy*, 15 Ir. Ch. Rep. 160, B.

The owner of the reversion would be bound by the covenant to renew, though the performance of the condition became impossible by the failure of the posterity of the lessee. *Id.*

2. *Quære*, whether a release of the condition might not be presumed from the renewals? *Id.*

2. *Evidence of lives.*

One of the lives in a renewal of 1803 was described as "B. C. the younger, son of B. C. of Sion, aged fifteen years or thereabouts." There were two

persons of the name of B. C.; one the eldest son of B. C. of Sion, who was proved by reputation to have been then fifteen years old; the other, the fourth son of B. C. of Kildalvin, who, as proved by the inscription on his tombstone, was then nine years old. *Held*, that neither reputation nor the inscription was admissible to prove the ages of the parties. *Colclough v. Smyth*, 15 Ir. Ch. Rep. 347, B.

*Held also*, that in the absence of evidence of mutual mistake of the executing parties to the renewal, B. C., the son of B. C., must be taken to have been the eldest son, &c. *Id.*

3. *Interest and renewal fines.*

A lessee for lives renewable for ever in 1782 demised the lands for the same lives, and covenanted that on the death of the lives, or any of them, he would within six calendar months add and renew the life of some other person with his landlord of the premises, which life or nominee so to be added should be agreed to and approved of by the sub-lessee, his heirs, or assigns, previous to the renewal, and of which renewal, as soon as conveniently could be, timely notice should be given by the lessee, his heirs, and assigns, to the sub-lessee, his heirs, and assigns; and then the sub-lessee should, within one calendar month next after such renewal and notice, pay to the lessee, his heirs, and assigns, a renewal fine over and above the rent and all arrears, on which payment the lessee and his heirs, &c. should immediately after add and renew the same life to the term of the lease that he or they so renewed with the head landlord; and in like manner, from time to time, successively for ever, &c., the sub-lessee covenanted to pay the rent and renewal fine within one month after the renewal by the head landlord. Renewals of the lease and sub-lease were made in 1820, the last life in which died in 1837. In 1840 a further renewal of the head lease was made, but no notice of the nomination of the new lives or of the renewal was then given to the representative of the sub-lessee. In 1855 the respondent purchased the lessee's interest, and shortly after informed the petitioner in whom the sub-lessee's interest was vested, of his purchase. No renewal had been made of the sub-lease since 1840. *Held*, on a petition for a fee-farm grant,—1st, that no septennial fines were paid by the sub-lessee; 2ndly, that interest on the fines payable by the sub-lessee was to be calculated from the time when he received notice of the renewal of the head lease. *De Vaux v. Mara*, 15 Ir. Ch. Rep. 16, B.

The principle on which septennial fines are payable stated. *Id.*

A purchaser from a lessor bound to grant a renewal is entitled to those renewal fines only which accrued subsequently to his purchase. *Id.*

A lessee under a lease of lives renewable for ever, who had the power of nominating the lives, described a *cœtus que vis* in a renewal so inaccurately and ambiguously as to render it uncertain which of two persons was referred to. One of these persons, having died in 1845, and the other in 1858, in a suit for renewal the lessor claimed fines from the former date, while the lessee tendered them from the latter. *Held*, that as the difficulty and obscurity were due to the



default of the lessee, the fines should be calculated from the earlier date. *Colclough v. Smyth*, 16 Ir. Ch. Rep. 396, Ch. Ap.

A, a lessee holding lands for lives in 1844, applied for a renewal, as he was entitled to do, tendering the proper amount of fines. The landlord being abroad, his solicitor desired the tenant to wait till the landlord's return, but in the meantime to be ready to prove his title at a date two months later. For several years, owing to the landlord's delay, no renewal was ever granted, and no title was proved, though the tenant had the means of doing so. About sixteen years afterwards, the tenant having applied for a renewal, *Held*—that as the landlord, for his own convenience, had put off the renewal, the tenant was entitled to renewal on payment of such fines only as were due in 1844, and there was nothing in the Irish Septennial Act to alter that conclusion. *Aldworth v. Allen*, 10 Ir. Jur. N. S. 321, H. of L.

#### 4. Who a trustee within s. 17 of Renewable Leasehold Conversion Act.

*Held* by Pigot, C. B., that a grant made to K. in trust for and on behalf of G., a lunatic, does not make K. a trustee within the 17th section of the Renewable Leasehold Conversion Act. *Pool v. Griffith*, 15 Ir. C. L. R. 238, Exch. Ch.

### RENT.

#### Who entitled to money payable for reduction of.

In 1709 a public company conveyed certain lands in fee to D., his heirs, and assigns, subject to a rent which D. granted to the company, their successors, and assigns, provided that if D., his heirs, or assigns, at any time thereafter should pay £1000 to the governor of the company for the time being, or to such other person or persons who at that time should be empowered to receive the rent, the rent should cease; and that so often as D., his heirs, executors, &c., should pay to the governor, company, and their successors, or assigns any sum not less than £100 over and above the rent and arrears then due, the rent should be lessened proportionably to the sum so paid. In 1716 the company assigned the rent to E. and his heirs, subject to the proviso for redemption. In 1840 B., who was then entitled to the rent, by a deed reciting the proviso for redemption in the deed of 1709 and the assignment of 1716 to E., assigned the rent to A. and his heirs. A. died intestate in 1849, whereupon the rent descended to his heir. In 1862 the owner of the lands gave notice to reduce the rent. *Held*, that the heir of A., and not his administrator, was entitled to the £1000. *Graves v. Graves*, 15 Ir. Ch. Rep. 357, R.

### REPRESENTATION.

The first count of the summons and plaint complained of the breach of an agreement by the defendant to let a farm to the plaintiff, and of his having demised it to another person, and contained an averment that the plaintiff was always ready and willing, &c. The subsequent counts were for fraudulent misrepresentation and concealment of the existence of this agreement. The defendant's third plea to the

first count traversed the plaintiff's readiness and willingness. To this the plaintiff replied that the defendant ought not to be permitted to aver the want of readiness and willingness on the part of the plaintiff, as it arose from the false and fraudulent representation and concealment on the defendant's part set forth in the subsequent counts of the summons and plaint. *Held*, upon demurrer, by the defendant, that the replication was bad. *Archbold v. Thomas*, 22 Howth, 10 Ir. Jur. N. S. 70, C. R. (also b. to *Widger*).

### REVENUE.

The statute 6 Geo. 4, c. 81, imposed a higher duty on licenses to retail spirits obtained by spirit grocers in Ireland, and a lower duty on other persons than spirit grocers being defined as those who do not sell spirits in a greater quantity at one time than five quarts to be consumed on the premises. A later Act, 6th & 7th Will. 4, c. 38, s. 3, enacted that no spirit grocer should obtain a license to sell on the premises other than a license to retail spirits in quantities not less at one time than one pint, and to be consumed elsewhere than on the premises, and no other license shall be granted to grocers. *Held* (affirming the judgment of the Exchequer Chamber) that the latter statute did not impliedly repeal the higher duty applicable to spirit grocers, but that the two statutes were compatible, the one fixing the maximum, and the other the minimum, of the quantity to be sold at one time; and the two descriptions of restrictions did not necessarily imply two different descriptions of persons. *Dickson v. The Queen*, 10 Ir. Jur. N. S. 181, H. of L.

### REVERSION (DAMAGE TO).

A landlord sued his tenant for (first) an injury done by the tenant to the landlord's reversion by (inter alia) wrongfully removing from the land large quantities of clay, and for (secondly) a conversion of the same clay. The jury found that the removal of the clay had depreciated the value of the lands by £156, and that the value of the clay itself was £150. A verdict was entered for the former sum. *Held*, on motion to increase the verdict by adding thereto the sum of £150, that the plaintiff was not entitled to receive the value of the clay as well as compensation for the injury done him by the removal of the clay. (Lefroy, C. J., dissentiente.) *Templemore v. Moore*, 15 Ir. C. L. R. 14, Q.B.

### ROMAN CATHOLICS.

#### Effect of stat. 10 G. 4, c. 7.

A testator, by his will dated 15th November 1860, bequeathed £300 to two Roman Catholic priests, or the survivor of them, to be applied as they might think best for the maintenance and education of two priests of the order of St. Dominic in Ireland, who were to be sent to another Roman Catholic priest, the Rev. Patrick Thomas Conway, on a secret trust, to be paid out by the testator during his lifetime; the trust being to apply said sum towards the redemption of the debt of the Church of the "Dominican Priests in Cork" (with reference to the former bequest (varying the order of the Master of the Rolls, which declared said bequest was not contrary to any express provisions of

10 Geo. 4, cap. 7, and should not accrue to the residuary, but should be carried out *cy pres*, that same was null and void, as being opposed to the Act of 10 G. 4, c. 7, and should accrue to the residue of the personal estate of the said testator; and with respect to the latter bequest (confirming the order of the Master of the Rolls), that being given on an invalid trust, it was void and could not be carried out *cy pres*. *Simms v. Quinlan*, 10 Ir. Jur. N. S. 41, Ch. App.

### SCOTCH LAW (TERMS OF).

See GUARANTEE.

### SETTLEMENT.

Construction of articles for.

By articles of agreement, bearing date 26th May, 1853, it was agreed "that after the death of H. B. the estate of Reavyle shall be limited to and settled upon E. H. B. and his issue, with remainder (in the event of the said E. H. B. dying in the lifetime of his father, the said H. B., without lawful issue) to each of the other sons of the said H. B., in succession, according to their seniority, with an ultimate remainder to the right heirs of said H. B. Held, in a suit to carry said articles into execution, that E. H. B. was entitled to have an estate in fee tail in possession conveyed to him thereunder. *Dillon v. Blaks*, 10 Ir. Jur. N. S. 88, Ch.

### SHERIFF.

See PLEADING, 3; INTERPLEADER, 2.

### SLANDER.

See DEFAMATORY WORDS.

### SPECIFIC PERFORMANCE.

See CORPORATION; LANDED ESTATES COURT, 2

### STAMP.

A lease executed in 1849 must, in order to be admissible in evidence, be stamped with the duty imposed by st. 6 & 6 Vic. c. 83; and it is not sufficient that when produced it bears a stamp sufficient to cover the duty now in force. *Moore v. Long*, 10 Ir. Jur. N. S. 256, Q. B.

See PUBLIC COMPANY.

### STOPPAGE IN TRANSITU.

See CONSIGNOR AND CONSIGNEE.

### SURRENDER.

In an action of trover for the conversion of household furniture the defendant justified the taking under a distress for rent, under a lease made by him to the assignees of the plaintiff, who was a bankrupt. At the trial it was proved that a fortnight before the distress the manager of the assignee's office wrote to the agent to the bankruptcy, desiring him to communicate to the landlord that they would give up possession, provided that the estate were freed from any claim for rent, and that this letter came to the knowledge of the person acting for the defendant's solicitor. The clerk of the agent to the bankruptcy proved that about ten days previously to the distress he received the keys of the premises from his employer, that he might

show them to the defendant's son and the person acting for the defendant's solicitor, and that he did show the premises accordingly. The person acting for the defendant and his solicitor proved that on the morning of the day on which the distress was made he got the keys of the house from the agent to the bankruptcy, that he might let the bailiffs in to distrain, and that on that day he gave them to the bailiffs to let themselves in. The agent to the bankruptcy was not produced. Held, that the judge was right in refusing to leave to the jury the question whether or not the premises were surrendered previously to the distress, and in directing a verdict for the defendant. *O'Reilly v. Mercer*, 10 Ir. Jur. N. S. 149, C. P.

### TENANT IN COMMON.

In an action on a covenant in a lease against an assignee, the first count averred generally that all the estate and interest of the lessee in the demised premises came by assignment to the defendant. The second count set out the title of the defendant as assignee; and, as one of the steps of that title, stated the will of the lessee, whereby he devised all his property to his widow for life, with power of appointment among her three daughters, of whom the defendant was one, and averred that in execution of that power the widow had appointed the demised premises to the defendant; the count then stated the death of the widow and entry of the defendant. The defendant traversed the averment in the first count; and as to the second, pleaded that the widow had not executed the power of appointment as alleged. The plaintiff, at the trial, stated and proceeded to prove the title of the defendant, as set out in the second count, but failed to show that any appointment under the power had in fact ever been made; but in order to show exclusive possession by her of the demised premises he proved the following act of ownership:—that since the death of her mother in 1859 (four years before the commencement of the action), the defendant and her husband had resided on the premises and farmed the land, and that after his death the defendant alone had managed and received the rents of the property; that she had applied by letter to the plaintiff for a renewal of the lease to her, describing herself as representative of her father; and that after judgment by default in an ejectment for non-payment of rent, she had redeemed the premises. A verdict was directed for the defendant on both issues. Held, per Monahan, C. J., Ball and Keogh, JJ. (*dissentiente*—Christian, J.), first that the evidence of possession was sufficient to sustain the averment in the first count. *Shee v. Gray*, 15 Ir. C. L. R. 296; s.c. 9 Ir. Jur. N. S. 270, C. P.

Secondly, that assuming that the plaintiff could not recover on the second count by reason of his having failed to prove one of the averments in it, viz., a due execution of the power, he should not be precluded from recovering on the first count. *Id.*

Thirdly, that assuming the defendant was tenant in common with her two sisters of the demised premises, that could not be relied on under the traverse to the first count, but must be pleaded in abatement. *Id.*

Held per Monahan, C. J., that the evidence of possession was sufficient to support the second count. *Id.*

*Held* per Christian, J., firstly, that the rule that in an action against an assignee of a lease, the landlord is allowed to rely on evidence of possession, as *prima facie* evidence of assignment is founded on his presumed ignorance of the real state of the defendant's title; but if the landlord relies on a particular derivation of that title, the reason of the rule ceases; and this applies not merely to the case where the landlord relies upon that particular derivation of title in pleading, but where he founds his right of action upon it at the trial in statement and in proof; and that as the plaintiff made a due execution of the power part of his case, at the trial he was bound to prove it. *Ib.*

Secondly, that assuming that the acts of ownership showed exclusive possession by the defendant, the period (four years) over which they extended was not sufficient in law to found the presumption of the due execution of the power. *Ib.*

Thirdly, that the evidence did not prove exclusive possession by the defendant, but was as consistent with the non-existence of a deed executing the power, and therefore that the plaintiff was not entitled to have either issue left to the jury. *Ib.*

#### TENANT FOR LIFE AND REMAINDERMAN.

Estates which were subject to charges were settled on A. for life; remainder to his eldest son, B., for life; remainder to the first and other sons of B. in tail; and A. covenanted to sell C. a portion of the estates, and out of the rents received by him before the sale, and the money which should arise from such sale, to pay off all the charges on the settled estate. The estate C., in consequence of the default of A. in keeping down the interest, was not sufficient to pay off the incumbrances, and another portion of the estates was sold to raise the amount of the deficiency. *Held*, that B. had an equity to be recouped the sum so raised for payment of the principal as well as the interest of the charges which the estate C. was sufficient to pay out of the rents of the life estate of A., in priority to judgments against A. obtained subsequently to the date of the settlement. *Kilworth v. Mountcashel*, 15 Ir. Ch. Rep. 565, R.

#### TRADE MARK.

A firm having adopted the letters "LL." to designate a peculiar quality of whiskey sold by them, acquires an exclusive right to the use of those letters as a trade-mark, though they were always preceded by the name of the firm upon the labels issued by them. *Kirahan v. Bolton*, 15 Ir. Ch. Rep. 75, Ch.

In order to prove acquiescence by a firm in the piratical use of their trade-mark, knowledge of such use must be proved; and that is not accomplished by the proof of publication of advertisements which would have been an invasion of the rights of the firm if these advertisements had been issued, not steadily or uniformly, but interchangeably with other advertisements in some respects similar, but not infringing the rights of the firm. *Ib.*

#### TRUSTEE AND CESTUI QUE TRUST.

It is a breach of trust for a trustee of a term in a settlement to secure portions, to assign the term for a principal sum, unless at the same time he receives all

arrears of interest then due. *Cox v. Leigh*, 10 Ir. Jur. N. S. 185, R.

Parties in suits for breach of trust. See *Purchase* (Equity) 1.

#### UNDERTAKING.

The plaintiff, who was a solicitor and attorney, held in his possession a will executed by a deceased client, upon which with other documents he claimed to have a lien for costs due to him by the client. The solicitor for the defendant (who was the son and heir-at-law of the deceased client) obtained possession of these documents upon giving to the plaintiff a written undertaking on the part of the defendant to pay to the plaintiff £100 in full for his costs in the event of making use of the documents in the progress of any suit. Subsequently, upon the defendant's application, the Court of Probate made an order that letters of administration to his deceased father should be granted to the defendant, upon condition of his lodging the will in question with the other documents; and upon his complying with this condition the letters of administration were granted. *Held*, that the plaintiff was entitled to recover the sum of £100. *Casey v. Osborne*, 10 Ir. Jur. N. S. 413, C. P.

#### VENDOR AND PURCHASER.

##### 1. Notice.

2. Purchases by and from persons in fiduciary positions.

##### 1. Notice.

Lessor by indenture of lease of the 22nd July, 1836, demised certain premises for thirty-one years to his lessee. In 1860 said lessee deposited said lease by way of equitable mortgage with D., to secure unto D. a sum of £96 10s. 1d. On the 24th of July, 1863, and previous to the expiration of said lease of 1836, lessor demised said premises to lessee for 31 years, in consideration of the surrender of the former lease. Said lessee, after the obtaining of the last-mentioned lease, assigned same to K. for value. K. had no notice of the equitable mortgage of said first lease. D. now sought to establish that said second lease was a graft on the first, and that K. must be held to have constructive notice of the equitable mortgage. *Held*, that a case of gross negligence not having been established, the purchaser was protected against said equitable mortgage. *Darley v. Gibbons*, 10 Ir. Jur. N. S. 362, Ch.

A will contained a direction that no part of the testator's property should be sold or disposed of except the interest in a certain house, for ten years only, if thought advisable on the part of the executors, and bequeathed the property to his son, who was a minor. The executor sold the whole interest in the house to the respondent, who had notice of some restriction on the executor's power to sell. There were no debts. *Held*, in a suit to impeach the sale, that the sale, being a breach of trust, the respondent was bound to prove that the sale was at the full value. *M'Mullen v. O'Reilly*, 15 Ir. Ch. Rep. 251, R.

2. Purchases by and from persons in fiduciary positions.

Purchase of an annuity at an under value by a

receiver, set aside in a suit instituted by the personal representatives of the vendor. *Eyre v. M'Donnell*, 15 Ir. Ch. Rep. 334, Ch.

Form of order. 16.  
Purchase by a receiver of a jointure charged upon the lands over which he was receiver, declared a trust for the benefit of those entitled to the estate. *Bodington v. Bodington*, 15 Ir. Ch. Rep. 558, Ch.

On the receiver over the estates of Lord L. became the purchaser from Lady L. his widow, of a jointure charged on the estate. In a suit instituted by B., an incumbrancer on the estate, to set aside this sale, and in declaring herself satisfied with the terms of the arrangement, the purchase was upheld as regarded her, but was declared a trust for those beneficially entitled to the estate. 16.

See EXECUTOR.

See VENUE.

See PRACTICE (LAW), 2.

See VERDICT.

To a subpoena and plaint, containing three counts, the first on a bill of exchange by indorsees against indorser, averring notice of dishonour; the second on the same bill averring waiver of such notice; and the third on a guaranty. The defendant, pleaded to the first two counts, traverses of the averments, and to the third payment into Court. The jury found for defendant on the issues on the two first pleas, and they also found that £245 11s. 10d. was due on foot of the guaranty, over and above the sum paid into Court. It appeared at the trial that the bill had been given on account of the defendant's liability on the guaranty. The defendant's counsel called on the judge to direct a verdict for the amount found due on the guaranty, less the amount of the bill; but no application was made to him to amend the pleadings. A verdict was directed for the whole amount found due on foot of the guaranty. On motion to reduce the verdict by the amount of the bill of exchange, or for a new trial, on the ground that the judge should have amended the pleadings, the Court refused to reduce the verdict, and held, that as the defendant had confined his defence at the trial to the construction of the guaranty, the Court would not set aside the verdict for the purpose of enabling him to set up a new defence by his pleadings, namely, that the bill was given in satisfaction of the sum due under the guaranty; and that he had not due notice of the dishonour. *Went v. Orr*, 15 Ir. C. L. R. 397, C. P.; 5 C. 149, 15 Ir. N. S. 131.

At the trial of an action for slander, to which were pleaded a plea of justification and a plea of privilege, the jury found for the defendant upon the issues joined upon the plea of privilege, but were unable to come to a finding in respect to the plea of justification. The judge discharged the jury from finding upon the latter issue. The plaintiff having obtained a conditional order that judgment might be entered for him notwithstanding the verdict found for the defendant, on the ground that the judge so discharged the jury against the plaintiff's wish, and at the request of the defendant, said that the plea of privileged communication was bad, and set for a new trial, on the ground that the judge had so discharged the jury. *Held*—

That the Court had power, with the consent of the defendant, to cause a verdict to be entered for the plaintiff upon the issue, upon which the jury were discharged from finding, and would do so as the plaintiff could not, in any event, have been in a better position at the time of the trial. *Cassidy v. Kincaid*, 10 Ir. Jur. N. S., 176, C. P.

### VOLUNTARY DEED.

A trader who had previously taken the benefit of the Insolvent Act, but was not indebted to the extent of insolvency, three days before entering into partnership with another, by a voluntary deed conveyed all his property to trustees, in trust for himself for life, or until bankruptcy or insolvency, &c., and afterwards in trust for his wife and children. Six years afterwards he became bankrupt. *Held*, in a suit by the assignees in bankruptcy, that the deed was void under the 10 Car. 1, s. 2, c. 3, (Ir.) (13 Eliz. c. 5, Eng.) *Murphy v. Abraham*, 15 Ir. C. L. R. 371, R.

A mortgaged the lands of X. to B. in 1846. In 1854 A. assigned X. to his son in consideration of natural love and affection. X. was held under a renewable lease; and the son covenanted to perform the duties incumbent on the lessee. A. covenanted merely for further assurance. The assignment was registered in 1856. In 1860 A. mortgaged certain lands which had been included with X. in the mortgage of 1846. Proceedings having been instituted for the sale of A.'s lands, a supplemental petition was presented for sale of X. on foot of the mortgage of 1846. The order was made, but A.'s lands were directed to be first sold. The proceeds of the sale of A.'s lands proved sufficient to pay off the mortgage of 1846, and the prior incumbrances, but left no sufficient residue for the mortgage of 1860. *Held*, that X. was not to be deemed to have been exonerated by the assignment from the mortgage of 1846, notwithstanding the covenant for further assurance; that the assignment was to be deemed a voluntary conveyance, and that therefore no indemnity could prove effectual against a purchaser for value; that the proceedings which had been instituted gave jurisdiction, and that independently of such proceedings, jurisdiction would have been given by any well founded equity of marshalling or of contribution. *In re Rorke's estate*, 15 Ir. Ch. Rep. 306, L. E. C.

### WARRANTY.

The plaintiff, a gentleman farmer, came into the shop of the defendant, a seed merchant, and said to his assistant, "Have you Dutch rape seed?" The latter replied, "We have, but of last year's importation." The plaintiff then asked, "Is it good?" The assistant replied, "I believe it to be so." The plaintiff then ordered five stone of it to be sent to him, which subsequently entirely failed to produce a crop. The defendant admitted, on cross-examination, that he knew that the seed was wanted for the purpose of growing. *Held*, that there was an implied warranty that the seed should be reasonably fit for the purpose for which it was bought. (Christian, J. dissentiente.) *Sheils v. Cannon*, 10 Ir. Jur. N. S. 247, C. P.

And, per Monahan, C. J., and Keogh, J.; that if the words, "I believe it to be so," constituted an ex-

press warranty, it was upon a different subject-matter from that upon which the plaintiff sought to raise the implied warranty, and meant not that the seed was growing seed, but seed fit for producing a good crop. *Id.*

And per Keogh, J., that the implied warranty was not a warranty of a good crop, or that the seed should appear above ground, but a warranty that it was reasonably fit, at the time of sale, for the purpose of being sowed. *Id.*

And, per Christian, J., that the words, "I believe it to be so," constituted an express qualified warranty, which excluded the implied warranty sought to be raised by the plaintiff. *Id.*

And (supposing this express warranty out of the case) that if the qualities which make seed germinate, be not wholly the gift of nature, but partly imparted by art, evidence should have been given at the trial, and the jury directed to find their verdict accordingly, as the defect was in what nature, or in what art imparted. *Id.*

#### WILL (CONSTRUCTION).

M. T., owner in fee of the lands of Garwick, devised same to his "third son, Meredith, for ever; but in case he should die unmarried, or without leaving lawful issue, in that case he may will half of it as he pleases, and the other half to go share and share alike between my surviving sons and their families." The will thus concluded—"All the bequests given my son R., my grandson M. son to my son J., and also my three other sons, Meredith (aforesaid), C., and H., of my property, no part of it shall or will be liable, or pay any debts they may contract, nor sell or mortgage same, but always go in the male line, free of any debt of theirs." *Held*, that Meredith took an estate tail under said devise in half of the said lands. *In re Thompson's estate*, 10 Ir. Jur. N. S. 47, Ch. App.

Testator by his will, dated 9th August, 1833, devised as follows:—"I give, devise, and bequeath to my son J. C. all those, my property, lands, tenements, and premises, at and about Fleak Castle, together with the live stock on said lands; also my plate, library, pictures, and furniture. I also devise and bequeath to my son J. C. my lands, tenements, and premises, with the appurtenances thereof, situate, lying and being at Dick's Grove, near Castle Island, county of K." The testator then made several bequests; amongst others, he bequeathed a life annuity of £700 sterling to his wife, "said annuity to be paid and payable into her own lands, out of the rents, issues, dividends, interest, and profits of my said estates;" and he further gave and bequeathed to his wife the sum of "£1,000 sterling to be paid to her out of my said estates at the end of the year next after my decease, for her own use and benefit." By codicil dated 6th December, 1833, the testator gave a further sum of £100 in addition to the annuity bequeathed in his said will, also to be paid "out of the rents, issues, dividends, interest, and profits of all my said estates by half-yearly payments, in the manner and at the times specified and declared in my said will." "And if it should happen that my son J. C. die without heirs of his body lawfully begotten, or to be begotten, in that case, and in default of such heirs,

I do hereby devise and direct that my lands, castles, tenements, and premises at or about Fleak Castle, and mentioned in my said will, together with the plate, furniture, and library in my said will specified, also my lands, farms, tenements, and premises situate, lying, and being at Dick's Grove, near Castle Island (all subject to and charged with the payment of the aforesaid annuity to my dear wife of £800 a year, and also with the payment of any reasonable provision made with my consent by my son for his wife, to be paid and payable to her during her natural life,) shall, at my son's death, descend to be transferred to my grandson, D. C., his heirs, executors, and assigns, for ever. The heir for the time being to add the name C. to the name D. Also if it should happen that my son, John Coltsman, die without heirs of his body lawfully begotten, or to be begotten, in that case, and in default of such heirs, I do hereby give and assign out of the monies I have at interest, and specified in my said will, the £6,000 to my daughter, Mary Godfrey, for her own use and benefit." *Held*, that J. C. took an estate in *quasi* fee simple in Fleak Castle, and an estate in fee simple absolute in Dick's Grove, subject to be defeated by an executory devise over to D. C. *Coltsman v. Coltsman*, 10 Ir. Jur. N. S. 5, s. 6. 15 Ir. C. L. R. 171, Exch.

The words of a bequest were as follows—"I leave severally to my four daughters—Mary Eleanor Pinner, Jane Lucretia Johnston, Elizabeth Francis Johnston, and Catherine Sarah Johnston, and unto their lawful children, the sum of £800 sterling each; which four portions, amounting together to £3,200, I hereby direct to be a first charge upon my said townland of Orkeeran, and my portion of Tamlet, purchased by me under the Incumbered Estates Court. And I direct interest at the rate of £5 per cent. on the said sums, that is to say, an annual sum of £160, to be paid in two equal half-yearly payments, severally unto each of my four daughters aforesaid, as a first charge out of the rents and profits of the said lands." The question was whether each £800 was to be considered as belonging to the daughter and her children, living at testator's death, as joint tenants, or whether each £800 was to be considered as settled on the daughter for life, with remainder to all her children. *Held*—that the testator's four daughters took the interests in the respective legacies with remainder to their children. *In re Johnston's estate*, 10 Ir. Jur. N. S. 358, L. E. C.

Testator, in his will dated 19th June, 1862, having recited that all his estates in the Counties of Meath and Westmeath were settled on his eldest son, except the lands of Baskin, and a townland called M., gave, devised, and bequeathed (without mentioning what he so gave, devised, and bequeathed) to said trustees, in trust for his son A. M., and he then gave, devised, and bequeathed to said trustees, in trust for his son A. S. M., the said townland called K., together with other premises therein mentioned. *Held*, that A. M. was absolutely entitled under said devise to the lands of Baskin. *Montgomery v. Montgomery*, 10 Ir. Jur. N. S. 102, Ch.

Testator, being seized of the lands of Baskin in fee, and also of a life estate in certain entails, lands, he empowered by a settlement made upon his marriage

in 1845, he charged the said estate with a sum of £55,000 for his own use. By indenture of mortgage bearing date 19th January, 1864, after reciting that the said B. M. had bequeathed to her son B. M. certain arrears of jointure (amounting to more than £5,000) charged upon testator's entailed estate, which estates, for the purpose of securing said arrears, he thereby charged with a sum of £55,000, he accordingly proceeded to mortgage same to B. M. Among the names of the townlands so mortgaged, the name of Baskin occurred. *Held*, that Baskin was introduced by mistake into the deed, and that same was not charged with the payment of said mortgage debt. *Id.*

1. Testator having charged by mortgage £5,000 on the said entailed estates, by his above-mentioned will further charged "said property according to the power given me, with a sum of £1,000 sterling for my daughter Julia; in addition to her share of the sum charged by my marriage settlement." Said mortgage, at testator's death, was reduced to £4,688, but by a sum of £311 became absolutely discharged from said mortgage. *Held*, that as to the sum of £311, Julia was absolutely entitled thereto. *Id.*

2. Under his will, reciting that, under the will of J., he was seized in fee of the lands of N. and W., and possessed of leasehold interests in the said lands of N. and the lands of B. The will then recited that at his testator believed that he should have personal property, exclusive of his chattel interests in land, sufficient to pay off his debts, and funeral and testamentary expenses. It then recited his desire to give to E. all his said fee-simple and leasehold estates, he (W.) paying the sum of £10,042. The testator then gave, devised, and bequeathed to E. "all my estate and interest in the aforesaid lands and houses, upon the terms of his paying to me or my executor the said sum of £10,042." W. at the time of his decease was entitled, under the will of J., to the lands of O. B., which had been held for a term which had expired before the date of W.'s will. *Held*, that the lands of O. B. did not pass to E. under W.'s will. *Mooney v. McDonnell*, 15 Ir. Ch. Rep. 84, Ch. App.

3. A testator devised a rent charge of 100 guineas to A. for life, and, after her death, "unto and amongst B., C., and D., the children of the said A., and me, to be equally divided between them, share and share alike, to hold to the said B., C., and D., and to their heirs for ever, as joint tenants; but in default of such heirs, the annuity to sink into the lands B., C., and D., were the illegitimate children of the testator and A. On the marriage of B. she put into settlement her undivided reversionary share. C. and D. died intestate and unmarried, in the lifetime of A., without having dealt with their shares. B. survived A. *Held*, that B. was entitled to raise out of the lands only one-third of the rent-charge of 100 guineas. *Daly v. Ashworth*, 16 Ir. Ch. Rep. 69, Ch.

4. M. having lands, A., B., C. and D., in the county of Kerry, by will said: "Being possessed of certain lands in the county of Kerry, which said lands are A., B., C. all situate in the said county, I require the aforesaid lands to be sold and equally divided between M. and L." and the residue was given to L. The lands of D. had been included with the others in one

original lease in 1720, and judgment debts had been registered against all four. *Held* (reversing the decree of the Master of the Rolls and Chancery Appeal in Ireland), that the lands of D. did not pass by the specific legacy to W. and L., but passed in the gift of the residue to L. *West v. Lawday*, 10 Ir. Jur. N. S. 381, H. of L.

Testator by his will, dated 1st February, 1847, gave and devised and bequeathed to his grand-daughter, A. E., "the sum of £1,000, or £50 per annum, whichever my executors think fit or most advantageous for my said grand daughter; said sum of £1,000, or £50 a year, as the case may be, to be paid by my daughter M. B., and to be chargeable and payable out of that portion of my property bequeathed to the said M. B., her heirs, &c. .... and in the event of my said grand-daughter A. E. dying unmarried, or without leaving lawful issue surviving, or before she attains the age of 21 years, the said sum of £1,000, or £50 per annum, to be bequeathed to her as aforesaid, to sink and not to be paid, but to be and remain the property of my said daughter M. B., her heirs," &c. Said M. B. elected as sole executrix to pay said annuity, and not the £1,000. *Held*, that said election was properly made by said executrix. *Slator v. Jordan*, 10 Ir. Jur. N. S. 386, Ch.

*Held* also, that the said words "or" and "or," which testator had so used, must be read "and" and that therefore in order that the executory devise over to M. B. might take effect, all the three events must have first happened, namely—A. E. must have died unmarried and without issue her surviving, and before she attained the age of twenty-one, and that one of the events having happened, the executory devise over was gone. *Id.*

A demise in these terms, "I leave to M. M. my estate of T., freehold property, and the residue of all I possess; and in case he had no heir at the demise of said M. M., my estate and freehold to be given to the first heir-at-law," is a devise of the entire interest with an executory devise over. *McEnally v. Wetherell*, 10 Ir. Jur. N. S. 118, C. P.; a. c. 15 Ir. C. L. R. 508.

Testator being possessed of considerable sums of money, viz. £800 and £500, secured by mortgage or charges on land; also £449 invested in Government consols; and £265 in Government new three per cent. stock, thus disposed of same by his will: "I will and bequeath whatever money I shall die possessed of to my brother J.;" and after making several other dispositions, thus concluded—"I will and bequeath all the rest and residue of my property, not heretofore disposed of, to my nephew, H., whom I appoint my residuary legatee." *Held*, that while the sums secured by mortgage, as also arrears of rent and rentcharge, interest, and dividends on consols and upon stock, passed under the expression "money" to J., the sums invested in consols and new three per cent. stock did not pass thereunder, but went to the residuary legatee, H. *Hewitt v. Bradin*, 10 Ir. Jur. N. S. 85, Ch.

The decision of the Lord Chancellor in *Hewitt v. Bradin* (ante p. 85) affirmed. *Bradin v. Hewitt*, 10 Ir. Jur. N. S. 265, Ch. App.

Testatrix by her will, bearing date 26th December, 1859, desired "that my dear brother, M. W., get the sum of £1000 of my money which is lodged in the Bank of Ireland. I also wish my dear sister, C. W., will get the sum of £500 of the money I have lodged in the Bank of Ireland. Now, my dear sister S. I wish you to get the remainder for yourself and daughters after my death—I mean the money that remains in the bank of Ireland." Testatrix never had any cash account whatever with the Bank of Ireland, nor money lodged on deposit receipts therein. She was, however, possessed of a sum of £6,179 3s. 3d., Government new three per cent. stock, standing in her name in the books of the governor and company of said bank. *Held*, that said stock passed under the bequest of "money;" and also that the said legacies of £1000 and £500 were to be paid in money and not in stock, and that same were not liable to the debts and funeral expenses of the testatrix. *M'Cauley v. Waters*, 10 Ir. Jur. N. S. 265, Ch.

Testator by will, bearing date 4th July, 1828, having devised certain freehold estates in lands to his sons, M. and T., share and share alike, thus proceeded—"I leave and bequeath to my two daughters, Julia and Mary, £1000 each. . . . And I charge and incumber all my said lands with the payment of my said daughters' fortunes." This will being made before the Wills Amendment Act, was duly attested by three credible witnesses. By codicil, unattested, the testator having recited that by his will he had charged said two legacies upon all his property, real and personal, with payment of said sums, thus proceeded: "I do hereby, by way of codicil to my last will, order and direct that said sums of £1000 shall, in the first instance, be paid out of whatever money I now have or may have in bank at the time of my decease, as also out of whatever sums of money as may be due to me by bond or otherwise, as far as same will go towards making up said two sums of £1000, with interest thereon from the day of my decease until fully paid; and in case said sums so remaining in bank and so due to me, when called in, shall appear inadequate to the payment of said two sums of £1000, with interest as aforesaid, I order and direct that the deficiency may be made up from the produce of the sale of my stock of cattle, as by my said will is directed." *Held*, that the freehold estates which were charged with said legacies by the will were not exonerated by the codicil. *In re O'Donell's estate*, 10 Ir. Jur. N. S. 83, Ch. Ap.

Testator by his will dated 26th June, 1841, charged certain lands of which he was seised with a sum of £1000 each for each of his five daughters, and he desired and directed his "trustees shall pay to, or permit and suffer each of my five daughters to receive and take for the term of her natural life the interest at the rate of 5 per cent. per annum, from the day of my decease.....and in case my said daughters, or any of them, shall hereafter marry, then upon trust.....to pay the children, if any, of my said daughters who shall marry.....and when each of my daughters shall die unmarried.....upon trust to pay and apply the principal sum of £1000 hereby provided for her so dying, to or amongst all or any of my other children.....in such shares and proportions as each of

my said daughters shall by deed or will appoint; in default of such appointment, then upon trust to pay and apply the principal sum of £1000 of her appointing to and amongst such of my other children as shall be then surviving, and the issue, if any, of such of them as shall then be dead, in equal shares and proportions." Testator, by a codicil made to said will, stating recited that upon the occasion of the marriage of one of his daughters, S., subsequent to the making of said will, he had paid and secured to her a sum of £1250 as a marriage portion; and also that he had given to his three daughters, H. and A. and M., each of the said five daughters, £1, having died, a sum of £1000 each as in will mentioned; and he revoked my said will so far as the same devised or bequeathed to the said S. is an object thereof. . . . And he also thereby further revoked my said will so far as the said sum of £1000 to each of my said daughters, H., and A. and M. is given absolutely, as I hereby declare; and my will is, that in the event of my said daughters, H., and A., and M., or any of them, remaining single or unmarried, they or she remaining single or unmarried shall only have and be entitled to interest for their or her natural lives or natural life, and no longer, like the said sum of £1000 each, which I devised and bequeathed of £1000 to each of them; the said H., and A. and M., I do hereby confirm subject to the conditions and restrictions as aforesaid." By a subsequent codicil this £1000 was increased to £1250. Testator died in April, 1847. Said M. died in December, 1847, and previous thereto she appointed her said fortune to her amongst her said two surviving sisters, A. and H., share and share alike. Afterwards H. died, and she appointed the fortune left by her father to A., *Held*, affirming an order of the Master of the Rolls, that A. was entitled to interest at 5 per cent. for life on her sum of £1250; and also that the powers of appointment given in the will to A., M., and H., were revoked by the first codicil; but that the bequests over in said will in default of appointment were not revoked, and consequently that his other children who survived M. and H. were entitled under the terms of the will to a distributive share of said two sums of £1250 each, the said fortune of M. and H. *Kellett v. Kellett*, 10 Ir. Jur. N. S. 405, Ch. App. 13 A.

Testator by his will recited that he did demise, &c. the house of Waterstown and 30 acres of land, held for the lives of his said five daughters, to one T. B., but subject to the yearly rent of £210s. per acre. And he did thereby declare that the said lease was so made to T. B. in trust, to and for the lives of his said five daughters and the survivors of them, and in order after his decease to provide them with maintenance; and by a third codicil thereto he, when speaking of his said daughters, determined and willed "that they shall have the house of Waterstown and 30 acres of land.....at their disposal." *Held*, that

*Held*—affirming the order of the Master of the Rolls—that A. having survived her sisters, was entitled, under the third codicil in the will, to the interest of the testator in the house of Waterstown and 30 acres of land, but free from the rent of £210s. per acre. *Id.*

O. M. having by his will dated 21st November, 1805, made several bequests, thus proceeded: "I



leave and appoint my ever dear and beloved wife residuary legatee to this my last will and testament, to have and to keep for her ~~own use~~ any further sum or sums of money I may die ~~bequeathed or possessed of~~ . . . convinced she will never desert my dear and beloved children . . . and at her death divide whatever she may have among the most deserving of her children . . . and my will is, if ever she should marry she should forfeit all title, power, or control over my children and property, and to have but £60 a year during her natural life; and that all power and authority vested in her should devolve on "other parties therein named." After testator's death his said wife being possessed of a sum of £800 (she never having married subsequently), made her will, dated 12th of April, 1829, wherein she declared that she, "in pursuance of all power and authority vested in her by her

said husband's will, bequeathed said sum of £800 to her daughter, J. K., for life, and at her death . . . that the sum of £400 should be given to her grandson, and the other £400 to be equally divided between her four granddaughters," naming them. *Held*, that the said expressions in O. M.'s will amounted merely to a recommendation, and did not legally bind his widow to divide whatever she might have among her children at her death, and that therefore the bequest to her grandchildren was good. *Touhy v. Burke*, 10 Ir. Jur. N. S. 292, M. O.

*Held* also, that the sum of £800 was the proper sum to bear the costs of establishing claimant's respective claims; and further, that the personal representative of J. K. who unsuccessfully contended that J. K. was absolutely entitled to said sum of £800, was entitled to his costs out of said fund. *Ib.*

## ADDENDA.

The following cases and references were accidentally omitted from the body of the Digest.

### CONTRACT.

The defendant who was the superintendent of a cemetery, and required certain books and printed forms for carrying on the business of the cemetery, applied to A. to procure them for him. A. applied to the plaintiff to execute the order. The plaintiff, who was a stationer and printer, and who had been in the habit of supplying to A. books and forms of the kind required, received from A. an order for "one of each of the large books, and as few as possible of the small forms." The plaintiff sent a greater number of the large books than were ordered, and a number of the small forms, which the jury found to be in excess of the order, and also a quantity of stationery. The defendant refused to receive any part of the goods sent, on the ground that they were not according to order. At the trial the judge refused to nonsuit the plaintiff, or direct a verdict for the defendant, but left to the jury the question whether A. was the agent of the defendant for the purpose of accepting the goods; and if so, whether there was an acceptance of the goods by him. The jury found that A. was the defendant's agent, and they brought in a verdict for the plaintiff for the price of the goods which they found that A. had authority to order, and did actually order. On motion for a new trial on the ground of misdirection. *Held*, that assuming there was an acceptance by A. to satisfy the Statute of Frauds, that did not preclude the defendant from rejecting the goods on the ground that they were not according to order. *Shannon v. Barlow*, 15 Ir. C. L. R. 479, C. P.; s. c. 9 Ir. Jur. N. S. 229.

*Held* (dissentiente Christian, J.) that as the plaintiff had sent goods in excess of the order, the defendant was not bound to select and accept such part of the goods as corresponded with the order. That consequently the defendant was justified in his refusal to receive any part of the goods, and that therefore there should be a new trial. *Ib.*

*Levy v. Green* (8 Ell. & Bl. 576; a. c., on appeal, 1 Ell. & Ell. 969) followed. *Ib.*

### LIBEL.

A., an importer of French brandy, complained of the following libel, contained in a letter written by B. to the attorney of A:—"Now, as to Mr. S., I warn him that I am willing to leave the matter to arbitration. As to his conduct, I did not say half enough; it more resembles that of a freebooter than of an honorable British merchant." In one count, which contained a preliminary inducement, the innuendo was, that the conduct of the plaintiff towards defendant in relation to defendant's advertisement, and in the negotiations stated in the inducement, was "dishonest and dishonorable, and unworthy of an honorable British merchant." In another count the innuendo was, that plaintiff had been guilty of discreditable and dishonorable conduct in his said trade. The defendant pleaded that he had published a notice complaining of the quality of some brandy which had got a prize medal; that plaintiff employed an attorney to write to him complaining of the publication, to which he replied that it was not plaintiff's brandy to which he referred; that thereon the plaintiff, through his attorney, insisted, as the terms for forbearing legal proceedings against defendant, that he should procure the publication of an advertisement in commendation of plaintiff's brandies, as furnished by plaintiff, fifty times, at his own expense, and should pay plaintiff £20, otherwise that legal proceedings should be forthwith commenced. That believing said demand of £20 to be extortionate and unjust, and the other terms to be unfair, and that he had an interest in inducing the plaintiff and his attorney to abandon their said demands, he *bona fide* and with a view to his interests, and believing the same to be warranted by the circumstances, wrote the said letter to the plaintiff's attorney in reply to the letter threatening proceedings. *Held*, on demurrer, to be a good plea of privileged communication. *Sayers v. Begg*, 15 Ir. C. L. R. 459, C. P.; s. c. 9 Ir. Jur. N. S. 337.

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# APPENDIX TO THE IRISH JURIST,

CONTAINING

## The Public General Statutes

PASSED IN THE SESSION 1865, AND 28 & 29 VICTORIA.

*N.B.—The Statutes relating to Ireland only are printed in full.*

### CAP. I.

An Act to amend certain clerical Errors in the Civil Bill Courts Procedure Amendment Act (*Ireland*), 1864.  
[3rd March, 1865.]

27 & 28 Vict. c. 99.

Sec. 1. *Certain alterations herein named to be introduced in 27 & 28 Vict. c. 99.*

'WHEREAS it is expedient that certain clerical errors in the Civil Bill Courts Procedure Amendment Act (*Ireland*) 1864, shall be rectified: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. The following alterations shall be introduced in the said Act, and read as if originally part thereof:

In the eighth section the word "seventeenth" shall be substituted for the word "sixteenth:"

In paragraph 9, part 2 of schedule B. the figures "12" shall be substituted for the figures "11:"

In paragraph 1, part 3 of schedule B., the figures "45" and "53" shall be respectively substituted for the figures "44" and "52:"

In paragraph 2, part 3 of schedule B., the figures "50" shall be substituted for the figures "49:"

In paragraph 1, part 4 of schedule B., the figures "12" shall be substituted for the figures "11:"

In paragraph 2, part 4 of schedule B., the figures "44" shall be substituted for the figures "43;" and in paragraph 3, part 4 of schedule B., the figures "45" and "53" shall be respectively substituted for the figures "44" and "52."

### CAP. II.

An Act to extend the Powers now vested in Justices of the Peace to grant Licences to deal in Game to the Divisional Magistrates within the Police District of *Dublin* Metropolis.

[27th March, 1865.]

23 & 24 Vict. c. 90. 1 & 2 W. 4, c. 32. 2 & 3 Vict. c. 35.

Sec. 1. *Powers to justices to grant licences to deal in game extended to magistrates of police of Dublin.*

2. *This and recited Acts to be as one.*

'WHEREAS by an Act passed in the twenty-third and twenty-fourth years of her present Majesty, chapter ninety, it is amongst other things enacted that all the provisions of two several Acts passed respectively in the first and second years of King *William* the Fourth, chapter thirty-two, and in the second and third years of her present Majesty, chapter thirty five, relating to the granting of licences by justices of the peace to deal in game, and to the holding of special sessions by said justices in their respective divisions or districts for the purpose of granting such licences, shall, so far as is consistent with the express provisions of the said first-recited Act, extend to and be in full force and effect in and throughout the whole of the United Kingdom: And whereas it is expedient that within the police district of *Dublin* metropolis, any two or more divisional magistrates of police should have the same powers of granting licences to deal in game as can be exercised by justices at special sessions under the said Acts: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal,



and commons, in this present Parliament assembled, and by the authority of the same as follows:

1. From and after the passing of this Act all the powers vested in justices of the peace under the said recited Acts relating to the granting of licences to deal in game, may, within the police district of *Dublin* metropolis, be exercised by any two or more divisional magistrates of police, and it shall be lawful for the said divisional magistrates of police, or any two or more of them, to grant said licences to deal in game.

2. This Act and the said recited Acts shall be construed together as one Act.

#### CAP. III.

An Act for the Protection of Inventions and Designs exhibited at certain Industrial Exhibitions in the United Kingdom. [27th March, 1865.]

Sec. 1. *Short title.*

2. *Power to Board of Trade to certify that certain industrial exhibitions are entitled to the benefit of this Act.*

3. *Exhibition of new inventions not to prejudice patent rights.*

4. *Exhibition of designs not to prejudice rights to registration.*

‘WHEREAS exhibitions of objects of art and industry manufactured or contributed wholly or in part by members of the industrious classes of her Majesty’s subjects have lately been held, and may be from time to time hereafter held, in divers parts of the United Kingdom; and it is expedient to encourage such exhibitions by granting to persons desirous of exhibiting at the same new inventions or new designs such protection as is hereinafter mentioned:’ Be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as the “Industrial Exhibitions Act, 1865.”

2. It shall be lawful for the Lords of the Committee of her Majesty’s Privy Council for Trade and Foreign Plantations, upon the application of any persons desirous of holding any such exhibition as aforesaid in any part of the United Kingdom, to certify, if they shall think fit, that the exhibition so proposed to be held is in their judgment calculated to promote *British* art and industry, and to prove beneficial to the industrious classes of her Majesty’s subjects, either generally or in or near the place where such exhibition is proposed to be held; and every such certificate shall mention the place at which and the time during which such exhibition is proposed to be held; and the time mentioned in any such certificate may afterwards, if the lords of the said committee shall so think fit, be enlarged and extended by a further certificate, but so that the whole time allowed and certified for the holding of the same exhibition shall in no case exceed the total period of six months; and every such exhibition so certified, if and so long as the same shall be held at the place and within the time mentioned in any such certificate, shall be deemed

to be an industrial exhibition entitled to the benefit of this Act.

3. The exhibition of any new invention at any industrial exhibition entitled to the benefit of this Act shall not, nor shall the publication during the period of the holding of such exhibition of any description of such invention, nor shall the user of such invention for the purposes of such exhibition, and within the place where the same may be held, or elsewhere, by any person using the same during the period of such exhibition, without the privity and consent of the true and first inventor thereof, prejudice the right of any person to register provisionally such invention, or to validate any letters patent which may be granted for such invention.

4. The exhibition at any industrial exhibition entitled to the benefit of this Act of any new design capable of being registered provisionally under the “Designs Act, 1850,” or of any article to which such design is applied, shall not, nor shall the publication during the period of the holding of such exhibition of any description of such design, prejudice the right of any person to register, provisionally or otherwise, such design, or invalidate any provisional or other registration which may be granted for such design.

#### CAP. IV.

An Act to apply the sum of one hundred and seventy five thousand six hundred and fifty pounds out of the Consolidated Fund to the service of the year ending the 31st day of March, One Thousand Eight Hundred and Sixty-five.

[27th March, 1865.]

#### CAP. V.

An Act for the Incorporation of the Territories of *British Kaffraria* with the colony of the Cape of Good Hope. [27th March 1865.]

#### CAP. VI.

An Act for the Protection of Inventions and Designs exhibited at the *Dublin* International Exhibition in the year one thousand eight hundred and sixty-five. [27th March 1865.]

1. *Short title.*

2. *Exhibitions of new inventions not to prejudice rights to register the same.*

3. *Exhibitions of new designs not to prejudice rights to register the same.*

‘WHEREAS it is expedient that such protection as is hereinafter mentioned should be afforded to persons desirous of exhibiting new inventions or new designs at the international exhibition to be held at *Dublin* in the present year:’ Be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as “The Protection of Inventions and Designs Amendment Act, 1865.”

2. The exhibition of any new invention at the *Dublin*



in International Exhibition shall, not, nor shall the publication during the period of the holding of such exhibition of any description of such invention, nor purposes of the said exhibition, prejudice the right of any person to register provisionally such invention, or invalidate any letters patent that may be granted for such invention.

3. The exhibition at the *Dublin* International Exhibition of any new design capable of being registered provisionally under the Designs Act, 1850, or of any article to which such design is applied, shall not, nor shall the publication during the period of the holding of such Exhibition of any description of such design, prejudice the right of any person to register, provisionally or otherwise, such design, or invalidate any provisional or other registration that may be granted for such design.

#### CAP. VII.

An Act to confirm a Provisional Order under "The General Police and Improvement (*Scotland*) Act, 1862," relating to the Burgh of *Perth*.

#### CAP. VIII.

An Act to amend "The Election Petitions Act, 1848," in certain Particulars. [7th April, 1865.]

11 & 12 Vict., c. 98.

- Sec. 1. Committee to adjourn to day after the meeting of the house when house not sitting, and committee has occasion to report.
2. In case the house shall not sit, committee further to adjourn.
3. In certain cases the house may direct a committee to adjourn for a reasonable period.
4. If committee dissolved by any error, &c., a new committee shall be struck, unless the house shall otherwise order.
5. House may order a dissolved committee to be revived, and to re-assemble and act.
6. As to sittings of revived Committee.

WHEREAS it is expedient to amend "The Election Petitions Act, 1848," (herein-after called the Principal Act,) in certain particulars hereafter mentioned: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows;

1. If any select committee appointed under the principal Act have occasion to apply to or report to the house, and the house be adjourned for more than twenty-four hours, such committee shall adjourn to the day immediately following that on which the house shall be appointed to meet for the despatch of business, unless that day shall happen to be a *Sunday*, *Christmas Day*, or *Good Friday*, and in that case the committee shall adjourn to the next following day.
2. In case the house from any cause shall happen not to sit for the despatch of business on the day appointed for that purpose, the committee shall again, and so from time to time, adjourn till after the house shall sit for the despatch of business; but no adjourn-

ment shall be made for any longer period than to the day next after the day the house shall actually sit for the despatch of business, unless such day shall happen to be a *Sunday*, *Christmas Day*, or *Good Friday*, and in that case the adjournment shall be to the next following day.

3. In case it shall become necessary to adjourn the consideration of any application or report made by any committee to the house, the house may, if it shall so think fit, direct the committee to adjourn their sitting again, and from time to time, and for such reasonable time as shall be sufficient to enable the house to decide on such application and report, and such committee shall adjourn accordingly.

4. If at any time after the appointment of a committee under the principal Act it shall appear to the house that, from any error, irregularity of proceeding, oversight, or other cause, such committee has become dissolved, or unable to continue its sittings for any cause not provided for by the principal Act, another committee shall be appointed to decide on the petition referred to such committee, unless the house shall otherwise order, within three sitting days, as hereinafter provided; and for the purpose of appointing such other committee the general committee and the members of the chairman's panel shall meet as soon as conveniently can be after the expiration of three sitting days from the time the occasion for such new committee shall be reported to or brought under the notice of the house by any member, at a day and hour to be appointed by the general committee; and notice of such meeting shall be published with the votes, and all the proceedings of such former committee shall be of no effect.

5. In all cases where a committee shall have become dissolved by any error, irregularity of proceeding, oversight, or other cause, not involving the death or permanent illness of any of its members, the house may, if it shall so think fit, within three sitting days after such event shall have been reported to or brought under the notice of the house by any member, order such committee to stand revived, and to meet, and continue its sittings; and in such case no new committee shall be appointed, unless for any subsequent cause; and the proceedings of such new committee shall have the same force and effect and be as valid as if no such dissolution thereof had taken place.

6. A committee ordered to stand revived shall meet at the time mentioned in such order, and shall in its subsequent sittings and adjournments be regulated by all the provisions of the principal Act and of this Act.

#### CAP. IX.

An Act to allow Affirmations or Declarations to be made instead of Oaths in all Civil and Criminal proceedings in *Scotland*. [7th April 1865.]

#### CAP. X.

An Act to apply the Sum of Fifteen Millions out of the Consolidated Fund to the Service of the year One thousand eight hundred and sixty-five. [7th April 1865.]

## CAP. XI.

An Act for punishing Mutiny and Desertion and for the better Payment of the Army and their Quarters.  
[7th April 1865.]

## CAP. XII.

An Act for the Regulation of Her Majesty's Royal Marine Forces while on shore. [7th April 1865.]

## CAP. XIII.

An Act to confirm certain Provisional Orders under "The Drainage and Improvement of Lands Act (Ireland), 1863," and the Act amending the same.  
[7th April 1865.]

26 & 27 Vict. c. 88.

1. *Provisional orders in schedule confirmed.*
2. *Act not to render legal works executed by drainage board that would otherwise have been illegal by injuriously affecting lands, &c.*
3. *Short title.*

"WHEREAS the commissioners of Public Works in Ireland have, in pursuance of "The Drainage and Improvement of Lands Act (Ireland), 1863," and the Act amending the same, duly made the provisional order contained in the first, second, third, and fourth parts of the schedule to this Act annexed, and it is by the said first-mentioned Act provided, that no such orders shall be of any validity whatsoever until they shall be confirmed by Parliament, and it is expedient that the said order should be so confirmed:" Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Each of the provisional orders contained in the schedule hereunto annexed is hereby confirmed, and from and after the passing of this Act shall be deemed to be a public general Act of Parliament of the like force and effect as if the provisions of the same had been enacted in the body of this Act.

2. It is hereby declared, that, as against any person owning or interested in any land or other property situate beyond the limits of the jurisdiction of the board established by this Act, nothing contained in the said drainage and improvement of lands Act (Ireland) 1863, or in the said provisional order, or in this Act, shall be construed to render legal any work executed or to be executed by such board that would, if the said Acts had not been passed, have been illegal by reason of its injuriously affecting such land or property; and any damages adjudged to be paid by the said board to any person as aforesaid shall be deemed to be part of the costs incurred by such board in defending legal proceedings instituted against them, and shall be defrayed in manner in which the said costs are authorized to be defrayed by "The drainage and improvement of lands Act (Ireland), 1863."

3. This Act may be cited for all purposes as "The drainage and improvement of lands supplemental Act, Ireland, 1865."

## SCHEDULE to which this Act refers.

## PART I.

DRAINAGE AND IMPROVEMENT OF LANDS ACT (IRELAND) 1863, 26 & 27 Vict. c. 88, and 27 & 28 Vict. c. 72  
In the matter of RATHDOWNEY DRAINAGE DISTRICT, Queen's County.

WHEREAS certain proprietors of and persons interested in the lands adjoining Erkins river and tributary streams in the Queen's County on or about the eighth day of March one thousand eight hundred and sixty-four presented their petition to the commissioners of public works in Ireland, under the provisions of the drainage and improvement of lands Act (Ireland) 1863 accompanied by the proper schedules, maps, plans, sections, and estimates, together with other particulars and information required by the said Act, showing reference to the said maps, the boundaries and area of the proposed drainage district, and stating the exigencies rendering the formation of such drainage district necessary, and praying that an inspector might be authorized by the said commissioners, and sent to the proposed district, to make the necessary inquiry with respect to the propriety of constituting the proposed district, and otherwise to proceed under the said Act for the purpose of having said district (if it should seem so expedient) formed under the said Act: and whereas the said commissioners referred the same to Samuel U. Roberts, Esquire, Civil Engineer, an inspector duly appointed under the said Act: and whereas all notices and inquiries required by the said Act have been duly given and made; and the said inspector has duly reported to us the said commissioners in writing the result of his inquiries: and we the said commissioners have duly considered the same, and no objections to the report of the said inspector have been made to us, and all preliminaries required by the said Act to precede the making of this provisional order have been performed and complied with: and whereas we the said commissioners of public works in Ireland, upon consideration of the premises, are satisfied of the propriety of constituting the proposed separate drainage district, and that the proprietors of two third parts in value of the lands in the proposed district are in favour thereof, and have subsequently to the date of the report of the said inspector assented thereto in writing: now, therefore, in pursuance of the power given to us by the said Act, we, the commissioners of public works in Ireland, do, by this provisional order under our common seal, constitute the area in the said petition and report, and the boundaries and extent of which are set forth within yellow lines on a certain map marked with the letter A., to which we have caused our common seal to be attached (and which map is deposited in the office of public works in Ireland), a separate drainage district by the name of "The Rathdowney Drainage District."

And we do declare that the lands to be purchased for the proposed works in such district (subject to such alterations and deviations therefrom as we the said commissioners may hereafter sanction) are the lands in that behalf shown and set forth in the said map and the schedule thereto annexed, marked with the letter B., and also sealed with our common seal; and we,

the said commissioners of public works, do, by this our order, order and direct that the time for completion of the necessary works in the said district shall be limited to the first day of May which will be in the year one thousand eight hundred and sixty-six.

And we do further by this our provisional order make the following regulations with respect to the drainage board:

That the drainage board for the said district shall consist of five members:

That the following persons shall be the members of the first drainage board: viz:

1. Matthew Henry Franks, Esquire, Westfield Farm, Mountirath;
2. Robinson G. Perry, Esquire Rathdowney;
3. Sir Patrick O'Brien, Baronet, M.P., 14, Merion Square, East, Dublin;
4. The Reverend Henry Herbert, Rathdowney; and
5. James Howard, Rathdowney:

That the first meeting of the said board shall be summoned by notice under the hands of any two or more of the said board, published in the Dublin Gazette and some newspaper generally circulated in the said district at least Fourteen Days next before the day of meeting:

That the qualification of any subsequent member of the said board shall be that he shall be the proprietor (as defined by the said Act and the Acts referred to therein or incorporated therewith) of not less than twenty acres of land situate within the area of the said district, or land agent for the time being of a person being a proprietor as aforesaid of no less than one hundred acres of land situate within the area of said district and acting as receiver of the rents and profits of such lands:

That the members of the first board shall vacate their offices on the first Thursday in September in the year following the date of this provisional order:

That the electors for members of the drainage board shall be the persons in that behalf mentioned in the said Act: provided always, that no such elector shall be entitled to vote or exercise any privilege as such, unless the land of which he is the proprietor, or some portion thereof, shall be rateable on account of the works in the district, and he shall have previously paid all rates or arrears of rates which may be payable by him in respect of any drainage rate for the aforesaid district:

In witness whereof, we, the said commissioners of public works in Ireland, have hereunto caused our common seal to be affixed, this seventh day of January, one thousand eight hundred and sixty five.

E. HORNSBY, (L. S.)

Office of Public Works, Dublin.

Secretary.

#### PART 2.

DRAINAGE AND IMPROVEMENT OF LANDS ACT (IRELAND), 1863, 26 & 27 Vict. c. 88. and 27 & 28 Vict. c. 72.

In the matter of the Silver River Drainage District in the King's County and County of Westmeath.

WHEREAS certain proprietors of and persons inter-

ested in the lands adjoining Silver River, on or about the eighteenth day of May, one thousand eight hundred and sixty-four, presented their petition to the commissioners of public works in Ireland under the provisions of the drainage and improvement of lands Act (Ireland) 1863, accompanied by the proper schedules, maps, plans, sections, and estimates, together with other particulars and information as required by the said Act, showing by reference to the said maps the boundaries and area of the proposed drainage district, and stating the exigencies rendering the formation of such drainage district necessary, and praying that the said lands within the proposed district should constitute a separate drainage district, under the provisions of the said Act: and whereas the said commissioners referred the same to Samuel U. Roberts, Esquire, Civil Engineer, and inspector duly appointed under said Act: and whereas all notices and inquiries required by the said Act have been duly given and made, and the said inspector has duly reported to us the said commissioners in writing the result of his inquiries, and we the said commissioners have duly considered the same, and no objections to the report of the said inspector have been made to us, and all preliminaries required by the said Act to precede the making of this provisional order having been performed and complied with, we, the said commissioners of public works in Ireland, upon consideration of the premises, are satisfied of the propriety of constituting the proposed separate drainage district, and that the proprietors of two third parts in value of the lands in the proposed district are in favour thereof, and have subsequently to the date of the report of the said inspector assented thereto in writing: now, therefore, in pursuance of the power given to us by the said Act, we, the commissioners of public works in Ireland, do, by this provisional order, under our common seal, constitute the area in the said petition and report, and the boundaries and extent of which are set forth within yellow lines on a certain map to which we have caused our common seal to be attached (and which map is deposited in the office of public works in Ireland), a separate drainage district by the name of "The Silver River Drainage District:"

And we do declare that the lands to be purchased for the proposed works in said district (subject to such alterations and deviations therefrom as we the said commissioners may hereafter sanction) are the lands in that behalf shown and set forth in the said map, and in the schedule thereto annexed, marked with the letter B., and also sealed with our common seal: and we, the said commissioners of public works, do, by this our order, order and direct that the time for completion of the necessary works in the said district shall be limited to the first day of June which will be in the year one thousand eight hundred and sixty six.

And we do further by this our provisional order make the following regulations with respect to the drainage board:

That the drainage board for the said district shall consist of six members:

That the following persons shall be the members of the first drainage board, viz:

Toler B. Garvey of Parsonstown in the King's County, Esquire;

Edward M. Dunne of Mountrath in the Queen's County, Esquire;

John Ridley of Tullamore in the King's County, Esquire;

Marcus Goodbody of Clara in the King's County, Esquire;

George Ridley, of Tullamore, in the King's County, Esquire;

Joseph R. Belton of Tullamore in the King's County, Esquire:

That the first meeting of the said board shall be summoned by notice under the hands of any two or more of the said board, published in the Dublin Gazette and some newspaper generally circulated in the said district, at least fourteen days next before the day of meeting:

That the qualification of any subsequent member of the said board shall be, that he shall be the proprietor (as defined by the said Act and the Act referred to therein or incorporated therewith) of not less than twenty acres of land situate within the area of said district, or the land agent for the time being of a person being a proprietor as aforesaid of not less than one hundred acres of land situate within the area of said district:

That the members of the first board shall vacate their offices on the first Thursday in September in the year following the date of this provisional order:

That the electors for members of the drainage board shall be the persons in that behalf mentioned in the said Act: provided always, that no such elector shall be entitled to vote or exercise any privilege as such unless the land of which he is the proprietor, or some portion thereof, shall be rateable on account of the works in the district, and he shall have previously paid all rates or arrears of rates which may be payable by him in respect of any drainage rate for the aforesaid district:

In witness whereof, we, the said commissioners of public works in Ireland, have hereunto caused our common seal to be affixed, this eighteenth day of February one thousand eight hundred and sixty-five.

E. HORNSBY (L. S.),

Office of Public Works, Dublin.

Secretary.

### PART 3.

**DRAINAGE AND IMPROVEMENT OF LANDS ACT (IRELAND)**  
1863, 26 & 27 Vict. c. 88, and 27 & 28 Vict. c. 72.

In the matter of **BALLYNACARRA DRAINAGE DISTRICT**, in the King's County and Queen's County.

WHEREAS certain proprietors of and persons interested in the lands adjoining Ballynacarrig river, on or about the twelfth day of January one thousand eight hundred and sixty four, presented their petition to the commissioners of public works in Ireland, under the provisions of "The Drainage and Improvement of Lands Act (Ireland), 1863," accompanied by the proper schedules, maps, plans, sections, and estimates, together with other particulars and information, as required by the said Act, showing, by reference to the said maps, the boundaries and area of the proposed

drainage district, and stating the exigencies rendering the formation of such drainage district necessary, and praying that the said lands within the proposed district should be constituted a separate drainage district under the provisions of the said Act: and whereas the said commissioners referred the same to Samuel U. Roberts, Esquire, civil engineer, and inspector duly appointed under the said Act: and whereas all notices and inquiries required by the said Act have been duly given and made, and the said inspector has duly reported to us the said commissioners, in writing, the result of his inquiries, and we, the said commissioners, have duly considered the same, and no objections as to the report of the said inspectors have been made to us, and all preliminaries required by the said Act to precede the making of this provisional order having been performed and complied with, we, the said commissioners of public works in Ireland, upon consideration of the premises are satisfied of the propriety of constituting the proposed separate drainage district, and that the proprietors of two third parts in value of the lands in the proposed district are in favour thereof, and have subsequently to the date of the report of the said inspector assented thereto in writing: now, therefore, in pursuance of the power given to us by the said Act, we, the commissioners of public works in Ireland, do, by this provisional order, under our common seal, constitute the area in the said petition and report, and the boundaries and extent of which are set forth within yellow lines on certain maps to which we have caused our common seal to be attached (and which maps are deposited in the office of public works in Ireland), a separate drainage district, by the name of "The Ballinacarrig Drainage District:" And we do declare that the lands to be purchased for the proposed works in said district (subject to such alterations and deviations therefrom as we the said commissioners may hereafter sanction) are the lands in that behalf shown and set forth in the said maps and the schedule thereto annexed, marked with the letter B., and also sealed with our common seal: and we the said commissioners of public works do, by this our order, order and direct that the time for completion of the necessary works in the said district shall be limited to the first day of June which will be in the year one thousand eight hundred and sixty-seven.

And we do further by this our provisional order make the following regulations with respect to the drainage board:

That the drainage board for the said district shall consist of six members:

That the following persons shall be the members of the first drainage board, videlicet:

1. Colonel Thomas Bernard of Castle Bernard in the King's County;
2. Colonel John Head Drought of Lotty Brook, King's County;
3. Henry Stuart Johnston of Rathosth in the County of Meath, Esquire;
4. The Reverend Joseph Marshall of Baronne Court in the King's County;
5. George Thomas Benwell of Cadams-town in the King's County, Esquire;
6. Matthew H. Franks of Westfield in the Queen's County, Esquire;

That the first meeting of the said board shall be summoned by notice under the hands of any two or more of the said board, published in the Dublin Gazette and some newspaper generally circulated in the said district, at least fourteen days next before the day of meeting:

That the qualification of any subsequent member of the said board shall be, that he shall be the proprietor, as defined by the said Act and the Acts referred to therein or incorporated therewith, of not less than twenty acres of land situate within the area of the said district, or the land agent for the time being of a person being a proprietor as aforesaid of not less than one hundred acres of land situate within the area of said district:

That the members of the first board shall vacate their offices on the first Thursday in September in the year following the date of this provisional order:

That the electors for members of the drainage board shall be the persons in that behalf mentioned in the said Act; provided always, that no such elector shall be entitled to vote or exercise any privilege as such unless the land of which he is the proprietor, or some portion thereof, shall be rateable on account of the works in the district, and he shall have previously paid all rates or arrears of rates which may be payable by him in respect of any drainage rate for the aforesaid district.

In witness whereof, we, the said commissioners of public works in Ireland, have hereunto caused our common seal to be affixed, this eighteenth day of February one thousand eight hundred and sixty-five.

E. HORNSBY, (L. S.)

Office of Public Works, Dublin. Secretary.

#### PART 4.

#### DRAINAGE AND IMPROVEMENT OF LANDS ACT (IRELAND), 1863,

26 & 27 Vict. c. 88, and 27 & 28 Vict. c. 72.

In the Matter of the Six Mile Bridge Drainage District, County of Clare.

WHEREAS certain proprietors and persons interested in the lands upon and adjacent to the Owenagarney river and tributaries, on or about the twenty-second day of March one thousand eight hundred and sixty-four, presented their petition to the commissioners of public works in Ireland, under the provisions of the Drainage and Improvement of Lands Act (Ireland), 1863, accompanied by the proper schedules, maps, plans, sections, and estimates, together with other particulars and information required by the said Act, showing, by reference to the said maps, the boundaries and area of the proposed drainage district, and stating the exigencies rendering the formation of such drainage district necessary, and praying that the said lands within the proposed district should be constituted a separate drainage district, under the provisions of the said Act: and whereas the said commissioners referred the same to Samuel U. Roberts, Esquire, civil engineer, and inspector duly appointed under the said Act: and

whereas all notices and inquiries required by the said Act have been duly given and made, and the said inspector has duly reported to us, the said commissioners, in writing, the result of his inquiries, and we, the said commissioners, have duly considered the same, and have also considered an objection to the said report made on behalf of Thomas Arthur, Esquire, a lunatic: And whereas all preliminaries required by the said Act to precede the making of this provisional order have been performed and complied with: And whereas ye, the said commissioners of public works in Ireland, upon consideration of the premises, are satisfied of the propriety of constituting the proposed separate drainage district, and that the proprietors of two third parts in value of the lands in the proposed district are in favour thereof, and have subsequently to the date of the report of the said inspector assented thereto in writing: Now, therefore, in pursuance of the power given to us by the said Act, we, the commissioners of public works in Ireland, do, by this provisional order, under our common seal, constitute the area in the said petition and report, and the boundaries and extent of which are set forth within yellow lines on the map to which we have caused our common seal to be attached (and which map is deposited in the office of public works in Ireland), a separate drainage district, by the name of "The Six-mile Bridge Drainage District;" and we do declare that the lands to be purchased for the proposed works in such district (subject to such alterations and deviations therefrom as we the said commissioners may hereafter sanction) are the lands in that behalf shown and set forth in the said map and schedule thereto annexed, marked with the letter B., and also sealed with our common seal: And we the said commissioners of public works, do, by this our order, order and direct that the time for completion of the necessary works in the said district shall be limited to the first day of October which will be in the year one thousand eight hundred and sixty-eight.

And we do further by this our provisional order make the following regulations with respect to the drainage board:

That the drainage board for said district shall consist of eight members:

That the following persons shall be the members of the first drainage board, viz:

1. Maurice O'Connell of Kilgorey,
2. William Bentley of Hurlston,
3. Richard Bentley of Doon House,
4. John Gabbet of Castle Lake,
5. Charles George O'Callaghan of Ballinahinch,
6. John Wilson Lynch of Belvoir,
7. Richard Robert Studdert of Coolreagh, and
8. John Browne of the Crescent in the County of Limerick, Esquire;

} all in the  
county of  
Clare, es-  
quires;

That the first meeting of the said board shall be summoned by notice under the hands of any two or more of the said board, published in the Dublin Gazette and some newspaper generally circulated in the said district at least fourteen days next before the day of meeting:

That the qualification of any subsequent member of the said board shall be, that he shall be the pro-

prietor (as defined by the said Act and the Acts referred to therein or incorporated therewith) of not less than twenty acres of land situate within the area of the said district, or the land agent for the time being of a person being a proprietor as aforesaid of not less than one hundred acres of land situate within the area of said district, and acting as receiver of the rents and profits of such lands:

\*That the members of the first board shall vacate their offices on the first Thursday in September in year following the date of this provisional order:

That the electors for members of the drainage board shall be the persons in that behalf mentioned in the said Act: Provided always, that no such elector shall be entitled to vote, or exercise any privilege as such, unless the lands of which he is the proprietor, or some portion thereof, shall be rateable on account of the works in the district, and he shall have previously paid all rates or arrears of rates which may be payable by him in respect of any drainage rate for the aforesaid district.

In witness whereof, we, the said commissioners of public works in Ireland, have hereunto caused our common seal to be affixed, this second day of March one thousand eight hundred and sixty-five.

E. HORNSBY, (L. S.)

Office of Public Works, Dublin.

Secretary.

#### CAP. XIV.

An Act to make better provision for the naval defence of the colonies. [7th April 1865.]

#### CAP. XV.

An Act to extend the term for granting fresh letters patent for the high court in *India*, and to make further provision respecting the territorial Jurisdiction of the said courts. [7th April 1865.]

#### CAP. XVI.

An Act to make further provision for the management of the unredeemed, public debt in *Ireland*, and for the reduction of the interest payable on certain sums advanced by the Bank of *Ireland* for the public service. [7th April 1865.]

1. From 6th April 1865 certain provisions of 8 & 9 Vict. c. 37, repealed.
2. Interest payable to the Bank of *Ireland*.
3. From 6th April 1865, interest on the debt to the Bank of *Ireland* to be reduced to £3. per cent. per ann.
4. As to future payment to the Bank of *Ireland* for management of the public debt in *Ireland*.
5. Commissioners of national debt to transmit to treasury statement of the amount of the debt in *Ireland*, and allowance for management to be computed thereon.

"WHEREAS it has been agreed that the rate of interest hitherto payable to the governor and company of the

Bank of *Ireland* on the amount advanced for the public service shall be reduced, and that provision shall be made for payment to the said governor and company for their management of the unredeemed public debt in *Ireland*."

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same as follows:

1. From and after the sixth day of April one thousand eight hundred and sixty-five, so much of the second section of an Act passed in the eight and ninth years of the reign of her present Majesty, chapter thirty-seven, intituled *An Act to regulate the issue of Bank notes in Ireland, and to regulate the repayment of certain sums advanced by the governor and company of the Bank of Ireland for the public service*, as relates to the payment of interest on said sums amounting to two millions six hundred and thirty thousand seven hundred and sixty-nine pounds four shillings and eightpence, and the whole of the third section of the said Act, shall be and the same are hereby repealed.

2. There shall be paid to the governor and company of the Bank of *Ireland*, on the sixth day of April one thousand eight hundred and sixty-five out of the consolidated fund of the United Kingdom of *Great Britain and Ireland*, interest on the said sum of two millions six hundred and thirty thousand seven hundred and sixty-nine pounds four shillings and eightpence, at the rate of three pounds five shillings per centum per annum for the quarter ending on the fifth day of April one thousand eight hundred and sixty-five.

3. From and after the sixth day of April one thousand eight hundred and sixty-five, there shall be paid and payable to the governor and company of the said Bank of *Ireland*, out of the consolidated fund of the United Kingdom of *Great Britain and Ireland*, in respect of the said capital sum of two millions six hundred and thirty thousand seven hundred and sixty-nine pounds four shillings and eightpence, now due to them by the public, an annuity of seventy eight thousand nine hundred and twenty-three pounds one shilling and sixpence, being an interest or annuity of three per centum per annum, by two equal half-yearly payments, on the eleventh day of October and the sixth day of April in each year.

4. There shall be paid to the governor and company of the Bank of *Ireland*, on some day between the sixth day of April and the fifth day of July one thousand eight hundred and sixty-six out of the consolidated fund of the United Kingdom of *Great Britain and Ireland*, or out of the growing produce thereof, for their charges in the management of the unredeemed public debt in *Ireland* for the year ending on the fifth day of April one thousand eight hundred and sixty-six, and in the like manner on some day between the sixth day of April and the fifth day of July in every succeeding year, for the management of the debt during the preceding year ended on the fifth day of April, in each year until the fifth day of April one thousand eight hundred and eighty-six, and thenceforth in any and every succeeding year, until Parliament shall otherwise direct, remuneration at the rates following; that is to say,

- 1st. While the whole of such unredeemed debt in the books of the Bank of Ireland, computed as hereinafter mentioned, shall be less than thirty million pounds, a sum at the rate of four hundred and fifty pounds *per annum* for each million of the capital:
- 2d. While the whole of such unredeemed debt shall amount to thirty million pounds and shall not exceed forty million pounds, a sum at the rate of three hundred pounds *per annum* for each million of the capital:
- 3d. While the whole of such unredeemed debt shall exceed forty million pounds, a sum at the rate of three hundred pounds *per annum* for every million of the capital up to forty million pounds, and a sum at the rate of one hundred and fifty pounds *per annum* for every million of the capital in excess of that amount:

Provided always, that in estimating the amount of unredeemed debt for the purposes of this Act annuities for terms of years shall be taken into account, and shall for the purpose of making a nominal capital be valued at fifteen years purchase, if originally granted for a term exceeding fifty years, and at ten years purchase, if granted for a term of fifty years or under.

5. The commissioners for the reduction of the national debt shall transmit to the commissioners of the treasury, as soon after the fifth day of *April* one thousand eight hundred and sixty-five as conveniently may be, a statement of the total capital of the unredeemed public debt in *Ireland* as it stands on the said fifth day of *April* one thousand eight hundred and sixty-five in which annuities shall be valued as aforesaid; and the allowance to the said governor and company of the Bank of *Ireland* for the management of the said unredeemed debt in *Ireland* for the year ending the fifth day of *April* one thousand eight hundred and sixty-six shall be computed on the said capital, and shall be paid to the said governor and company out of the said consolidated fund on the growing produce thereof in one sum before the fifth day of *July* one thousand eight hundred and sixty-six, and the allowance for such management shall be computed and paid in like manner in every succeeding year.

#### CAP. XVII.

An Act to enlarge the powers of the governor general of *India* in council at meetings for making laws and regulations, and to amend the law respecting the territorial limits of the several presidencies and lieutenant governorships in *India*. [9th May 1865.]

#### CAP. XVIII.

An Act for amending the Law of Evidence and Practice on Criminal Trials. [9th May, 1865.]

Sec. 1. *Provisions of section 2 of this Act to apply to trials commenced on or after July 1, 1865.*

2. *Summing up of evidence in cases of felony and misdemeanor.*

3. *How far witnesses may be discredited by the party producing.*

4. *As to proof of contradictory statement of adverse witness.*
5. *Cross-examination as to previous statements in writing.*
6. *Proof of previous conviction of witness may be given.*
7. *As to proof by attesting witnesses.*
8. *As to comparison of disputed writing.*
9. *"Counsel."*
10. *Not to apply to Scotland.*

'WHEREAS it is expedient that the law of evidence and practice on trials for felony and misdemeanor and other proceedings in Courts of Criminal Judicature should be more nearly assimilated to that on trials at *Nisi Prius*:' Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows; that is to say,

1. That the provisions of section two of this Act shall apply to every trial for felony or misdemeanor which shall be commenced on or after the first day of *July* one thousand eight hundred and sixty-five, and that the provisions of sections from three to eight, inclusive, of this Act shall apply to all courts of judicature, as well criminal as all others, and to all persons having, by law or by consent of parties, authority to hear, receive, and examine evidence.

2. If any prisoner or prisoners, defendant or defendants, shall be defended by counsel, but not otherwise, it shall be the duty of the presiding judge, at the close of the case for the prosecution, to ask the counsel for each prisoner or defendant so defended by counsel whether he or they intend to adduce evidence, and in the event of none of them thereupon announcing his intention to adduce evidence, the counsel for the prosecution shall be allowed to address the jury a second time in support of his case, for the purpose of summing up the evidence against such prisoner or prisoners, or defendant or defendants; and upon every trial for felony or misdemeanor, whether the prisoners or defendants, or any of them, shall be defended by counsel or not, each and every such prisoner or defendant, or his or their counsel respectively, shall be allowed, if he or they shall think fit, to open his or their case or cases respectively; and after the conclusion of such opening or of all such openings, if more than one, such prisoner or prisoners, or defendant or defendants, or their counsel, shall be entitled to examine such witnesses as he or they may think fit, and when all the evidence is concluded, to sum up the evidence respectively; and the right of reply, and practice and course of proceedings, save as hereby altered, shall be as at present.

3. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness,



and he must be asked whether or not he has made such statement.

4. If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

5. A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attestation must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit.

6. A witness may be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer, (for which certificate a fee of five shillings and no more shall be demanded or taken,) shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same.

7. It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite, and such instrument may be proved as if there had been no attesting witness thereto.

8. Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute.

9. The word "counsel" in this Act shall be construed to apply to attorneys in all cases where attorneys are allowed by law, or by the practice of any court, to appear as advocates.

10. This Act shall not apply to *Scotland*.

#### CAP. XIX.

An Act to extend the period for borrowing the sum authorized to be raised under the metropolitan main drainage extension Act, 1863. [9th May 1865.]

#### CAP. XX.

An Act to authorise the inclosure of certain lands in pursuance of a report of the inclosure commissioners for *England and Wales*. [9th May 1865.]

#### CAP. XXI.

An Act to amend the *Irish Bankrupt and Insolvent Act, 1857*. [9th May 1865.]

1. *No railway company incorporated by Parliament liable to be made bankrupt under 20 & 21 Vict. c. 60.*
2. *Not to affect any adjudication of bankruptcy already made.*
3. *Short title.*
4. *To extend to Ireland only.*

"WHEREAS it is expedient to provide that railway companies incorporated by Act of Parliament shall not be liable to be adjudicated bankrupt:" Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. From and after the passing of this Act, no railway company incorporated by Act of Parliament shall be liable to be made bankrupt under "The *Irish bankrupt and insolvent Act, 1857*," and the provisions of the said Act which relate to the bankruptcy of joint stock companies shall not apply to railway companies so incorporated as aforesaid.

2. Nothing herein contained shall affect any adjudication of the bankruptcy of any such railway company made or to be made on any petition for adjudication presented on or before the first day of April one thousand eight hundred and sixty-five, or the proceedings thereunder; it being, however, hereby declared, that no person, company, or body corporate, by reason of his or their being a shareholder or shareholders of any railway company made bankrupt under any such adjudication of bankruptcy, is or shall be liable to pay or contribute any sum beyond the extent of his or their shares in the capital of the company not paid up at the time of such adjudication.

3. This Act may be cited for all purposes as "The *Irish Bankrupt and Insolvent Amendment Act, 1865*."

4. This Act shall extend to *Ireland only*.

#### CAP. XXII.

An Act to amend the Acts relating to the *Scottish Herring Fisheries*. [9th May 1865.]

#### CAP. XXIII.

An Act to confirm a Provisional Order under "The *Land Drainage Act, 1861*." [9th May 1865.]

#### CAP. XXIV.

An Act to confirm certain Provisional Orders under "The *Local Government Act, 1858*," relating to

the Districts of *Bridlington, Brighouse, Burnley, Henley, Shipley, Wallingford, Llangollen, Ormskirk, Swansea, Tormoham, and Lockwood.*

[9th May 1865.]

### CAP. XXV.

An Act to confirm certain Provisional Orders under "The Local Government Act, 1858," relating to the Districts of *Derby, Ramsgate, Oswestry, Bury, Heap, Cockermouth, Matlock, Bath, and Bromsgrove.*

[9th May 1865.]

### CAP. XXVI.

An Act to provide for Superannuation Allowances to Officers of Unions in *Ireland.* [26th May 1865.]

1. *Power to guardians, with consent of poor law commissioners, to grant superannuation allowances to officers in certain classes.*
2. *Such allowances not to be assignable, &c.*
3. *Limitation of grants of allowances.*
4. *Notice of grant to be given to guardians.*
5. *Interpretation of words herein used.*

WHEREAS it is expedient that provision shall be made to enable superannuation allowances to be granted to officers of unions in *Ireland* who become disabled by infirmity or age to discharge the duties of their offices: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. That the guardians of any union in *Ireland* may, at their discretion, with the consent of the commissioners for administering the laws for relief of the poor in *Ireland*, grant to any officer whose whole time has been devoted to the service of the union, and who shall become incapable of discharging the duties of his office with efficiency, by reason of permanent infirmity of mind or body, or of old age, upon his resigning or otherwise ceasing to hold his office, an annual allowance not exceeding in any case two thirds of his then salary, and shall charge such allowance to the same account as that to which such salary would have been charged if he had continued in his office.

2. This allowance shall be payable to or in trust for such officer only, and shall not be assignable nor chargeable with his debts or other liabilities.

3. No officer shall be entitled to such allowance on the ground of age who shall not have completed the full age of sixty years, and shall not have served as an union officer for twenty years at the least.

4. No grant shall be made without one month's previous notice, to be specially given in writing to every guardian of the union, of the proposal to make such grant, and the time when it shall be brought forward.

5. The words herein used shall be interpreted in the manner prescribed by the Acts in force for the relief of the destitute poor in *Ireland.*

### CAP. XXVII.

An Act for awarding Costs in certain Cases of Private Bills.

[26th May 1865.]

1. *When committee report "preamble no proved," opponents to be entitled to recover costs.*
2. *When committee report unanimously "opposition unfounded," promoters to be entitled to recover costs.*  
*Proviso.*
3. *Costs to be taxed.*
4. *Powers of taxing officer.*
5. *Recovery of costs when taxed.*
6. *Form of action in Scotland.*
7. *Persons paying costs may recover a proportion from other persons liable thereto.*
8. *When committee report "preamble not proved," promoters to pay costs out of deposits.*
9. *Definition of promoters.*
10. *Meaning of private bill.*
11. *Commencement of Act.*

WHEREAS it is expedient to empower committees of both houses of Parliament on private bills to award costs in certain cases: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. When the committee on a private bill shall decide that the preamble is not proved, or shall insert in such bill any provision for the protection of any petitioner, or strike out or alter any provision of such bill for the protection of such petitioner, and further unanimously report, with respect to any or all of the petitioners against the bill, that such petitioner or petitioners has or have been unreasonably or vexatiously subjected to expense in defending his or their rights proposed to be interfered with by the bill, such petitioner or petitioners shall be entitled to recover from the promoters of such bill his or their costs in relation thereto, or such portion thereof as the committee may think fit, such costs to be taxed by the taxing officer of the house as herein-after mentioned, or the committee may award such a sum for costs as they shall think fit, with the consent of the parties affected.

2. When the committee on a private bill shall decide that the preamble is proved, and further unanimously report that the promoters of the bill have been vexatiously subjected to expense in the promotion of the said bill by the opposition of any petitioner or petitioners against the same, then the promoters shall be entitled to recover from the petitioners, or such of them as the committee shall think fit, such portion of their cost of the promotion of the bill as the committee may think fit, such costs to be taxed by the taxing officer of the house as herein-after mentioned, or such a sum for costs as the committee shall name, with the consent of the parties affected; and in their report to the house the committee shall state what portion of the costs, or what sum for costs, they shall so think fit to award, together with the names of the parties liable to pay the same and the names of the parties entitled to receive the same: Provided always, that no landowner who *bonâ fide* at his own sole risk and charge opposes a bill which proposes to take any portion of the said petitioner's property for the purposes of the bill shall be liable to any costs in respect of his opposition to such bill.

3. On application made to the taxing officer of the house by such promoters or petitioners, or by their solicitors or parliamentary agents, not later than six calendar months after the report of such committee, and in cases where no sum shall have been named by the committee, with the consent of the parties affected, not until one month after a bill of such costs shall have been delivered to the party chargeable therewith, which bill shall be sealed with the seal or subscribed with the proper hand of the parties claiming such costs, or of their solicitor or parliamentary agent, the taxing officer shall examine and tax such costs, and shall deliver to the parties affected, or either or any of them, on application, a certificate signed by himself expressing the amount of such costs, or in cases where a sum for costs shall have been named by the committee, with the consent as aforesaid, such sum as shall have been so named, with the name of the party liable to pay the same, and the name of the party entitled to receive the same, and such certificate shall be conclusive evidence as well of the amount of the demand as of the title of the party therein named to recover the same from the party therein stated to be liable to the payment thereof; and the party claiming under the same shall, upon payment thereof, give a receipt at the foot of such certificate, which shall be a sufficient discharge for the same.

4. All powers given to the taxing officer by the Acts ten and eleven *Victoria*, chapter sixty-nine, and twelve and thirteen *Victoria*, chapter seventy eight, with reference to the examination of parties and witnesses on oath, and with reference to the production of documents, and with reference to the fees payable in respect of any taxation, shall be vested in the taxing officer for the purposes of this Act.

5. The party entitled to such taxed costs, or such sum named by the committee, with such consent as aforesaid, or his executors or administrators, may demand the whole amount thereof, so certified as above, from any one or more of the persons liable to the payment thereof, and in case of nonpayment thereof on demand may recover the same by action of debt in any of her Majesty's Courts of record at *Westminster* or *Dublin*, or by action in the court of session in *Scotland*. In such action it shall be sufficient, in *England* or *Ireland*, for the plaintiff to declare that the defendant is indebted to him in the sum mentioned in the said certificate; and the said plaintiff shall, upon filing the said declaration, together with the said certificate and an affidavit of such demand as aforesaid, be at liberty to sign judgment as for want of plea by nil dicit, and take out execution for the said sum so mentioned in the said certificate, together with the costs of the said action, according to due course of law: Provided always, that the validity of such certificate shall not be called in question in any court.

6. In such action it shall be sufficient, in *Scotland*, for the pursuer to allege that the defender is indebted to him in the sum mentioned in the said certificate, under the like proviso in regard to the validity of the certificate.

7. In every case it shall be lawful for any person from whom the amount of such costs or sum named by the committee with consent as aforesaid has been so recovered to recover from the other persons, or any of them, who are liable to the payment of such costs or

sum named by the committee with consent as aforesaid a proportionate share thereof, according to the number of persons so liable, and according to the extent of the liability of each person.

8. In any case in which the committee shall have reported that the preamble is not proved, and where, in accordance with the standing orders of either house of Parliament and of an Act of the ninth year of her present Majesty, chapter twenty, a deposit of money or stock is made with respect to the application to Parliament for an Act, the money or stock so deposited shall be a security for the payment by the promoters of the bill for the Act of all costs or sums in respect of costs, if any, payable by them under this Act; and every party entitled to receive any costs or sum so payable shall accordingly have a lien available in equity for the same on the money or stock so deposited, and the lien shall attach thereon at the time when the bill is first referred to a committee of either house of Parliament; provided that where several parties have the lien for an amount exceeding in the aggregate the net value of the money or stock, their respective claims shall proportionately abate.

9. When a bill is not promoted by a company already formed, all persons whose names shall appear in such bill as promoting the same, and in the event of the bill passing, the company thereby incorporated, shall be deemed to be promoters of such bill for all the purposes of this Act.

10. For the purposes of this Act the expression private bill shall extend to and include any bill for a local and personal Act.

11. That this Act shall not take effect before the first day of *November* one thousand eight hundred and sixty-five.

#### CAP. XXVIII.

An Act to authorize certain payments out of the Land Revenues of the Crown to provide Compensation for certain Claims in the *Isle of Man*.  
[26th May 1865.]

#### CAP. XXIX.

An Act for raising the Sum of One million Pounds by Exchequer Bonds for the Service of the Year One thousand eight hundred and sixty-five.  
[26th May 1865.]

#### CAP. XXX.

An Act to grant certain Duties of Customs and Inland Revenue.  
[26th May 1865.]

#### CAP. XXXI.

An Act to enable the Commissioners of Her Majesty's Works and Public Buildings to acquire additional Lands for improving the Site of the new Public Offices in *Downing Street* and the Approaches thereto.  
[2nd June 1865.]

## CAP. XXXII.

An Act to enable the Secretary of State in Council of *India* to acquire additional Lands for improving the Site of the *India* Office and the Approaches thereto.

[2nd June 1865.]

## CAP. XXXIII.

An Act to repeal the Act of the Parliament of *Ireland* of the Sixth Year of *Anne*, Chapter Eleven, for explaining and amending the several Acts against Tories, Robbers, and Rapparees. [2nd June 1865.]

1. 6 *Anne*, c. 11 (1.), &c. repealed.
2. *Grand juries not to present persons as vagrants.*
3. *Short title.*
4. *Sect. 7. of 50 G. 3. c. 102. repealed.*

‘WHEREAS it is expedient to repeal the laws now in force under which poor people in *Ireland* are sentenced to penal servitude for the offence of vagrancy:’ Be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same as follows:

1. The *Irish* Act of the sixth year of Queen *Anne*, chapter eleven, for explaining and amending two several Acts against tories, robbers, and rapparees, and so much of any Act or Acts as revives or makes perpetual the same, are hereby repealed.

2. From and after the passing of this Act, it shall not be lawful for any grand jury to present any person in *Ireland* as a vagrant, any statute to the contrary notwithstanding.

3. This Act to be called “The Vagrancy, *Ireland*, Amendment Act, 1865.”

4. The seventh section of the Act of the fiftieth *George* the Third, chapter one hundred and two, is hereby repealed.

## CAP XXXIV.

An Act to make the Metropolitan Houseless Poor Act perpetual. [2nd June, 1865.]

## CAP. XXXV.

An Act to amend the Law relating to the Police Superannuation Funds in Counties and Boroughs. [2nd June 1865.]

## CAP. XXXVI.

An Act to amend the Law relating to the Registration of County Voters, and to the Powers and Duties of Revising Barristers in certain Cases.

[2nd June 1865.]

## CAP. XXXVII.

An Act to make better Provision respecting the Transaction of County Business and the Administration of Justice at Quarter Sessions in the County of *Sussex*; and to confirm certain Proceedings of the Justices of the said County. [2nd June 1865.]

## CAP. XXXVIII.

An Act to authorize the Alteration of the Time for holding Statutory Meetings of Commissioners of Supply in *Scotland*. [19th June 1865.]

## CAP. XXXIX.

An Act to authorize the Inclosure of certain Lands in pursuance of a Report of the Inclosure Commissioners for *England* and *Wales*. [19th June 1865.]

## CAP. XL.

An Act to extend to the Court of Chancery of the County Palatine of *Lancaster* certain of the Provisions of an Act passed in the Session holden in the Twenty-third and Twenty-fourth Years of Her present Majesty, intituled *An Act to give to Trustees, Mortgagees, and other certain Powers now commonly inserted in Settlements, Mortgages, and Wills*. [19th June 1865.]

## CAP. XLI.

An Act to confirm certain Provisional Orders under “The Local Government Act, 1858,” relating to the Districts of *Sheffield*, *Bradford*, and *Gloucester*. [19th June 1865.]

## CAP. XLII.

An Act for facilitating the Annexation of Tithes to District Churches. [19th June 1865.]

## CAP. XLIII.

An Act to provide for the Security of property of Married Women separated from their Husbands in *Ireland*. [19th June 1865.]

1. *Protection of property acquired by wife after desertion by her husband.*
2. *Protection of wife’s property after divorce à mensâ et thoro.*
3. *After divorce à mensâ et thoro, wife to be deemed feme sole as to property.*
4. *Mode of enforcing decree for alimony.*
5. *To apply to Ireland only.*

‘WHEREAS certain provisions have been made for the protection of the property of married women separated from their husbands in *England*, and it is expedient to extend the same to *Ireland*:’ Be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same as follows:

1. A wife deserted by her husband in *Ireland* may at any time after such desertion, if resident within the police district of *Dublin*, apply to a police magistrate, or if resident in the country to justices in petty sessions, or in either case to a judge of the Court of Common Pleas sitting in chambers, for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of after such desertion, against her

husband or his creditors, or any person claiming under him; and such magistrate or justice or judge, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion from her husband, and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a feme sole: Provided always, that a copy of every such order, if made by a police magistrate or justices at petty sessions, shall, within ten days from the making thereof, be lodged with the clerk of the peace of the county within which the wife is resident; and that it shall be lawful for the husband, and any creditor or other person claiming under him, to apply to the same judge, or any other judge of the Court, or to the magistrate or justices by whom such order was made, or for the time being acting instead of or as successors to the same, for the discharge thereof: Provided also, that if the husband, or any creditor or other person claiming under the husband, shall seize or continue to hold any property of the wife after notice of any such order, he shall be liable, at the suit of the wife (which she is hereby empowered to bring), to restore the specific property, and also for a sum equal to double the value of the property so seized or held after such notice as aforesaid: If any such order of protection be made, the wife shall, during the continuance thereof, be and be deemed to have been during such desertion of her in the like position in all respects with regard to property, and courtesy, and suing and being sued, as she would be under this Act if she obtained a decree of divorce *à mensâ et thoro*.

2. In every case of a divorce *à mensâ et thoro* the wife shall, from the date of the sentence, and whilst the separation shall continue, be considered as a feme sole with respect to property of any description which she may acquire or which may come to or devolve on her, and such property may be disposed of by her in all respects as a feme sole, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead: Provided that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate.

3. In every case of divorce *à mensâ et thoro* the wife shall, whilst so separated, be considered as a feme sole for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding, and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant: Provided that where upon any such divorce alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessities supplied for her use: Provided that nothing shall prevent the wife from joining at any time during such separation in the exercise of any joint power given to herself and her husband.

4. Every decree or order for alimony and costs made or pronounced after the passing of this Act by any court in *Ireland* having authority for that purpose may be enforced in the same manner as if the said decree or order was a judgment or order of one of the superior courts of law in *Ireland*.

5. This Act shall be held to apply to *Ireland* only.

#### CAP. XLIV.

An Act for confirming a Provisional Order made by the Board of Trade under The Merchant Shipping Act Amendment Act, 1862, relating to the Pilot age of the River *Tyne*. [19th June 1865.]

#### CAP. XLV.

An Act to provide for the Collection by means of Stamps of Fees payable in the Superior Courts of Law at *Westminster*, and in the Offices belonging thereto. [19th June 1865.]

#### CAP. XLVI.

An Act to suspend the making of Lists and the Ballots for the Militia of the United Kingdom. [19th June 1865.]

Sec. 1. *Meetings relating to the Militia of the United Kingdom and ballots for such Militia suspended.*

2. *Proceedings may be had during such suspension by order in council.*

3. *So long as lists are suspended, not necessary to transmit extracts, &c., as required by Sect. 3 of 7 G. 4, c. 58.*

4. *Not to extend to prevent the holding of certain meetings relating to the Militia.*

‘WHEREAS it is expedient to suspend for a farther period the ballots for the Militia of the United Kingdom;’ Be it therefore enacted by the Queen’s most excellent Majesty, and by and with the advice and consent of the lords spiritual and temporal, and commons in this present Parliament assembled, and by the authority of the same as follows:—

1. All general and subdivision meetings relating to the Militia of the United Kingdom, and all proceedings relating to procuring any returns or preparing or making out lists of such Militia, or any part thereof, for the purpose of a ballot, or relating to balloting for any Militiamen or supplying any vacancies in such Militia by ballot, as are or may be directed or authorized by or under any Act of Parliament now in force, shall cease and remain suspended until the first day of *October* one thousand eight hundred and sixty-six.

2. Provided always, that it shall be lawful for her Majesty, by any order in council to direct that any proceedings shall be had at any time before the expiration of such period as aforesaid, either for the giving of notices and making returns and preparing lists, and also for the proceeding to ballot and enrol men for the filling up vacancies in the Militia, as her Majesty shall deem expedient; and upon the issuing of any such order all such proceedings shall be had for carrying into execution all the provisions of the Acts in force in the United Kingdom relating to the giving notices

for and returns for lists, and for the balloting and enrolling of men to supply any vacancies in the Militia, and holding general and subdivision meetings for such purpose at such times respectively as shall be expressed in any such order in council, or by any directions given in pursuance thereof to Lord Lieutenants, or Deputy Lieutenants acting for Lord Lieutenants, of the several counties, shires, cities, and places in the United Kingdom; and all the provisions of the several Acts in force in the United Kingdom relating to the Militia shall, upon any such order, and direction given in pursuance thereof, become and be in full force and be carried into execution at the periods specified in such order or direction as aforesaid, with all such penalties and forfeitures for any neglect thereof, as fully as if such periods had been fixed in the Acts relating to such Militia.

3. So long as the making of lists and the ballots for the Militia of Great Britain are suspended it shall not be necessary for the clerks of general meetings of the several counties therein to transmit to the clerks of the sub-division meetings, or to her Majesty's principal secretary of state for the war department, the extracts and abstracts mentioned and referred to in section three of seventh George the Fourth, chapter fifty-eight.

4. Provided also, that nothing herein contained shall extend to prevent the holding before the expiration of such period as aforesaid of such general or other meetings relating to the Militia of the United Kingdom as may be called in Great Britain under the authority of one of her Majesty's principal secretaries of state, or in Ireland under the authority of the Lord Lieutenant or other chief governor or governors of Ireland, or of any meeting which may be called for the purpose of altering, enlarging, or providing any place for the reception of the arms, accoutrements, clothing, or other stores belonging to the Militia.

## CAP XLVII.

An Act to defray the charge of the pay, clothing, and contingent and other expenses of the disembodied Militia in Great Britain and Ireland; to grant allowances in certain cases to subaltern officers, adjutants, paymasters, quartermasters, surgeons, assistant surgeons, and surgeons mates of the Militia; and to authorize the employment of the non-commissioned officers. [19th June, 1865.]

## CAP XLVIII.

An Act to supply means towards defraying the expenses of providing courts of justice and the various offices belonging thereto; and for other purposes. [19th June, 1865.]

## CAP XLIX.

An Act to enable the commissioners of her Majesty's works and public buildings to acquire a site for the erection and concentration of courts of justice, and of the various offices belonging to the same. [19th June, 1865.]

## CAP. L.

An Act for regulating the keeping of Dogs, and for the protection of Sheep and other property from Dogs, in Ireland. [19th June, 1865.]

- Sec. 1. *Short title.*  
 2. *Commencement of Act.*  
 3. *Only to extend to Ireland.*  
 4. *Interpretation clause.*  
 5. *Commissioners of inland revenue to provide dies for denoting license duty.*  
 6. *License to keep dogs, &c.*  
 7. *Occupiers to be liable to payment of license duty.*  
*Joint Occupiers.*  
 8. *Clerk to make entry of licence in book to be kept for that purpose.*  
 9. *Proceedings on transfer of dog by sale or gift.*  
 10. *Power to justices to enforce payment of fees in certain cases. Petty Sessions clerk shall fill up forms, when required.*  
 11. *Lists of licenses to be printed and posted.*  
 12. *Petty Sessions clerk to account with the registrar half-yearly.*  
 13. *Accounts to be verified.*  
 14. *Allowance for licenses or license stamps spoiled, &c.*  
 15. *Repayment of expenses.*  
 16. *Monies received for stamps to be subject to 21 & 22 Vict. c. 100.*  
 17. *Accounts to be presented to Parliament.*  
 18. *Registrars to furnish notices setting forth Acts required to be done under this Act.*  
 19. *Provisions of the stamp Acts, as far as applicable, to be extended to this Act.*  
 20. *Penalty on owners of dogs not having the same licensed.*  
 21. *Penalty for refusing to produce license.*  
 22. *Recovery of penalties. Application of penalties.*  
 23. *No penalty where failure not wilful.*

WHEREAS much loss and damage is suffered in Ireland by the owners of sheep and other property by the ravages of dogs, and there is great difficulty in identifying the owners of such dogs: And whereas it is expedient to regulate the keeping of dogs: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

## Preliminary.

1. This Act may be cited for all purposes as the "Dogs Regulation (Ireland) Act, 1865."
2. This Act shall come into operation on the first day of January, one thousand eight hundred and sixty-six.
3. This Act shall extend to Ireland only.
- 4.—  
 The expression "registrar" as used in this Act, shall mean the registrar under the petty sessions clerks (Ireland) Act, 1858:  
 The expression "Lord Lieutenant," as used in this Act, shall mean the Lord Lieutenant or other Chief Governor or Governors of Ireland:

The expression "chief or under secretary," as used in this Act, shall mean the chief or under secretary of the Lord Lieutenant or other chief governor or governor of *Ireland*:

The expression "petty sessions clerks," as used in this Act, shall mean the clerk of any petty sessions court under the "petty sessions (*Ireland*) Act, 1851," and the "petty sessions clerk (*Ireland*) Act, 1858," and shall include the chief or other clerk of any police court in the police district of *Dublin* metropolis:

The expression "justice or justices at petty sessions," as used in this Act, shall include any divisional justice of *Dublin* metropolitan police; and the expression "petty sessions district," as used in this Act, shall include the police district of the *Dublin* metropolis.

#### PART I.

5. The commissioners of inland revenue shall provide all necessary dies for denoting, either by impressed or adhesive stamps, the amount or value of licenses according to the scale fixed in schedule A. to this Act annexed; and the registrar shall, under the direction and supervision of the chief or under secretary, cause a sufficient supply of the forms in the schedule (B.) to this Act annexed to be printed; and the said commissioners shall cause any of such forms to be stamped according to this Act with proper stamps denoting the license duty thereon; and the registrar shall cause the same, when so stamped, and also any adhesive stamps that may be necessary for the purposes of this Act, to be from time to time furnished to the several petty sessions clerks in *Ireland*; and for the purposes aforesaid the said commissioners shall supply the registrar with such stamped forms and adhesive stamps for denoting the amount or value of any of such licenses, under such rules and regulations as the chief or under secretary shall from time to time make or direct.

6. Any person, after the commencement of this Act, having in his possession or custody any dog or dogs, shall, on or before the thirty-first day of *March* in each year, take out a license for such dog or dogs in the petty sessions district in which he shall reside; and the petty sessions clerk, upon payment by such person of the proper license duty, shall deliver such license to such person, which shall entitle such person to keep such dog or dogs for one year from and after the date of such license: Provided always, that where the owner of a dog or dogs has given the custody of such dog or dogs to another person who shall not reside in the same petty sessions district as the owner, the license for such dog or dogs shall be taken out by the person having the custody of such dog or dogs, and not by the owner.

7. The occupier of any house or premises where any dog or dogs are kept or permitted to live or remain shall be liable to pay the license duty for such dog or dogs, and in default of such payment shall be liable to the penalties incurred by persons keeping unlicensed dogs, unless the said occupier can prove to the satisfaction of the justice or justices that he is not the owner or has not the custody of such dog or dogs, and that such dog or dogs were kept or permit-

ted to live or remain in the said house or premises without his sanction or knowledge: Provided always, that where there are more occupiers than one in any house or premises let in separate apartments or lodgings, or otherwise, the occupier of that particular part of the premises in which such dog or dogs shall have been kept or permitted to live and remain shall be liable to pay the license duty for such dog or dogs.

8. Every petty sessions clerk shall keep a book to be provided by the registrar, and to be called "the Registry of Dogs License Book," in which he shall register the issue of such license, the date thereof, and the name and residence of the person to whom issued, as also the description of the dog or dogs as contained in the license, which book shall be open to the inspection of the registrar and his clerks, and of every justice of the peace, county inspector, sub-inspector, head or other constable of constabulary, and of every superintendent, head or other constable, of the *Dublin* metropolitan or other local police force; and the petty sessions clerk shall certify at the foot or on the back of every such license that the same has been duly registered, and shall affix to every such certificate of registry a sixpenny petty sessions stamp, to be paid for by the person taking out the license.

9. Where any dog shall be transferred by sale or gift by its owner to any other person, it shall not be necessary for such person to take out a new license for such dog if such dog shall have been licensed within the year, but such person shall obtain from the petty sessions clerk of the district where the license was issued a certificate in the form in the schedule (D.) to this Act annexed, to which certificate a sixpenny petty sessions stamp shall be affixed to be paid by the person requiring the same, and such person shall, within fifteen days after such transfer, cause such certificate to be registered in the "Registry of Dogs License Book" for the petty sessions district in which the person to whom such transfer shall have been made resides, and the petty sessions clerk of such district shall, on application, register such certificate, and shall certify such registry at the foot or at the back of the certificate, and no fee or stamp duty shall be payable on such registry; and in default of causing such registry to be made, such person shall be liable to the penalties incurred by persons keeping unlicensed dogs.

10. In case the person who shall be liable, under the provisions of this Act, to pay such fee of sixpence upon every such certificate of the registry of such license, shall fail to make such payment, it shall be lawful for the justice or justices at petty sessions to make a summary order, on the complaint of the clerk of such petty sessions, to require the payment of such fee; and such order shall be enforced in like manner as any order of a justice or justices may now be enforced under the provisions of "The Petty Sessions (*Ireland*) Act, 1851," and any Act amending the same: provided always, that every petty sessions clerk shall, when required so to do, and as a part of his duty, and without charge, properly fill up all licenses purchased of him under the provisions of this Act.

11. Every petty sessions clerk shall, on or before the fifteenth day of *April* in each year after the commencement of this Act, cause a sufficient number of lists to



be printed or written in the form in the Schedule (C.) to this Act annexed, and shall cause such lists to be posted on or near to the doors of every petty sessions court and police station and barrack within his district, and shall furnish a copy of such lists to the clerk of each poor law union in his district, and to the secretary of the grand jury of the county in which his district is situate. The cost of printing and posting such lists shall be defrayed by the registrar.

12. Every petty sessions clerk shall account with the registrar for all licenses or license stamps issued to him; and such account shall be made, passed, and audited in such form and manner and at such times as the Lord Lieutenant shall for that purpose direct.

13. Every such account shall be verified by the affidavit or affirmation of the petty sessions clerk, to be made before the registrar or one of the justices of the district or one of the districts to which the said clerk shall belong.

14. The Lord Lieutenant may from time to time make regulations for the allowance of such of the licenses or license stamps issued under the provisions of this Act as may have been spoiled or rendered useless or unfit for the purpose intended, or which through mistake or inadvertence may have been improperly or unnecessarily used.

15. All the costs and expenses incurred by the commissioners of inland revenue and registrar under this Act shall be paid out of the monies arising from the sale of licenses under this Act, and any surplus monies arising from such sale, and remaining in the hands of such registrar after defraying all expenses incurred by him under this Act, shall be paid over by him once a year to the credit of the treasurer of the county or borough, as the case may be, in which such licenses shall have been sold, in such manner as the Lord Lieutenant shall direct, to be applied by such treasurer in aid of the county or borough rates, as the case may be, in such manner as the grand jury or town council of such county or borough shall direct: provided always, that it shall be lawful for the Lord Lieutenant from time to time, by any writing under his hand, to direct that the registrar shall have and be allowed to retain such annual sum as the Lord Lieutenant may think fit, by way of remuneration for the trouble incurred by the registrar and his clerks and by the petty sessions clerks respectively in performing the duties imposed on them by this Act.

16. The monies received by the clerk of petty sessions for the petty sessions stamps to be used for the purposes of this Act shall be subject in all respects to the provisions of "The Petty Sessions Clerk (Ireland) Act, 1858."

17. The registrar shall make out and prepare an annual statement of his accounts under this Act at such time and in such form as the Lord Lieutenant shall direct, and such accounts shall be annually laid before Parliament.

18. The registrar shall, in sufficient time before the thirty-first day of December one thousand eight hundred and sixty-five, furnish to the clerks of petty sessions printed notices, which the said clerks shall, on or before the said thirty-first day of December, cause to be fixed or placed on the outside of the seve-

ral church and chapel doors or other public and conspicuous buildings or places within their respective districts, and which notices shall specify the several Acts required to be done for the purpose of registering any dog or dogs under the provisions of this Act.

## PART II.

### *Penalties.*

19. The provisions contained in the several Acts for the time being in force relating to stamps under the care and management of the commissioners of inland revenue shall (so far as the same are applicable, and consistent with the provisions of this Act), in all cases not hereby provided for, be in full force and effect with respect to the stamps to be provided under the provisions of this Act, and shall be applied and put in execution for preventing, detecting, and punishing all frauds, forgeries, and other offences relating thereto, as fully and effectually, to all intents and purposes, as if such provisions had been adapted to and specially enacted by this Act in reference to the stamps hereby provided.

20. Any person who shall, from and after the thirty-first day of March in each year after the commencement of this Act, have in his possession or custody any dog or dogs not duly licensed in accordance with the provisions of this Act, shall be liable to a penalty not exceeding two pounds; and the justice or justices shall further order such person forthwith to take out a license for such dog or dogs; and the petty sessions clerk shall thereupon issue such license upon payment of the proper license duty by such person, and such license shall be held to be valid to the thirty-first day of March next following the date of such license; and if after such order such person shall continue to keep any dog or dogs without having obtained a license, he shall, in addition to the penalty imposed for the second and any subsequent offence, pay a sum not exceeding one shilling for each day he shall have kept a dog without license.

21. Every person having in his possession or custody any dog or dogs shall produce the license for such dog or dogs whenever so required by a justice of the peace, officer, head or other constable of constabulary or of the Dublin metropolitan or other local police force, and in case of refusal he shall, if licensed, be liable to a penalty not exceeding five shillings.

22. Every penalty recoverable under the provisions of this Act shall be recoverable in a summary way, with respect to the police district of Dublin metropolitan subject and according to the provisions of any Act regulating the powers and duties of justices of the peace for such district or of the police of such district, and with respect to other parts of Ireland, before a justice or justices of the peace sitting in petty sessions, subject and according to the provisions of "The Petty Sessions (Ireland) Act, 1851," and any Act amending the same, and shall be applied according to the provisions of "The Fines Act (Ireland) Act, 1851," and any Act amending the same.

23. No penalty shall be exacted in any case where it shall appear to the satisfaction of the justice or justices that the person failing to comply with the

provisions of this Act has not wilfully been guilty of such failure, but that such failure has been occasioned by accident; provided always, that such justice or justices shall forthwith order such person to take out a license for the dog or dogs in his possession or custody, or otherwise comply with the provisions of this Act, and that such person shall forthwith comply with such order.

### SCHEDULES.

#### SCHEDULE (A.)

Schedule.	Duty.
For every license to keep one dog	£ s. d. 0 2 0
For every license to keep two or more dogs	{ 0 2 0 For each dog.

#### SCHEDULE (B.)

I hereby certify, that *A.B. [farmer]*, residing at in the townland of in the parish of in the county of has this day taken out a license for the year ending for the dog or dogs described at the foot hereof, and paid the sum of being the licence duty imposed in respect of such dog or dogs by the "Dogs Regulation (Ireland) Act, 1865."

Number of Dogs.	Colour.	Description.

Dated this day of 18 .  
(Signed) *C.D.*,  
Clerk of  
Petty Sessions.

*Note.*—In cases where an owner or master of a pack of hounds, harriers, or beagles, or an owner of several greyhounds, takes out a license, the number of such dogs need only be given; but where a license is taken out for other dogs, the colour and description of each dog should be given as far as possible.

No. in Registry Book. } I hereby certify, that this license has been duly registered in the "Registry of Dogs License Book" kept for that purpose by me, pursuant to section 8. of the "Dogs Regulation (Ireland) Act, 1865."

Dated this day of 18 .  
(Signed) *C.D.*,  
Clerk of  
Petty Sessions.

Place for  
Petty Sessions  
Stamp.

#### SCHEDULE (C.)

I hereby certify, that the following persons have taken out licenses in the petty sessions district of in the county of for the number

of dogs set opposite their names for the year ending

Name.	Residence.	Number of Dogs.

Dated this day of 18 .  
(Signed) *C.D.*,  
Clerk of  
Petty Sessions.

#### SCHEDULE (D.)

I hereby certify that *A.B. [farmer]* residing in the townland of in the parish of in the county of has paid the license duty, under the "Dog Regulation (Ireland) Act, 1865," for the dog described at the foot hereof for the year ending 18

Colour.	Description.

Dated this day of 18 .  
(Signed) *C.D.*,  
Clerk of  
Petty Sessions.

Place for  
Petty Sessions  
Stamp.

#### CAP. LI.

An Act to enable the Admiralty to contract for certain Works in connexion with the extension of her Majesty's Dockyards. [29th June, 1865.]

#### CAP. LII.

An Act to amend "The Drainage and Improvement of Lands Act (Ireland)," and to afford further facilities for the purposes thereof. [29th June, 1865.]

26 & 27 Vic. c. 88. 27 & 28 Vic. c. 72.

- Sec. 1. *Short title.*  
2. *Copies of inspectors' reports to be lodged with clerk of the peace.*  
3. *Part of section 38 of first-recited Act repealed, and Commissioners of Public Works empowered to advance monies necessary for the works.*  
4. *All the provisions of former Acts with respect to loans to apply to loans under this Act.*

5. *Nothing in the Acts construed to render legal works that would have been illegal if Acts had not passed.*

6. *Districts in which this Act to apply.*

7. *This and recited Act to be as one.*

‘WHEREAS an Act was passed in the session of Parliament holden in the twenty-sixth and twenty-seventh years of her Majesty, chapter eighty-eight: And whereas a further Act was passed in the session of Parliament holden in the twenty-seventh and twenty-eighth years of her Majesty, chapter seventy-two, intituled, *An Act to explain certain provisions contained in the Drainage and Improvement of Lands Act (Ireland), 1863*: And whereas it is expedient that further facilities should be given for the purposes of the said Acts, and that the said Acts should be amended:’ Be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as “The Drainage and Improvement of Land Amendment Act (*Ireland*), 1865.”

2. In all cases in which copies of the schedules, maps, plans, sections, and estimates in respect of the formation of any district, signed by the inspector appointed by the Commissioners of Public Works, shall be lodged with the clerk of the peace, as directed by section six, number three, of the said first-recited Act, copies of the inspector’s report referring to such maps, plans, sections, and estimates shall be lodged therewith.

3. So much of the thirty-eighth section of the said first recited Act as provides that no issue or instalment of any loan or advance shall be made unless the said commissioners shall be satisfied that the Drainage Board have previously *bona fide* expended a sum of money equal to the amount of such issue or instalment in the drainage and improvement of such district, and that in no case shall any such loan or advance be made exceeding one moiety of the monies proposed to be expended on the drainage and improvement of such district, shall be and the same is hereby repealed; and the said Commissioners of Public Works are hereby empowered (with the sanction of the Commissioners of her Majesty’s Treasury, by such instalments and subject to such rules and regulations as the said last-mentioned commissioners may think proper) to advance any sum or sums of money which the said Commissioners of Public Works may think necessary and proper for the execution of the works in any district, and for defraying the expenses which the said commissioners may consider properly connected therewith: Provided that no second or subsequent instalment of any such loan shall be made until it shall have been proved to the satisfaction of the said Commissioners of Public Works that the preceding instalment has been properly expended in the execution of the works in such district.

4. All the provisions in the said recited Acts or either of them contained with respect to loans or advances made by the said Commissioners of Public Works, and the security and repayment thereof, and the making of the final awards by the Commissioners

of Public Works, shall be deemed and taken to apply to all loans to be made by the said commissioners under the provisions of this Act.

5. It is hereby declared, that as against any person owning or interested in any land or other property situate beyond the limits of the jurisdiction of any board established by the said first-recited Act, nothing contained in the said Act or in any provisional order, or any Act confirming the same, shall be construed to render legal any work executed or to be executed by such board that would, if the said Acts had not been passed, have been illegal by reason of its injuriously affecting such land or property; and any damages adjudged to be paid by the said board to any person as aforesaid shall be deemed to be parts of the costs incurred by such board in defending legal proceedings instituted against them, and shall be defrayed in the manner in which the said costs are authorized to be defrayed by the said “Drainage and Improvement of Lands Act (*Ireland*), 1863.”

6. All the provisions of this Act shall be deemed and taken to apply to districts in respect of which the Commissioners of Public Works have heretofore made provisional orders under the said first-recited Act.

7. This Act and the recited Acts shall be read together and construed as one Act.

#### CAP. LIII.

An Act to confirm a Provisional Order under “The Drainage and Improvement of Lands (*Ireland*) Act, 1863,” and the Act amending the same.

[29th June, 1865.]

Sec. 1. *Provisional order in schedule confirmed.*

2. *Short title.*

‘WHEREAS the Commissioners of Public Works in *Ireland* have, in pursuance of “The Drainage and Improvement of Lands (*Ireland*), Act 1863,” and the Act amending the same, duly made the provisional order contained in the schedule to this Act annexed, and it is by the said last-mentioned Act provided that no such order shall be of any validity whatsoever until it shall have been confirmed by Parliament, and it is expedient that the said order should be so confirmed:’ Be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons in this present Parliament assembled, and by the authority of the same, as follows:

1. The provisional order contained in the schedule hereunto annexed is hereby confirmed, and from and after the passing of this Act shall be deemed to be a public general Act of Parliament of the like force and effect as if the provisions of the same had been enacted in the body of this Act.

2. This Act may be cited for all purposes as “The Drainage and Improvement of Lands Supplemental Act (No. 2, *Ireland*), 1865.”

SCHEDULE to which this Act refers.

DRAINAGE AND IMPROVEMENT OF LANDS ACT (*IRELAND*), 1863.”

In the matter of Kilmaistulla Drainage District, in the County of Tipperary.

Whereas certain proprietors of and persons interested

in the lands upon and adjacent to the Kilmastulla River, in the county of Tipperary, on or about the 23rd day of March, 1864, presented their petition to the Commissioners of Public Works in Ireland under the provisions of the Drainage and Improvement of Lands Act (Ireland), 1863, accompanied by the proper schedules, maps, plans, sections, and estimates, together with other particulars and information required by the said Act, showing by reference to the said maps the boundaries and area of the proposed drainage district, and stating the exigencies rendering the formation of such drainage district necessary, and praying that the said lands within the proposed district should be constituted a separate drainage district under the provisions of the said Act.

And whereas the said commissioners referred the same to Samuel U. Roberts, Esq., civil engineer, an inspector duly appointed under the said Act.

And whereas all notices and inquiries required by the said Act have been duly given and made, and the said inspector has duly reported to us the said commissioners in writing the result of his inquiries; and we the said commissioners have duly considered the same, and no objections to the report of the said inspector have been made to us.

And whereas all preliminaries required by the said Act to precede the making of this provisional order have been performed and complied with.

And whereas we, the said Commissioners of Public Works in Ireland, upon consideration of the premises, are satisfied of the propriety of constituting the proposed separate drainage district, and that the proprietors of two third parts in value of the lands in the proposed district are in favour thereof, and have subsequently to the date of the report of the said inspector assented thereto in writing.

Now, therefore, in pursuance of the power given to us by the said Act, we the Commissioners of Public Works in Ireland, do by this provisional order under our common seal constitute the area in the said petition and report, and the boundaries and extent of which are set forth within yellow lines on the map to which we have caused our common seal to be attached, (and which map is deposited in the office of Public Works in Ireland) a separate drainage district by the name of the Kilmastulla Drainage District, and we do declare that the lands to be purchased for the proposed works in such district (subject to such alterations and deviations therefrom as we the said commissioners may hereafter sanction) are the lands in that behalf shown and set forth in the said map and the schedule thereto annexed, marked with the letter B, and also sealed with our common seal.

And we the said Commissioners of Public Works do, by this our order, order and direct that the time for completion of the necessary works in the said district shall be limited to the first day of August which will be in the year 1868.

And we do further by this our provisional order make the following regulations with respect to the Drainage Board:

That the Drainage Board for the said district shall consist of seven members.

That the following persons shall be the members of the first Drainage Board, viz:—

The Right Honourable Lord Baron Dunally-Kilboy, county Tipperary;

William H. Carroll, Tulla House;

Christopher Keays, of Gurtmore Cottage;

George Cashel, of Shallee House;

William Bonfield, of Gortmore;

William Vere Cruise, Silver-street;

All in the county of Tipperary, Esquires, and William Tuthill, of Upper Mount-street, in the city of Dublin, Esquire.

That the first meeting of the said board shall be summoned by notice under the hands of any two or more of the said board, published in the Dublin Gazette and some newspaper generally circulated in the said district, at least fourteen days next before the day of meeting.

That the qualification of any subsequent member of the said board shall be, that he shall be the proprietor (as defined by the said Acts and the Acts referred to therein or incorporated therewith) of not less than twenty acres of land situate within the area of the said district, or the land agent for the time being of a person being a proprietor as aforesaid of not less than one hundred acres of land situate within the area of said district and acting as receiver of the rents and profits of such lands.

That the members of the first board shall vacate their offices on the first Thursday in September in the year following the date of this provisional order.

That the electors for members of the Drainage Board shall be the persons in that behalf mentioned in the said Act: Provided always, that no such elector shall be entitled to vote or exercise any privilege as such unless the land of which he is the proprietor or some portion thereof shall be rateable on account of the works in the district, and he shall have previously paid all rates and arrears of rates which may be payable by him in respect of any drainage rate for the aforesaid district.

In witness whereof we the said Commissioners of Public Works in Ireland have hereunto caused our common seal to be affixed, this third day of April, one thousand eight hundred and sixty-five.

E. HOANSTY, (Seal.)

Office of Public Works, Dublin. Secretary.

#### GAP. LIV.

An Act to alter the Days between which Pheasants may not be killed in Ireland.

[29th June, 1865.]

27 G. 3, c. 35. (I.)

Sec. 1. *Part of recited Act repealed.*

2. *Fixing period for shooting pheasants in Ireland.*

3. *Limit of Act.*

‘WHEREAS by an Act passed in the Parliament of Ireland in the twenty-seventh year of the reign of his late Majesty King George the Third, chapter thirty-five, intituled *An Act for the preservation of Game*, it was enacted (amongst other things) that from and after the first day of June, one thousand seven hundred and eighty-seven, every person who

shall wilfully kill or destroy any pheasant between the tenth day of *January* and the first day of *September* in any year shall forfeit a sum not exceeding five pounds for every such pheasant: And whereas these days having been found inconvenient it is expedient to alter them: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons in this present Parliament assembled, and by the authority of the same, as follows:

1. From and after the passing of this Act so much of the said recited Act of the twenty-seventh *George* the Third as relates to the killing or destroying any pheasant between the tenth day of *January* and the first day of *September* in any year shall be and the same is declared to be hereby repealed.

2. From and after the passing of this Act no person or persons shall on any pretence whatsoever kill or destroy any pheasant between the first day of *February* and the first day of *October* in any year, and if any person or persons shall do so he or they shall be liable to the same penalty as by the before recited Act is laid upon every person or persons transgressing the same.

3. This Act shall be held to apply to *Ireland* only.

#### CAP. LV.

An Act to empower the University of *Oxford* to make statutes as to the *Vinerian* Foundation in that University. [29th June, 1865.]

#### CAP. LVI.

An Act to provide for the better Prevention of Trespass in *Scotland*. [29th June, 1865.]

#### CAP. LVII.

An Act to amend certain provisions in "The Ecclesiastical Leasing Act, 1858." [29th June, 1865.]

#### CAP. LVIII.

An Act for confirming, with Amendments, certain Provisional Orders made by the Board of Trade under The General Pier and Harbour Act, 1861, relating to *Carrickfergus, Hastings, Maldon, Northam, and Shanklin*. [29th June, 1865.]

24 & 25 Vict. c. 45.

Sec. 1. Orders in Schedule confirmed.

2. Short title.

#### SCHEDULE.

1. Repeal of sections and schedule in former order.
2. Borrowing.
3. Sinking Fund.
4. Re-borrowing.
5. Receiver.
6. Money to be applied to purposes of order.
7. Power to take specified lands by agreement.
8. Lands Clauses Act incorporated.

9. Power to make works.
10. Description of pier and breakwater.
11. Power to take rates according to schedule.
12. Certain fishing vessels under stress of weather exempt from rates.
13. Custom house officers exempt.
14. Application of rates and moneys received by the commissioners.
15. Construction and short titles.

' WHEREAS a provisional order made by the board of trade under the General Pier and Harbour Act, 1861, is not of any validity or force whatever until the confirmation thereof by Act of Parliament:

' And whereas the board of trade have made certain provisional orders: and whereas those orders have been amended by Parliament, and are as so amended set out in the Schedule: and whereas it is expedient that the orders so set out in the Schedule hereto be confirmed by Act of Parliament:'

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The orders set out in the Schedule hereto shall be and are hereby confirmed, and all the provisions thereof in manner and form as they are set out in the said Schedule shall, from and after the passing of this Act have full validity and force.

2. This Act may be cited as The Pier and Harbour Orders Confirmation Act, 1865.

#### The SCHEDULE of Orders.

1. CARRICKFERGUS.
2. HASTINGS.
3. MALDON.
4. NORTHAM.
5. SHANKLIN.

#### SCHEDULE to which the foregoing Act refers.

##### CARRICKFERGUS.

Order for the Amendment of The Carrickfergus Harbour Order, 1862.

1. Sections 4 to 16 (both inclusive) of the Carrickfergus Harbour Order, 1862, hereafter in this order called the order of 1862, with the Schedule therein referred to, are hereby repealed: but nothing herein contained shall invalidate any act done under the authority of those sections before this repeal takes effect, or affect any right, title, obligation, or liability then acquired or accrued thereunder.

##### Money.

2. The commissioners may borrow on mortgage or bond at interest such sums of money as may be required for the purposes of the works authorised by this order not exceeding in the whole the sum of £8,000.

3. In order to create a sinking fund for the discharge of the principal money so borrowed the commissioners shall yearly set apart the surplus annual revenue of the harbour (hereafter in this order defined), and shall deposit the same in some joint stock bank of issue in Ireland, to be increased by accumulation, in

the way of compound interest or otherwise, until the accumulated fund is sufficient to pay off the principal money borrowed, or any such part thereof as the commissioners think ought to be then paid off, and the commissioners shall then apply such accumulated fund in such payment accordingly, but so that the commissioners shall not allow any sum exceeding £500 to remain so deposited for a longer time than six calendar months without applying the same in such payment.

4. Any money borrowed under this order, and discharged by means of the sinking fund shall not be re-borrowed, but any money borrowed and discharged otherwise than by means of the sinking fund may be re-borrowed if required for the purposes of this order, and so *toties quoties*.

5. The mortgagees of the commissioners may enforce the payment of the arrears of interest, or of the arrears of principal and interest, due to them on their respective mortgages by the appointment of a receiver. The amount to authorise a requisition for a receiver is £1,000.

6. Every part of the money borrowed under this order shall be applied only for purposes authorised by this order.

#### *Lands.*

7. For the purposes of this order the commissioners may, from time to time, by agreement, enter on, take and use all or any part of the lands shown on the deposited plans as intended to be taken for the purposes of the proposed works, and also all or any part of the lands described in Schedule A. to the order of 1862 annexed.

8. The Lands Clauses Consolidation Act, 1845, and The Lands Clauses Consolidation Acts Amendment Act, 1860, except so much thereof respectively as relates to the purchase and taking of lands otherwise than by agreement, are incorporated with this order.

#### *Works.*

9. Subject to the provisions of this order, the commissioners may, on the lands taken by them under this order, and in the lines, and according to the levels, and within the limits of deviation shown on the deposited plans and sections, make and maintain the works shown on the deposited plans.

10. The works authorized by this order are the following:—

- (1.) A pier, with all proper approaches, works, and conveniences connected therewith, on the eastern side of the harbour of Carrickfergus, commencing near the seaward end of the existing pier or quay, and running in a southerly direction for a distance of 600 feet or thereabouts, then with a cant in a westerly direction for a distance of 100 feet or thereabouts, such pier to be partly stone and partly open pile work,—and the excavation of soil on the western side of the said intended pier:
- (2.) A stone breakwater to protect the same intended pier 400 feet or thereabouts in length, lying about 350 feet to the westward of and parallel to the pier, with an easterly cant at the south end.

#### *Rates.*

11. The commissioners may demand and receive in respect of the vessels, persons, goods, and things described in the Schedule hereto any sums not exceeding the rates in that Schedule specified.

12. Fishing vessels belonging to countries with which, for the time being, treaties exist exempting from duties and portcharges such vessels when forced by stress of weather to seek shelter in the ports of or on the coasts of the United Kingdom, shall, when forced by stress of weather to make use of the pier and harbour authorised by this order, and not breaking bulk while making use thereof, be exempt from rates leviable under this order.

13. Officers of customs, being in the execution of their duty, shall at all times have free ingress, passage, and egress on, into, along, through, from, and out of the pier and harbour by land, with their vessels and otherwise, without payment.

14. The commissioners shall apply all rates received under this order, and all other moneys coming to their hands from the existing harbour or new works, or the lands or property connected therewith, for the purposes and in the order following, and not otherwise:—

- (1.) In paying the costs of and connected with the preparation and making of this order:
- (2.) In paying from year to year the expenses of the maintenance, management, and regulation of the existing harbour and new works, and the lands and property connected therewith:
- (3.) In paying the interest accrued due on any money borrowed under this order, and any sum payable on account of the principal thereof:
- (4.) In paying the rent accrued due in respect of the property described in Schedule A. to the order of 1862 annexed, and in fining down such rent in pursuance of any agreement in that behalf made or to be made:
- (5.) As to the surplus annual revenue of the harbour,—that is to say, so much of the rates and other moneys aforesaid as remains from year to year after making the several payments before in the present section directed,—in creating a sinking fund in manner and for the purposes before in this order specified.

15. This order shall be construed with the order of 1862 as one order, and may be cited as The Carrickfergus Harbour Amendment Order, 1865; and the order of 1862 and this order may be cited together as the Carrickfergus Harbour Orders, 1862 and 1865.

SCHEDULE to which the foregoing order refers.

#### I.—RATES ON VESSELS ENTERING OR USING THE EXISTING HARBOUR OR NEW WORKS.

For every vessel under the burden of 15 tons,  
per register ton

s. d.  
0 4

For every vessel of the burden of 15 tons and under 50	0 6	Blocks, ship, per dozen	1 0
For " " 50 " 100	0 8	Bogwood, per ton	0 3
For " " 100 " 150	0 10	Boilers, steam, large	2 6
For " " 150 and upwards, 1s.		" small, under one ton each	0 9
For every vessel which remains in the harbour more than three weeks continuously, there shall be paid for every week or part of a week during which the same remains in the harbour after the first three weeks the further sum, per register ton, of	0 3	Bone dust, per ton	0 8
All lighters from any vessel in the roads shall be exempted from rates, but if the vessel do not enter the harbour every lighter shall pay for each trip, per ton	0 2	Bottles, loose, empty, per gross	0 2
All boats entirely open landing or taking on board goods, each	0 6	" in baskets or carboys, full	0 6
All other boats entirely open, pleasure yachts, and boats employed in fishing, exempt.		Bran, per ton	0 3
II.—RATES ON PASSENGERS LANDING ON OR EMBARKING FROM THE EXISTING HARBOUR OR NEW WORKS.		Brandy, per hogshead	1 0
	s. d.	Bricks, common, per 1,000	0 8
For every person landing from or embarking in any steamboat or other passenger vessel any sum not exceeding	0 2	" fire, per 1,000	1 0
III.—RATES ON GOODS SHIPPED OR UNSHIPPED AT THE EXISTING HARBOUR OR NEW WORKS.		" bath, per 1,000	1 0
	s. d.	Butter, per cask	0 3
Alabaster, rough, per ton	0 3	" per firkin	0 1½
" worked, per cwt.	0 3	" per barrel	0 4
Ale, beer, or porter, per butt or pipe	1 0	Cables, per cwt.	0 2
" " per hogshead	0 6	Candles, tallow, chest of 14 dozen	0 6
" " per barrel	0 3	" " half-chest	0 3
" " in bottles, per dozen	0 1	" wax, per 12 lbs.	0 1
Ale, bottled, per barrel bulk	0 3	Canes, per bundle	0 6
Animals, wild, each	0 9	Carriages or coaches, each	1 0
" or birds stuffed, per package	0 6	Carts, each	0 6
Anchors, per cwt.	0 2	Casks, empty (not returned), each	0 2
Apples, in bulk, per ton	0 6	Cattle, asses, and mules, each	0 3
Artificial manure, per ton	0 3	" bulls, each	0 3
Asbes, barilla, per cwt.	0 1	" cows and oxen, each	0 2
" pearl and pot, per cwt.	0 2	" calves and lambs, each	0 0½
" black, per cwt.	0 1	" horses, each	0 2
" bleaching, per cwt.	0 2	" pigs or sheep, each	0 0½
" common Irish, per cwt.	0 1	" sucking pigs, each	0 0½
" soda, per cwt.	0 1	Cement, per cwt.	0 1
Asphaltum, per cwt.	0 1	Chains, per cwt.	0 2
Bags or sacks (not returned), per bundle	0 1	Chalk, per ton	0 8
Bacon or pork, per cwt.	0 2	Cheese, per cwt.	0 6
Ballast, per ton, registered measurement of vessel	0 3	Chimney-pots, earthenware, each	0 1
Bark, tanners' chopped, per ton	1 0	China, per hogshead	1 6
Barley, per ton	0 3	" per tierce	1 0
Baskets, per dozen	0 1	Cigars, per cwt.	0 6
Beans, per ton	0 3	Clay, pipe and potters', per ton	0 6
Beef or pork, per tierce	0 4	" fire, per ton	0 3
" " per barrel	0 2	Cloth, packs, not exceeding 1 cwt.	0 4
" " per half-barrel, and smaller package	0 1	Cloths, linen, woollen, bale, pack, or truss, per cwt.	0 4
" " ton	1 0	" in boxes, per foot	0 1
Biscuit or bread, per cwt.	0 2	Cloverseed, per sack	0 3
Bleaching-powder, per hhd.	0 6	Coals, per ton	0 3
" per barrel	0 3	Coke, per ton	0 4
		Copper, per ton	1 6
		Cordage, per cwt.	0 2
		Cordials, per case of 1 dozen	0 1
		" per hogshead	1 0
		Corn, viz:—	
		Wheat, per ton	0 3
		Barley, per ton	0 3
		Oats, per ton	0 3
		Barleymeal, per ton	0 4
		Indian corn, per ton	0 3
		" meal, per ton	0 4
		Oatmeal, per bag	0 2
		Beans and peas, per bag	0 2
		Rye, per bag	0 2
		Corkwood, per cwt.	0 3
		Corks, per ten gross	0 2
		Culm, per ton	0 3
		Currants, per nutt	1 0



Dates, per cwt.	0	3	Household furniture, belonging to parties changing their residence only, per 10 barrels bulk	0	6
Dissolved bones and other artificial manures, per ton	0	8	Husbandry utensils, per ton	1	4
Dogs, and other animals not enumerated, each	0	2	"    per barrel bulk	0	2
Drugs in casks, hampers, or boxes, at per foot	0	1	Ice, per ton	0	6
Dyer's stuff, per cwt.	0	4	Iron, pig, per ton	0	8
Dyes, per cwt.	0	3	" bar, bolt, and wrought, per ton	1	4
Earthenware, coarse, in bulk, per potters' dozen	0	3	" plate and sheet, per ton	0	4
"    in crates, at per crate	0	8	" hoops, per cwt.	0	1
Eggs, per gross of 12 dozen	0	1	" cask, hollow ware, per cwt.	0	3
Empty bags or sacks (not returned) per bundle	0	1	" cast solid, per cwt.	0	2
Farming implements, per ton	1	4	" ore, per ton	0	4
"    "    per barrel bulk	0	2	" scrap, per ton	0	6
Feathers, per bale	0	4½	" wire and nailrods, per cwt.	0	1
"    per bag	0	3	Junk, or old ropes, per cwt.	0	1
Felt, per cwt.	0	1	Juta, per ton	0	6
Fish: herrings, cured, per barrel	0	3	Kelp, per ton	0	3
"    other fish cured (not before specified), per cwt.	0	1	Kerb stones, per ton	0	3
Flagstones, rough, per 100 feet	1	0	Lead, pigs of, per ton	1	4
"    worked, per 100 feet	2	0	" pipes, per ton	0	6
Flaxseed, per hogshead	0	6	" sheet, per cwt.	0	1
"    per bag	0	3	Lamps, each	0	1
"    per barrel	0	2	Leather, tanned, per cwt.	0	2
Flax, rough, per ton	1	0	" wrought, per cwt.	0	3
" dressed, per stone	0	1	Lemons, per chest	0	4
"    per dozen hanks	0	1	"    per box	0	2
Flour, per sack	0	2	Lime, burnt, per ton	0	6
"    per barrel	0	1½	Limestone, per ton	0	3
Flower roots, plants, or trees, in packages, at per foot	0	1	Linen or woollen rags, per cwt.	0	1
Freestones, per ton	1	0	"    " cloth, per cwt.	0	4
Fruit, green, per cwt.	0	1	Linseed meal, per ton	1	0
" dry, per cwt.	0	2	" cake, per ton	1	0
Fuel, patent, per ton	0	4	Liquor, in bottles, per case or box	0	6
Furnaces, metal, per cwt.	0	3	Liquors (not enumerated), per hogshead	1	0
Furniture, household, new, at per barrel bulk	0	1	"    "    per barrel	0	6
Gas metres, per crate or box	0	6	Loam, or moulding sand, per ton	0	3
"    each	0	1	Machinery:—		
Gates, iron, or wood, each	0	2	Steam and other engines, and part of the same, per cwt.	0	2
Geese, per 100	1	0	Wood and iron mixed, per foot	0	1
Glass, per crib, slide, or case	0	6	Malt, per quarter	0	2
Grains, per ton	0	4	Manure (not enumerated), per ton	0	3
Grain, not enumerated, per ton	0	3	Marble, rough, per ton	1	0
Granite, per ton	0	3	" worked, per cwt.	1	0
Grassseed, per sack	0	3	Masts or spars, each	0	6
Grates or stoves, per foot	0	2	Mats and matting, per parcel	0	2
Gravel or sand, per ton	0	3	Matches, per hogshead	0	3
Groats, per cwt.	0	2	"    per case or barrel	0	2
Groceries per box, package, or hamper	0	4	Maunds or hampers, empty, imported, per dozen	0	1
Guano, per ton	0	8	Meal, per bag (all kinds, not enumerated)	0	2
Gunpowder, per barrel	0	3	"    per ton	0	4
"    per half barrel	0	1½	Meat, per cwt.	0	2
Haberdashery and hosiery, in bales, per cwt.	0	4	Metal castings (not enumerated), per cwt.	0	3
"    "    in boxes, per cwt.	0	1	Millinery, per foot	0	1
Hams, per cwt.	0	2	Mineral and aerated waters, in bottles, per doz.	0	1
Hardware, per cwt.	0	2	Muslin, per bale	0	6
Hats, per box, per foot	0	1	"    per parcel	0	3
Hay, per ton	1	6	Nails, per cwt.	0	1
"    per truss	0	2	Naptha, per puncheon	0	2
Hemp, per ton	1	6	"    per carboy	0	1
Herrings, cured, per barrel	0	3	Nats, per bag or barrel	0	2
Hides, wet or dry, for every 100 in number	1	4	Oakum, per cwt.	0	1
"    fleshings, per cwt.	0	2	Oars, per dozen	0	3
Household furniture, new, per barrel bulk	0	1	Oats, per ton	0	3

Oil, castor, per cwt.	0 4	Starch, per cwt.	0 2
" sperm, per hoghead	1 0	Steel, per cwt.	0 6
" sweet and lamp, and all oils not enumerated		Sticks, walking, per bundle	0 2
per hoghead	0 10	Stones, per ton	0 3
" in flasks, per chest	0 4	" grinding, per cwt.	0 1
" " per half chest	0 2	" Caen, for millstones, per 100	3 0
Olives, per ton	1 0	Straw, per ton	1 6
Onions, per cwt.	0 1	Sulphur, per cwt.	0 3
Oranges, per box	0 2	Sugar, soft, per cwt.	0 4
" per chest	0 4	" refined, in barrels	0 2
Oysters, per ton	1 8	" " in hogsheds	1 4
Paintings, pictures, and pier glasses, per foot	0 3	Tar, pitch, or rosin, per barrel	0 2
Paints and painters' colours, per cwt.	0 2	Tea, per chest	1 6
Pans, brass or metal, per cwt.	0 6	Tiles, paving, per score	0 1
Paper, per cwt. common	0 1½	" roofing, per 1,000	0 9
" stationery, per cwt.	0 4	Timber, not enumerated, per load of 55 feet	0 6
Peas, per bag	0 2	" mast pieces, under 12 inches, each	0 6
Petroleum, per ton	5 0	" wainscot boards, per 100	1 0
Perfumery, per package	0 3	Tinplate, per box	0 2
Periodicals and newspapers, per parcel	0 1	Tobacco, per cwt.	0 3
Pipes for smoking, per hoghead	1 0	Tow, per ton	1 8
" per barrel	0 6	Toys, per case	0 3
Pipes, metal, per ton	0 8	Trawlbeams, each	0 4
" earthenware, for draining, per ton	1 0	Treacle or molasses, per puncheon	0 10
Ploughs, each	0 6	" per half-puncheon	0 5
Potash, per cwt.	0 1	" per cask	0 3
Potatoes, per ton	0 6	Treenails, under 2 feet in length, per 1,000	0 6
Poultry and game, per dozen	0 4	" exceeding 2 feet in length, per 1,000	1 0
Punchons, empty, and not returned, each	0 2	Turf, per ton	0 6
Putty, glaziers, per cask	0 3	Turnips or mangold, per ton	0 6
Rags, per ton	1 0	Turpentine, per cwt.	0 6
Raisins and figs, per cwt.	0 2	Twine or netting, per cwt.	0 3
Rice, per tierce	0 8	Varnish, per barrel	0 6
" per barrel	0 4	Vegetables, shipped, per cwt.	0 1
Rope-coil, per cwt.	0 2	Vetches, per ton	0 3
Rope-coil yarn, per cwt.	0 1	Vinegar, per pipe	1 0
Rosin, per barrel	0 1	" per hoghead	0 6
Sacking, per bale	0 2	" per firkin	0 3
Sago, per cwt.	0 2	Vitriol, per carboy	0 6
Sails, per cwt.	0 4	Wheat, per ton	0 3
Salt, per ton	0 10	Whiskey, per puncheon	2 0
" fine, per cwt.	0 4	Whiting, per cwt.	0 1
" coarse, for manure, or curing fish, per ton	0 3	Wine, foreign, per pipe, all sorts	2 6
" rock, per ton	0 3	" British, per pipe, all sorts	1 6
Sand or gravel, per ton	0 3	" per hoghead, all sorts	1 0
Scutillas, coal, per dozen	0 3	" per barrel, all sorts	0 6
Scythes stones per cwt.	0 3	" in bottles, all sorts, per dozen	0 2
Scythes, per dozen	0 2	Wood, deals, per 120	1 0
Seeds, garden, or agricultural grass seeds,		" battens, Petersburg, per hundred	0 6
per cwt.	0 3	" fir, pine, and other descriptions not	
Seeds, not enumerated, per cwt.	0 3	enumerated, per load of 50 feet	0 10
Shot, bird, per cwt.	0 3	" oak or wainscot, per load of 50 feet	1 0
Shovel handles, per dozen	0 1	" firewood, per fathom	0 6
Silk, per cwt.	0 8	" laths and lathwood, per fathom of 216	
Skins, per score	0 6	cubic feet	2 6
Slabs, marble, per ton	1 0	" spars, under 22 feet in length, above	
" slate, per ton	0 3	2½ and under 4 inches in diameter,	
Slates, scantle, per 1000	0 3	per 120	2 6
" common helling, per 1000	0 2	" spars, 2½ inches in diameter and un-	
Slates, earth or tobasstone, per foot	0 0½	der, per 120	1 4
Soap, per cwt.	0 2	" spars, 22 feet in length and upwards,	
Soda, per barrel	0 1	and not exceeding 4 inches in dia-	
Soda-water, per dozen	0 1	per 120	6 6
Spades and shovels, per dozen	0 4	" spars, of all lengths, above 4 and	
Spirits, foreign and British, per hoghead of		under 6 inches in diameter, per 120	12 0
56 gallons	0 8		4

Wood, lignum vitæ, logwood, mahogany,		
rosewood, &c. per ton	1	4
Woollen manufactures, at per cwt.	0	8
Wool, per pack	0	4
Yarn, per cwt.	0	2
Zinc, per ton	1	4

ALL OTHER GOODS NOT PARTICULARLY ENUMERATED  
ABOVE.

Light goods, per barrel bulk	0	2
Heavy goods, per ton	1	4

In charging the rates on goods the gross weight or measurement of all goods to be taken, and for any less weights, measures, and quantities than those above specified a proportion of the respective rates shall be charged.

Five cubic feet, not exceeding two and a half cwt. to be rated as a barrel bulk, but when the weight of five cubic feet is greater than two and a half-cwt. then two and a half cwt. to be rated as a barrel bulk.

IV.—RATES FOR THE USE OF THE CRANES, WEIGHING  
MACHINES, AND SHEDS OF THE COMMISSIONERS.

1st. Rates of Craneage.

	s.	d.
All goods or packages not exceeding 1 ton	0	3
Exceeding 1 ton and not exceeding 2 tons	0	4
" 2 tons                      " 3 tons	0	6
" 3 tons                      " 4 tons	0	8
" 4 tons                      " 5 tons	0	10
" 5 tons                      " 6 tons	1	0
" 6 tons	1	3

2nd. Weighing Machines.

For goods weighed, 1d. for each ton or part of a ton.

3rd. Shed Dues.

For each ton of goods of eight barrels bulk, or for each ton of goods of 20 cwt., which shall remain in the sheds or on the quays of the harbour for a longer time than 48 hours, the sum of 3d., and the sum of 1½d. per ton for each day during which such goods shall remain after the first 48 hours.

CAP. LIX.

An Act for confirming, with Amendments, a Provisional Order made by the Board of Trade under "The Merchant Shipping Act Amendment Act, 1862," relating to the Pilotage of the Port of *Sunderland*.  
[29th June, 1865.]

CAP. LX.

An Act to render Owners of Dogs in *England* and *Wales* liable for Injuries to Cattle and Sheep.  
[29th June, 1865.]

CAP. LXI.

An Act for providing a further Sum towards defraying the Expenses of constructing Fortifications for the Protection of the Royal Arsenals and Dockyards and the Ports of *Dover* and *Portland*, and of creating a Central Arsenal.  
[29th June, 1865.]

CAP. LXII.

An Act to provide for the Exemption of Churches and Chapels in *Scotland* from Poor Rates.  
[29th June, 1865.]

CAP. LXIII.

An Act to remove Doubts as to the Validity of Colonial Laws.  
[29th June, 1865.]

- Sec. 1. Definitions: "Colony:" "Legislature," "Colonial Legislature:" "Representative Legislature:" "Colonial Law:" "Act of Parliament, &c. to extend to colony when made applicable to such colony:" "Governor:" "Letters patent."
2. Colonial Law when void for repugnancy.
  3. Colonial law when not void for repugnancy.
  4. Colonial law not void for inconsistency with instructions.
  5. Colonial Legislature may establish, &c. Courts of law. Representative Legislature may alter constitution.
  6. Certified copies of laws to be evidence that they are properly passed. Proclamation to be evidence of assent and disallowance.
  7. Certain Acts enacted by Legislature of South Australia to be valid.

'WHEREAS doubts have been entertained respecting the validity of divers laws enacting or purporting to have been enacted by the Legislatures of certain of her Majesty's colonies, and respecting the powers of such Legislatures, and it is expedient that such doubts should be removed:'

Be it hereby enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present assembled, and by the authority of the same, as follows:

1. The term "colony" shall in this Act include all of her Majesty's possessions abroad in which there shall exist a Legislature, as herein-after defined, except the Channel Islands, the *Isle of Man*, and such territories as may for the time being be vested in her Majesty under or by virtue of any Act of Parliament for the Government of *India*:

The terms "Legislature" and "Colonial Legislature" shall severally signify the authority, other than the Imperial Parliament or her Majesty in council, competent to make laws for any colony:

The term "Representative Legislature" shall signify any colonial Legislature which shall comprise a legislative body of which one half are elected by inhabitants of the colony.

"The term "colonial law" shall include laws made for any colony, either by such Legislature as aforesaid, or by her Majesty in council:

An Act of Parliament, or any provision thereof, shall, in construing this Act, be said to extend to any colony when it is made applicable to such colony by the express words or necessary intendment of any Act of Parliament:

The term "governor" shall mean the officer lawfully administering the government of any colony:

The term "letters patent" shall mean letters pa-

tent under the great seal of the United Kingdom of Great Britain and Ireland.

2. Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

3. No colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of *England*, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid.

4. No colonial law, passed with the concurrence of or assented to by the governor of any colony, or to be hereafter so passed or assented to, shall be or be deemed to have been void or inoperative by reason only of any instructions with reference to such law or the subject thereof which may have been given to such governor by or on behalf of her Majesty, by any instrument other than the letters patent or instrument authorizing such governor to concur in passing or to assent to laws for the peace, order, and good government of such colony, even though such instructions may be referred to in such letters patent or last-mentioned instrument.

5. Every colonial Legislature shall have, and be deemed at all times to have had, full power within its jurisdiction to establish courts of judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein; and every representative Legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such Legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, order in council, or colonial law for the time being in force in the said colony.

6. The certificate of the clerk or other proper officer of a legislative body in any colony to the effect that the document to which it is attached is a true copy of any colonial law assented to by the governor of such colony, or of any bill reserved for the signification of her Majesty's pleasure by the said governor, shall be *prima facie* evidence that the document so certified is a true copy of such law or bill, and, as the case may be, that such law has been duly and properly passed and assented to, or that such bill has been duly and properly passed and presented to the governor; and any proclamation purporting to be published by authority of the governor in any newspaper in the colony to which such law or bill shall relate, and signifying her Majesty's disallowance of any such colonial law, or her Majesty's assent to any such reserved bill as aforesaid, shall be *prima facie* evidence of such disallowance or assent.

And whereas doubts are entertained respecting the validity of certain Acts enacted or reputed to be

enacted by the Legislature of *South Australia*: be it further enacted as follows:

7. All laws or reputed laws enacted or purporting to have been enacted by the said Legislature, or by persons or bodies of persons for the time being acting as such Legislature, which have received the assent of her Majesty in council, or which have received the assent of the governor of the said colony in the name and on behalf of her Majesty, shall be and be deemed to have been valid and effectual from the date of such assent for all purposes whatever; provided that nothing herein contained shall be deemed to give effect to any law or reputed law which has been disallowed by her Majesty, or has expired, or has been lawfully repealed, or to prevent the lawful disallowance or repeal of any law.

#### CAP. LXIV.

An Act to remove Doubts respecting the Validity of certain Marriages contracted in Her Majesty's Possessions abroad. [29th June, 1865.]

Sec. 1. *Colonial laws establishing validity of marriages to have effect throughout her Majesty's dominions, but only where parties are competent to contract marriage.*

2. *Definition of "Legislature."*

'WHEREAS laws have from time to time been made by the Legislatures of divers of her Majesty's possessions abroad for the purpose of establishing the validity of certain marriages previously contracted therein, but doubts are entertained whether such laws are in all respects effectual for the aforesaid purpose beyond the limits of such possessions: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Every law made or to be made by the Legislature of any such possession as aforesaid for the purpose of establishing the validity of any marriage or marriages contracted in such possession shall have and be deemed to have had from the date of the making of such law the same force and effect for the purpose aforesaid within all parts of her Majesty's dominions as such law may have had or may hereafter have within the possession for which the same was made: provided that nothing in this law contained shall give any effect or validity to any marriage unless at the time of such marriage both of the parties thereto were, according to the law of *England*, competent to contract the same.

2. In this Act the word "Legislature" shall include any authority competent to make laws for any of her Majesty's possessions abroad, except the Parliament of the United Kingdom and her Majesty in council.

#### CAP. LXV.

An Act to explain "The Defence Act, 1860." [29th June, 1865.]

## CAP. LXVI.

An Act to allow the charging of the Excise Duty on Malt according to the Weight of the Grain used.  
[29th June, 1865.]

Sec. 1. *Commencement of Act.*

2. *Malster entitled to have the duty upon malt made by him charged according to the weight of the grain used.*
3. *Cover to be affixed to cistern.*
4. *Notice to be given of the steeping of grain.*
5. *Declaration to be given of the weight of grain to be steeped.*
6. *Mode of ascertaining weight of grain.*
7. *Mode of calculating duty on malt when charged according to weight.*
8. *Malster to provide scales and weights and bushel measure.*
9. *Officer may weigh any grain in the malthouse of a malster making malt under the provisions of this Act.*
10. *Penalty where the weight of grain shall exceed declared weight.*
11. *Grain making into malt may be sprinkled at the expiration of ninety hours after being emptied from cistern.*
12. *Penalty for offences against this Act.*
13. *Condition No. 3 in section 28 of 23 & 24 Vict. c. 113 repealed, and other provisions made.*
14. *12 G. 1, c. 4, ss. 48 to 59, and 3 G. 4, c. 18, ss. 12 to 16, and 18 & 19, relating to the exportation of malt on drawback, repealed.*
15. *Not to repeal provisions of other Malt Acts.*
16. *Continuance of Act.*

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act shall (except where otherwise expressly enacted) commence and take effect on the first day of September one thousand eight hundred and sixty five.

2. Any malster who shall desire to have the duty payable upon malt made by him charged according to the weight of the corn or grain used in the making of such malt under the provisions of this Act shall give notice in writing of such his desire to the officer of excise under whose survey he shall be, and upon his complying with the provisions of this Act in other respects he shall be entitled to have the duty charged accordingly in respect of any corn or grain which he shall wet or steep at any time and from time to time after the expiration of four clear days from the giving of such notice; Provided always, that if the malster who shall have given such notice shall not begin to make, or shall discontinue making, malt to be charged with duty under the provisions of this Act for the space of one calendar month, the notice given by him shall be of no further avail, and he shall not be entitled to the privilege of having the duty on malt made by him charged under the provisions of this Act until after

he shall have given a fresh notice in the manner hereinbefore required.

3. Every malster who shall have given such notice as aforesaid shall, before he shall place any corn or grain in any cistern for the purpose of being made into malt to be charged with duty under the provisions of this Act, provide and affix to such cistern a proper and secure cover, with proper fastenings, to the satisfaction of the supervisor of excise, or any other officer of excise of superior rank to a supervisor; and such cover shall, when there shall be any corn or grain in such cistern, be kept locked and secured by the officers of excise during such period of time as the Commissioners of Inland Revenue shall by their regulation or order direct in that behalf; and no malster shall, after such cover shall have been locked and secured as aforesaid, open, remove, or damage such cover, or obtain access to the corn or grain in such cistern.

4. The malster shall give forty-eight hours' notice in writing to the officer of excise under whose survey he shall be of the day and hour when he intends to steep corn or grain to be made into malt under the provisions of this Act; and in such notice the malster shall specify the day and the particular hour when he intends to place the corn or grain in the cistern (which hour shall not be later than twelve o'clock at noon of the day preceding the day on which it is intended to steep such corn or grain); and if any notice shall be given contrary hereto, or if the whole of the corn or grain shall not be steeped within three hours, or placed in the cistern within one hour, after the respective times mentioned in any notice in that behalf, such notice shall be null and void.

5. The malster, or his chief workman or servant, shall, immediately after the corn or grain shall have been placed in the cistern for the purpose of being made into malt under the provisions of this Act, fill up and sign a declaration in writing, stating the true weight per bushel of the corn or grain so intended to be made into malt as aforesaid; and such declaration shall be delivered by the said malster or his chief workman or servant, to the officer of excise on his first visit after the corn or grain shall have been placed in the cistern as aforesaid; and no other or different corn or grain shall be substituted for the corn or grain or any part thereof which shall have been placed in any cistern for the purpose of being made into malt under the provisions of this Act after the same shall have been taken account of by any officer of excise.

6. After any corn or grain shall have been placed in the cistern the weight thereof shall be ascertained by any officer of excise, who shall take a sample or samples of such corn or grain before any water shall be added thereto; and the weight of a bushel of the corn or grain so taken as a sample or samples as aforesaid, after the same shall have been screened and cleaned (if the officer shall think fit to require such screening and cleaning), shall be deemed to be the weight per bushel of the whole of the corn or grain in the cistern: Provided that if in the weight of the sample bushel there shall be a fraction of a pound amounting to one half or upwards, such fraction shall be reckoned as an entire pound, but no account shall be taken of any fraction less than half a pound.

7. For the purpose of calculating and charging the duty upon malt made under the provisions of this Act, a measured bushel of dry corn or grains of the weight of fifty-three pounds Avoirdupois shall, for the purposes of this Act, be deemed to be the standard weight on which the amount of duty payable upon a bushel of malt shall be chargeable; and in order to ascertain the number of bushels of malt to be charged on any steeping of corn or grain to be made into malt, the quantity shall first be calculated by gauge according to the existing laws and regulations in that behalf, and such quantity shall then be multiplied by the number of pounds which the sample-bushel taken from such corn or grain in the manner directed by this Act shall be found to weigh, and the product to be divided by fifty-three, and the quotient of such division shall be the quantity upon which the duty shall be charged: Provided that if no sample-bushel of the corn or grain shall have been taken as hereinbefore directed, then the quantity of malt, when calculated by gauge as aforesaid, shall be multiplied by the weight of a bushel of the corn or grain as declared by the malster, his workman or servant, and the product to be divided as aforesaid.

8. The malster shall provide and keep proper and correct scales and weights, and a correct bushel measure to the satisfaction of the supervisor of excise of the district in which the malthouse is situated for the purpose of weighing and measuring corn and grain to be made into malt under the provisions of this Act; and such scales and weights and measure shall at all times be kept in the malthouse, and such malster and his servants shall allow any officer of excise to use the same, and shall also, upon request, render to any such officer who shall be desirous of weighing or measuring such corn or grain, or any part thereof, such assistance as the said officer shall require.

9. It shall be lawful for any supervisor of excise, or any other officer of excise of superior rank to a supervisor, to measure and weigh any corn or grain in the malthouse of any malster who shall make malt under the provisions of this Act, and for that purpose to use the weights and scales and bushel measure belonging to such malster; and the malster and his workmen or servants shall, when requested by any such supervisor or other officer as aforesaid, render to them respectively such assistance as they may require in measuring and weighing such corn or grain.

10. If after any corn or grain shall have been placed in the cistern for the purpose of being made into malt under the provisions of this Act, and before the wetting thereof the weight of a bushel of such corn or grain (screened and cleaned as aforesaid, if the officer shall require it) shall be found by any officer of excise to be in excess of the weight declared by the malster or his chief workman or servant by such declaration as aforesaid in a greater proportion than two pounds avoirdupois per bushel, the malster shall forfeit the sum of one hundred pounds.

11. That it shall be lawful for any malster to water or sprinkle any corn or grain making it into malt at the expiration of ninety hours after the same shall have been taken out of the cistern, provided such corn or grain shall have been kept covered with water in the cistern for the full space of fifty hours from the

time of such corn or grain being first wetted or steeped, and the malster shall have given to the officer of excise twenty-four hours previous notice in writing of his intention to water or sprinkle such corn or grain as aforesaid, anything in any former Act contained to the contrary notwithstanding.

12. If any act, matter, or thing by this Act required or directed to be done or performed by any malster or his workman or servant shall be omitted or neglected or refused to be done or performed by them respectively, or if any act, matter, or thing prohibited by this Act shall be done or permitted by any malster or his workman or servant, the malster shall in every such case forfeit the sum of one hundred pounds over and above any other penalty or penalties to which he may be subject under any other Act now in force.

13. The condition numbered "three" in the twenty-eighth section of the Act passed in the twenty-third and twenty-fourth years of her Majesty's reign, chapter one hundred and thirteen, is hereby repealed; and no malt shall be exported on drawback which, after having been screened and cleaned as directed in the said section, shall be of less weight than thirty-six pounds or of greater weight than forty-four pounds avoirdupois per bushel; and the amount of drawback allowed by law upon the exportation of malt shall be calculated in the following manner; (that is to say,) when the malt is of the weight of thirty six pounds and under forty pounds avoirdupois per bushel, the amount of drawback allowable by law upon a bushel of malt shall be allowed and paid in respect of every forty pounds avoirdupois of the malt exported; and when the malt shall weigh forty pounds avoirdupois or upwards per bushel, the drawback shall be allowed and paid according to the quantity ascertained by measure as heretofore; subject, however, in either case to the deduction of seven and a half per centum upon the quantity ascertained as directed by the thirtieth section of the above mentioned Act.

14. The several portions of Acts hereinafter mentioned relating to the making of malt for exportation, and the exportation of malt, shall be and the same are hereby repealed, save and except as to any malt made for exportation before the commencement of this Act; (that is to say,) sections forty-eight to fifty-nine, both inclusive, of the Act passed in the twelfth year of the reign of King George the First, chapter four, and sections twelve to sixteen, both inclusive, and sections eighteen and nineteen, of an Act passed in the third year of the reign of King George the Fourth, chapter eighteen.

15. Nothing in this Act shall be deemed to repeal, alter, or affect any of the provisions contained in any Act now in force relating to the manufacture of malt, or the duties imposed thereon, save and except so far as such provisions shall be specially repealed or altered by or be repugnant to the provisions of this Act.

16. This Act shall continue and be in force for four years from the passing thereof, and until the end of the then next session of Parliament, and shall then expire except as to any act done or offence committed, or any penalty or forfeiture previously incurred.

## CAP. LXVII.

An Act to amend the Acts relating to the Harbour of Kingstown. [29th June, 1865.]

56 G. 3, c. 62; 1 G. 4, c. 69; 6 & 7 W. 4, c. 117; 1 & 2 Vic. c. 36.

- Sec. 1. *Threepence a ton on all vessels entering Kingstown and taking in cargo.*
2. *Gunpowder not to be brought into the harbour except in conformity with regulations of harbour master.*
3. *Penalty for refusing to comply with directions of harbour master.*
4. *Exemption for her Majesty's ships.*
5. *Provisions of former Acts extended to this Act.*
6. *This and recited Acts to be as one.*

'WHEREAS an Act was passed in the fifty sixth year of the reign of his late Majesty King George the Third, chapter sixty-two, intituled *An Act for erecting an Harbour for Ships to the Eastward of Dunleary, within the Port of Dublin*; and the said Act was amended by an Act of the first year of his late Majesty King George the Fourth, chapter sixty-nine: And whereas a further Act was passed in the session held in the sixth and seventh years of his late Majesty King William the Fourth, being *An Act to amend several Acts relating to the Harbour of Kingstown*, by which it was, amongst other things, enacted that the old harbour of *Dunleary*, together with the new harbour then in course of erection, should thenceforth be constituted one harbour, under the name and title of "*Kingstown harbour*:" And whereas another Act was passed in the session held in the first and second years of the reign of her Majesty the now Queen, intituled *An Act to make further Provisions and to amend the Acts relating to the Harbour of Kingstown, and the Port and Harbour of Dublin*: And whereas in consequence of the increased number of vessels entering the harbour of *Kingstown* in ballast, and leaving the same with cargoes of iron ores and pyrites and other produce of mines, as well as with other cargoes, it has become necessary to enlarge the wharfs and quays of the said harbour, and afford increased accommodation thereat; and it is intended to enlarge a certain quay situate in the said harbour, now known as the coal-quay, and to construct other works for increasing the wharfs and quays of the said harbour: And whereas it is reasonable that all vessels entering the said harbour in ballast, and taking away cargoes as aforesaid, should pay the rates hereinafter mentioned: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. From and after the passing of this Act all vessels entering the said harbour of *Kingstown* in ballast from any part of the port of *Dublin*, and which, while within such harbour, or five hundred yards of the entrance thereof, shall take in a cargo of ores or pyrites, or other produce of any mines, or of any other matter or thing, shall, in addition to the rates payable under the said recited Acts or any of them, be liable to pay to the commissioners of the said harbour

or their collector a tonnage rate to be from time to time affixed and appointed by the said commissioners, not exceeding three pence per ton, according to the registered tonnage of such vessel.

2. From and after the passing of this Act, if any owner, master or person having the charge of any ship or vessel (unless driven by stress of weather) shall bring the same into the said harbour of *Kingstown*, having on board any quantity of gunpowder exceeding one hundred pounds, without having previously obtained the permission of the harbour master of the said harbour signified in writing under his hand, or shall knowingly permit or suffer any such quantity of gunpowder to be placed or to be on board of any such ship or vessel while within such harbour without such permission as aforesaid, or if any person without such permission as aforesaid shall knowingly place any such quantity of gunpowder as aforesaid in or upon any vessel within the said harbour, every such owner, master, or other person so offending shall forfeit and pay to the commissioners of the said harbour the sum not exceeding two hundred pounds for every such offence.

3. In case any such owner, master, or other person having the charge or command of any ship or vessel on board which any such quantity of gunpowder may be shall refuse or neglect to moor, unmoor, place, or remove his ship or vessel according to the direction from time to time given by the harbour master, or shall refuse or neglect to follow and obey any directions of the said harbour master with respect to the storage and custody of such gunpowder immediately when notice to him or them of such directions as aforesaid shall be given or left with any person or persons on board of such ship or vessel for that purpose, every such owner, master, or other person aforesaid shall forfeit and pay to the said commissioners for every such offence a sum not exceeding fifty pounds; and it shall be lawful for the said harbour master, in case any direction so given by him shall be disobeyed as aforesaid, forthwith to destroy all such gunpowder, and for that purpose to enter upon every such ship or vessel and make search for the same; and in case the said harbour master shall be obstructed in so doing by any person or persons whomsoever, then every such person so offending shall for every such offence forfeit and pay to the said commissioners a sum not exceeding twenty pounds.

4. Nothing herein contained shall apply to any ship or vessel belonging to her Majesty or in her Majesty's service; but if any person shall claim the benefit of this exemption, not being entitled thereto, every such person for every such offence shall forfeit and pay to the said commissioners a sum not exceeding twenty-five pounds.

5. All the powers and provisions in the said Acts contained and now in force with respect to the recovery of rates, penalties, and forfeitures, and the seizing or distraining for the same, shall apply to the rates, penalties, and forfeitures imposed by this Act; and the said rates, penalties, and forfeitures shall be applicable to the like purpose as the rates and penalties now payable to the commissioners of the said harbour under the provisions of the Acts aforesaid, or any of them.



6. This Act and the hereinbefore recited Acts shall be read together as one Act.

## CAP. LXVIII.

An Act to enable the Ecclesiastical Commissioners for England to grant Superannuation Allowances to Persons employed in their Service.

[29th June 1865.]

## CAP. LXIX.

An Act further to amend and render more effectual the Law for providing fit Houses for the Beneficed Clergy, and for other purposes.

[29th June, 1865.]

17 G. 3, c. 53; 21 G. 3, c. 66; 7 G. 4, c. 66; 1 & 2 Vict. c. 23.

- Sec. 1. *Extension of provisions of recited Acts relating to repairing, rebuilding, or acquiring houses of residence, &c.*
2. *Governors of Queen Anne's bounty may sell lands, &c., given to them for their general purposes.*
3. *Powers of recited Acts extended to this Act.*
4. *Corporations and persons under disability or incapacity authorized to convey houses and lands for parsonages.*
5. *Five of the governors may form a quorum.*

‘WHEREAS under the provisions of the several Acts passed in the sessions held in the seventeenth year of the reign of his late Majesty King George the Third, chapter fifty-three, in the twenty-first year of the same reign, chapter sixty-six, in the seventh year of the reign of his late Majesty King George the Fourth, chapter sixty-six, and in the first and second years of the reign of her present Majesty, chapter twenty-three, the incumbent of a benefice is authorized and empowered, with the consents in the said Acts specified, to borrow and take up at interest a sum of money exceeding one year's but not exceeding three years net income of his benefice, for the purpose of building, repairing, or purchasing a house and other necessary buildings, or a proper site for such house and other necessary buildings, to be used as the parsonage or glebe house and offices for his benefice, and as a security for the money so to be borrowed to mortgage the glebe tithes, rentcharges, rents, and other profits and emoluments of his benefice for the term of thirty-five years, the principal so borrowed being repayable by thirty annual instalments, with interest to accrue due thereon: and whereas it is expedient to extend the provisions of the said Acts and to provide for the other purposes herein-after expressed:’ Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The incumbent of any benefice may, according to the provisions of and with the consents required by the said Acts, and by any Act or Acts amending or referring to the same, borrow and take up at inte-

rest on mortgage as provided by the same Acts, or any of them, for the purposes of the same Acts, or any of them, or for the purposes of the Act passed in the session held in the fifty fifth year of the reign of his said Majesty King George the Third, chapter one hundred and forty-seven, or for the purpose of purchasing any lands or hereditaments not exceeding twelve acres, contiguous to or desirable to be used or occupied with the parsonage house or glebe belonging to such benefice, or for the purpose of building any offices, stables, or outbuildings, or fences necessary for the occupation or protection of such parsonage, or for the purpose of restoring, rebuilding, or repairing the fabric of the chancel of the church of such benefice (in any case where such incumbent is or shall be liable to repair or sustain the fabric of such chancel), or for the purpose of building, improving, enlarging, or purchasing any farm house or farm buildings, or labourers' dwelling houses, with the appurtenances belonging to or desirable to be acquired for any farm or lands appertaining to such benefice, any sum or sums of money not being less than one hundred pounds, and not exceeding three years net income of such benefice; and out of the sum to be borrowed it shall be lawful to pay the charges and expenses of the architect or surveyor who shall be employed in or about any of the purposes aforesaid, and also the costs and expenses of and incidental to the preparation of the mortgage deed or deeds, and of and incidental to any purchase by the said Acts or this Act authorized to be made.

2. It shall be lawful for the governors of the bounty of Queen Anne, for the augmentation of the maintenance of the poor clergy, absolutely to sell and dispose of, either altogether or in parcels, and either by public sale or by private contract, for such sum or sums of money as to the said governors shall seem fair and reasonable, all houses, lands, tithes, tithe rentcharges, and hereditaments of what nature or kind soever which may have been or shall hereafter be given, devised, or conveyed to or acquired by the said governors for the purpose generally of augmenting the maintenance of the poor clergy; and the monies to arise from every such sale shall be paid to the said governors, and the receipts of the treasurer for the time being shall be sufficient discharges for the said monies, and shall effectually release and exonerate the person or persons, paying the same from all responsibility in respect of the application thereof; and the said monies when so received shall be applied and disposed of by the said governors for the benefit and augmentation of benefices in such and the same manner according to the rules and regulations of the said governors as the general funds and profits of the said governors are applicable and disposable.

3. All the powers, authorities, provisions, forms, and matters in the herein-before mentioned Acts contained shall, except as herein otherwise is provided, extend and be applicable, *mutatis mutandis*, to all the purposes of this Act and of the said herein-before mentioned Acts, as if the same had been respectively repeated and set forth herein.

4. It shall be lawful for the principal officer of any public department holding any messuages, buildings, lands, tenements, or hereditaments for or on behalf of

her Majesty, or otherwise for the public use or the use of such department, and for every body politic, corporate, or collegiate, and corporation aggregate or sole, and for all trustees, guardians, commissioners, or other persons having the control, care, or management of any hospital, school, charitable foundation, or other public institution, and for all other persons by "The Lands Clauses Consolidation Act, 1845," empowered to sell and convey or release lands by any assurance under the hand and seal or under the common seal, as the case may be, of such principal officer, body, or corporation, or under the hands and seals, or hand and seal, of such trustees, guardians, commissioners, or other persons or person, to grant and convey or release, either by way of voluntary gift or of sale, to the said governors, in fee simple or otherwise, any messuages, buildings, lands, tenements, or hereditaments to be used as and for parsonages or residences for incumbents of benefices, or the out-buildings, yards, gardens, or appurtenances thereto, or as and for sites or for enlarging sites for such parsonages or residences or the buildings, yards, gardens, or appurtenances thereto, and all such assurances may be made according to the form contained in the twentieth section of the Act passed in the first year of her Majesty's reign, chapter twenty, or as near thereto as the circumstances of the case will admit, or in any other form which the said governors may approve; but no such assurance or assurances from the same body or persons otherwise than upon a sale for the fair value shall comprise (including the site of any buildings) more than one acre, and upon every such assurance by way of sale the purchase money may be paid to the seller or sellers, or as he or they shall appoint, and the receipt of them or him or their or his appointees shall be a sufficient discharge for the same, except that in the case of a sale for more than twenty pounds by a tenant for life or other person having only a partial estate, the purchase money shall be paid to and applied by two trustees in manner provided by the seventy-first section of "The Lands Clauses Consolidation Act, 1845."

5. To facilitate the despatch of the business of the said governors, any five of the said governors, three of whom at least shall be archbishops or bishops, shall make a quorum for the future, and be sufficient at any court for the despatch, by majority of votes, of all business of the said governors.

#### CAP. LXX.

An Act to alter the Distribution of the Constabulary Force in *Ireland*, and to make better Provision for the Police Force in the Borough of *Belfast*.

[29th June, 1865.]

20 & 21 Vict. c. 17.

Sec. 1. *Present police force in Belfast shall cease to exist.*

2. *Borough of Belfast constituted a distinct district.*

3. *Distribution of constabulary.*

4. *Lord Lieutenant to add any number of men,*

*not exceeding 320, to the constabulary force of Belfast.*

5. *As to expenses of additional force.*

6. *Inspector general shall transmit to town council of Belfast half-yearly accounts.*

7. *Provision as to officers of the constabulary force in Belfast, and their salaries, &c.*

8. *Inspector general to appoint constables for night watch, who shall receive extra remuneration for night duty.*

9. *Restrictions as to age.*

10. *Superannuation, &c., of constabulary.*

11. *Provisions as to rates for support of police to continue in force.*

12. *This Act and Acts relating to constabulary force to be construed as one.*

13. *Interpretation of terms.*

14. *Commencement of Act.*

15. *Short title.*

'WHEREAS the lords justices of *Ireland* did, on the third day of *November* one thousand eight hundred and sixty-four, issue their warrant to certain commissioners directing them to hold a court of inquiry at *Belfast*, and to report upon the existing local arrangements for the preservation of the peace of that borough, the magisterial jurisdiction exercised within it, and the amount, constitution and efficiency of the police force usually available there, and other matters relating thereto; and whereas the said commissioners, having duly inquired into the said several matters as directed by the said warrant, have made their report thereon, dated the eighth day of *March* last: and whereas it is expedient to provide for the more effectual preservation of the peace of the said borough, and to alter the distribution of the constabulary force now maintained in the several counties and towns in *Ireland*, and for that purpose to amend an Act passed in the twentieth and twenty-first years of the reign of her Majesty, chapter seventeen, intituled, *An Act to amend the Act of the Eleventh and Twelfth Years of Her Majesty, Chapter Seventy-two, so far as relates to the Distribution of the Constabulary Force in Ireland*.' Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. From and after the commencement of this Act, it shall not be lawful for the town council of the borough of *Belfast* to appoint or maintain any police force; and all persons who have been appointed chief constables, inspectors, constable, or other officers of the said force, shall cease to hold their offices, and shall severally discontinue acting in such offices accordingly; and the constabulary force in the town of *Belfast* shall have and discharge all powers and duties now lawfully had and discharged by the police force of the town.

2. The municipal borough of *Belfast* shall for the purposes of this Act be constituted a distinct district, herein-after called the town of *Belfast*; and all and every the provisions of the several Acts relating to the constabulary force in *Ireland* shall apply to the said town of *Belfast*.

3. 'Whereas it is expedient to alter the distribution of the constabulary force in the several counties and towns in *Ireland*, and to allot to the town of *Belfast* a just proportion thereof: be it therefore enacted, that the schedule to this Act annexed, and the distribution of the constabulary force therein provided, shall be substituted for the schedule annexed to the Act of the twentieth and twenty-first years of her Majesty, chapter seventeen: provided always, that the total number of constables and sub-constables to be distributed shall not exceed the number fixed by the said recited Act, and that the number allotted to the town of *Belfast* shall not be less than one hundred and thirty constables and sub-constables.

4. It shall be lawful for the lord lieutenant to add to the constabulary force which shall be allotted to the town of *Belfast* under the provisions of this Act any number of men not exceeding three hundred and twenty, which the lord lieutenant may think fit to provide for the more effectual preservation of the peace of the said town, and that such additional number of men, together with the one hundred and thirty herein-before mentioned, shall constitute the ordinary constabulary force of the said town.

5. The expense of the said additional force, save as to the additional pay herein-after mentioned, shall, in the first instance, be advanced and defrayed in like manner as the expense of the force appointed under the Constabulary Acts is to be advanced and defrayed; one moiety of the monies so advanced shall be repaid by the town council of the borough of *Belfast* by means of rates, to be apportioned and levied in the same manner as the monies hitherto raised and applied or which may be applicable in the said town of *Belfast* to the maintenance of a police force.

6. The inspector general of constabulary shall, with the assistance of the receiver, twice in each year, ascertain the amount of the monies chargeable under the provisions of this Act to the said town of *Belfast*, and shall make out a certificate thereof under his hand, specifying the force or service in respect whereof such charge may have been incurred, and transmit the same, when signed by the receiver and approved and certified by the chief or under secretary to the Lord Lieutenant, to the town clerk of the borough of *Belfast*, who shall lay the same forthwith before the town council, and thereupon the town council shall forthwith make and levy a rate sufficient for the payment thereof, and shall thereout, or out of any monies in their hands, pay the amount mentioned in such certificate to the paymaster general's department in *Ireland*.

7. The officers of the constabulary force in the town of *Belfast* shall consist of one inspector, who shall rank as a county inspector of constabulary, and be called "the inspector of constabulary for the town of *Belfast*," and two or more sub-inspectors, who shall be provided from the number of sub-inspectors mentioned in the schedule annexed to the Act of the twentieth and twenty-first years of her Majesty, chapter seventeen. The inspector shall be appointed in like manner as constabulary officers now are, and his salary shall be four hundred pounds a year, and be wholly defrayed by the town council of the bo-

rough, and shall be included in the certificate to be furnished by the inspector general of constabulary, under the sixth section of this Act, and be raised and paid in the manner therein directed.

8. The inspector general of constabulary shall fix the number of men, not exceeding one hundred and fifty, who shall discharge the duties of a night watch; and for each of the said one hundred and fifty men there shall be charged the sum of sixpence *per diem*, to be wholly defrayed by the town council of the borough of *Belfast*, and such sum shall be included by the inspector general of constabulary in the certificate to be furnished by him under the sixth section of this Act, and it shall be raised and paid in manner therein directed; and it shall be lawful for the said inspector general, with the approval of the lord lieutenant, to apply such sum to remunerate the constabulary force stationed in *Belfast*, for discharging the duties of a night watch.

9. Notwithstanding any regulations requiring persons entering the constabulary force to be unmarried, or to be under a certain age, the inspector general of the constabulary force in *Ireland* shall admit into the said force any constable of the said local police force whose age shall not exceed forty years, and who, within one calendar month after such notification in the "*Dublin Gazette*" as aforesaid, shall apply to be admitted, and who in other respects shall be eligible according to the said regulations.

10. It shall be lawful for the council of the said borough (if they shall so think fit) to grant to any head constable, inspector, or constable belonging to the present police force of said borough, whose office shall cease or become unnecessary by means of the provisions of this Act, such an adequate compensation, by way of yearly allowance or other gratuity, as shall to them seem just: provided always, that any such compensation shall be wholly charged on and defrayed by the local funds which the said council may have authority to levy.

11. The several provisions of the local Acts in force within the borough relating to the apportionment, levy, collection, recovery, and receipts of rates applicable wholly or in part to the support of the police force and establishment in the police district of *Belfast* shall continue in force notwithstanding the passing of this Act.

12. This Act and the several Acts now in force relating to the constabulary force in *Ireland* shall be construed as one Act, so far as is consistent with the tenor hereof, and nothing herein contained shall be construed to deprive the lord lieutenant of any power now vested in him in relation to the said constabulary force.

13. The expression "Lord Lieutenant" in this Act shall mean the Lord Lieutenant or other chief governor or governors of *Ireland*.

14. This Act shall come into operation from and after a day to be fixed by the Lord Lieutenant, and notified in the "*Dublin Gazette*," and not being less than twenty-one days after such notification.

15. This Act may be cited for all purposes as the "Constabulary (*Ireland*) Amendment Act, 1865."

## SCHEDULE.

County Inspectors	35	} For the whole of Ireland.	
Sub-Inspectors	262		
Head-Constables	375		
Counties and Ridings	Constables and Sub-Constables	Counties and Ridings	Constables and Sub-Constables
Antrim	200	Limerick	387
Armagh	175	Londonderry	120
Carlow	140	Longford	191
Cavan	290	Louth	188
Clare	398	Mayo	347
Cork		Meath	284
East Riding 454	} 748	Monaghan	175
West Riding 294		Queen's	254
Donegal	326	Roscommon	347
Down	260	Sligo	201
Dublin	231	Tipperary—	
Fermanagh	181	North Riding 320	} 784
Galway—		South Riding 464	
East Riding 329	} 657	Tyrone	210
West Riding 328		Waterford	219
Kerry	264	Westmeath	280
Kildare	220	Wexford	270
Kilkenny	355	Wicklow	199
King's	309		
Leitrim	251	Total	9,461
Counties and Ridings			9,461
Cities and Towns—			
Belfast			130
Carrickfergus			10
Cork			100
Drogheda			40
Galway			65
Kilkenny			50
Limerick			80
Waterford			70
		Total	10,006

## CAP. LXXI.

An Act to amend the Acts for the Establishment of a National Gallery in Dublin.

[29th June, 1865.]

17 & 18 Vict., c. 99; 18 & 19 Vict., c. 44.

*Indenture of lease of 4th Aug. 1855, from the Right Hon. Sidney Herbert to the Royal Dublin Society.*

Sec. 1. *Sect. 10 of 17 & 18 Vict. c. 99, repealed.*

2. *The commissioners of public works to be a corporation.*

3. *The building and grounds vested in the commissioners of public works. In case £3,000 advanced the rent of £100 per annum to cease. Proviso as to use and occupation of the portion of the building by the governors and guardians of National Gallery. The whole of the rent of £277 7s. 9d. to be paid by the Society.*

\* WHEREAS an Act was passed in the session of Parliament held in the seventeenth and eighteenth years of the reign of her Majesty, intituled *An Act to pro-*

*vide for the Establishment of a National Gallery of Paintings, Sculpture, and the Fine Arts, for the Care of a Public Library, and the Erection of a Public Museum, in Dublin: and whereas a further Act was passed in the session of Parliament held in the eighteenth and nineteenth years of the reign of her present Majesty, intituled An Act to amend an Act of last Session, to provide for the Establishment of a National Gallery of Paintings, Sculpture, and the Fine Arts, for the Care of a Public Library, and the Erection of a Public Museum in Dublin: and whereas it is by the said first recited Act, amongst other things, enacted, that certain persons therein named, together with such other persons as the Lord Lieutenant should approve, should be trustees for the building therein-after mentioned, and that it should be lawful for such trustees to receive such sum of money as might be subscribed, given, or contributed, or might from any source become available, for the purpose of erecting a suitable building in Dublin, to be devoted in part to the fit accommodation of a National Gallery of paintings, sculpture, and the fine arts, and the remainder to the reception of a public library; and it is by the same Act enacted, that "it should be lawful for the governors and guardians of Archbishop Marsh's Library (anything in an Act of the Parliament of Ireland intituled An Act for settling and preserving a Public Library for ever in the House for that Purpose built by his Grace Narcissus then Lord Archbishop of Armagh on Part of the Ground belonging to the Archbishop of Dublin's Palace near the City of Dublin, passed in the sixth year of the reign of Queen Anne, or otherwise to the contrary notwithstanding,) to cause the said library to be removed to the said building so to be erected as soon as the same should be completed, and in a condition to receive the said library, provided always, that the said governors and guardians shall approve of the plans and arrangements of that portion of the said building to be appropriated to the reception of a public library;" and it was by the same Act further enacted, that certain persons therein mentioned, and their successors as therein-after directed, should be and were thereby constituted a body corporate by the name of the governors and guardians of the National Gallery of Ireland, with power to the said body corporate to receive devises, bequests, donations, and subscriptions (annual or otherwise) of land, buildings, money, and works of art, and to hold the same, and to lay out such sums of money as they should so receive for the purposes of the National Gallery of Ireland in the improvement and enlargement of the collection of works of art presented to or purchased for the said gallery, or deposited therein, and the said body corporate should have the entire and exclusive possession, occupation, and control, for the purposes of their trusts therein mentioned, of those portions of the said buildings so to be erected as therein-before mentioned, which should be, upon the completion of the said building, set apart by the building trustees for the accommodation of the National Gallery of Ireland, and of all such other buildings, enclosures, and appurtenances as should or might from time to time be required and obtained for the purposes of the said National Gallery or any part thereof, and that the*

building so to be erected should be constructed according to such plans and specifications as should have been approved and agreed upon by and between the said building trustees, the said governors and guardians of the National Gallery of *Ireland*, and the said governors and guardians of Archbishop *Marsh's* Library; and whereas it is by the said Act further enacted, that "the persons who for the time being should compose the said respective bodies corporate, that is to say, the governors and guardians of the National Gallery of *Ireland*, and the governors and guardians of Archbishop *Marsh's* Library, should be one body corporate under the name of the joint trustees of the National Gallery of *Ireland* and of *Marsh's* Library," and so soon as the said building so to be erected as aforesaid should have been completed the said building trustees shall declare it to be so by an instrument under the hands of them or of any three of them, and thereupon the said building, together with the ground whereon the same should have been erected, should become and be vested in the said last-mentioned body corporate for ever, subject nevertheless to the exclusive possession, occupation, and control of those portions of the said building respectively to be occupied by the said governors and guardians of the National Gallery of *Ireland*, and the said governors and guardians of Archbishop *Marsh's* Library, for the purposes of their respective trusts as aforesaid; and whereas by indenture bearing date the fourth day of *August* one thousand eight hundred and fifty-five, and made between the Right Honourable *Sidney Herbert* of *Belgrave Square* in the parish of *Saint George, Hanover Square*, in the County of *Middlesex*, M.P., of the one part, and the Royal *Dublin* Society for promoting husbandry and other useful Arts in *Ireland*, of the other part, reciting as therein recited, the said Right Honourable *Sidney Herbert*, in pursuance of the power and authority for that purpose given and reserved by the therein and herein-before recited Act of the seventeenth and eighteenth years of her present Majesty Queen *Victoria*, and of any other power in that behalf enabling him, and for the considerations therein mentioned, granted and demised unto the said Royal *Dublin* Society all that and those that piece or parcel of ground lying between the house of the said Society and the flagway on the east side of *Merrion Square* (which said piece or parcel of land is commonly called "*Leinster Lawn*,") containing in the whole three acres three roods and thirty-six perches statute measure, and situate, lying, and being in the parish of *Saint Peter* and county of the city of *Dublin*, and which said piece or parcel of ground is, as to its contents, dimensions, abutments, and boundaries, more particularly described in the map or plan annexed thereto, together with all and singular the messuages and tenements and all erections and buildings to be built and erected thereon, and all rights, easements, ways, paths, passages, waters, watercourses, profits, commodities, and appurtenances whatsoever to the said piece or parcel of ground belonging or in anywise appertaining, to hold the same, with the appurtenances, unto the said Royal *Dublin* Society and its successors for ever, at and subject to the yearly fee-farm rent of two hundred and seventy-seven pounds

seven shillings and ninepence, payable half-yearly, as therein mentioned, and subject to the performance of the covenants and conditions therein contained: And whereas in pursuance of the provisions in that behalf contained in the said firstly herein-recited Act the premises comprised in the said lease, with the sanction of the board of trade and navigation, which have been divided between the said Society and the said building trustees, and a certain portion thereof has been appropriated for the purpose of the said National Gallery and Library, and the rent of one hundred pounds *per annum* has been, with the like sanction, ascertained as the amount of the rent payable in respect of the said portion so appropriated, as aforesaid: And whereas the building by the said first-recited Act, authorized and intended for the said National Gallery and Library has been erected on the said portion of the premises so comprised in the said lease of the fourth day of *August* one thousand eight hundred and fifty-five at an expense of twenty-eight thousand pounds and upwards, the whole of which (with the exception of a sum of five thousand pounds received by subscriptions of individuals for the purpose of commemorating the eminent public services of *William Dargan* esquire in founding and sustaining the Great Industrial Exhibition of 1853 in *Dublin*) has been voted by Parliament: And whereas, in consideration of the said sum of five thousand pounds so raised by subscription, an equal sum of five thousand pounds has been or is proposed to be voted by Parliament in aid of the purchase of pictures, and it is also intended to grant to the said Royal *Dublin* Society a sum of three thousand pounds, to be applied by them in the purchase of a certain piece of ground adjoining their premises, in lieu of the piece of ground forming the site of the said building intended for the said National Gallery and Library as aforesaid, and in consequence of such grant of three thousand pounds the said Royal *Dublin* Society have agreed to pay the entire of said rent of two hundred and seventy-seven pounds seven shillings and ninepence; And whereas the governors of *Marsh's* Library have declined to remove their Library to the part of the said building designed for the reception of same, and it expedient that the said building with the ground on which the same has been erected, with the rights, members, and appurtenances thereunto belonging, should be vested in the public body herein-after provided: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The tenth section of said firstly herein-recited Act is hereby repealed for all intents and purposes.

2. The Commissioners of Public Works for the time being in *Ireland* shall be a body corporate for the purposes of this Act, and shall have a common seal and perpetual succession, and shall and may take, purchase, and hold lands and real estates and other property in trust for the purposes of this Act.

3. The said building so erected and intended for the said National Gallery and Library, and the lands and ground forming the site thereof, containing in front to *Merrion-square* one hundred and twenty-four feet, in rear on the west side sixty six feet, on the

south side three hundred and eighty-three feet, and on the north three hundred and fifteen feet, be the said several admeasurements more or less, with all enclosures thereunto belonging, being the portion of the said demised premises so appropriated for the said National Gallery as herein aforesaid, together with all ways, easements, and privileges thereto appertaining or therewith enjoyed, shall be and the same are hereby vested in the Commissioners of Public Works in Ireland, and their successors, for all the term and interest created by the said recited lease of the fourth day of *August*, one thousand eight hundred and fifty-five, in trust for her Majesty and her successors, subject to the payment to the said Royal Dublin Society and their successors of the annual rent of one hundred pounds by two half-yearly payments on every twenty-fifth day of *March* and twenty-ninth day of *September* in each year during the said term, the first payment of the said rent to be made on the twenty-ninth day of *September*, one thousand eight hundred and sixty-five, and subject to the observance of the covenants and conditions in the said lease contained, so far as regards the said premises so vested in the said Commissioners of Public Works as aforesaid; and the said Royal Dublin Society shall have all remedies for the recovery of the said rent as are incident to a rent reserved upon a demise for years.

In case the aforesaid sum of three thousand pounds shall at any time hereafter be advanced and paid to the said Royal Dublin Society out of public monies, then from and after such payment the said annual rent of one hundred pounds so payable to the said Royal Dublin Society shall cease and determine.

Provided always, that it shall be lawful for the governors and guardians of the National Gallery to use and occupy all that portion of the said building now used and occupied by them for the purpose of the National Gallery, together with the free use of all ways and entrances leading to and from the same; and, subject as aforesaid, all the residue of the said building and premises shall be held by the Commissioners of Public Works, their successors and assigns, for such purposes and uses connected with the advancement of the fine arts as may from time to time be directed by the Lords Commissioners of her Majesty's Treasury.

The whole of the said rent of two hundred and seventy-seven pounds seven shillings and ninepence so reserved by the said lease of the fourth day of *August*, one thousand eight hundred and fifty-five, shall be paid by the Royal Dublin Society, and the said society shall indemnify the said Commissioners of Public Works, and the said land and building so vested in them as aforesaid, of and from all actions, suits, costs, and charges whatsoever by reason of the non-payment of the said rent, or the non-observance of the covenants and conditions in the said lease contained on the part of the lessees, so far as the same relate to the premises demised thereby, other than the portion thereof so hereby vested in the said Commissioners.

## CAP. LXXII.

An Act to make better Provision respecting Wills of Seamen and Marines of the Royal Navy and Marines.  
[29th June, 1865.]

Sec. 1. *Short title.*2. *Interpretation of terms.*3. *Will made before entry ineffectual as to wages, &c.*4. *Will invalid if combined with power of attorney.*5. *Regulations for wills of seamen, &c. as to wages, &c.*6. *As to wills made by prisoners of war.*7. *Payment under will not in conformity with Act.*8. *Commencement of Act.*9. *Publication of orders in council.*

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same as follows:

1. This Act may be cited as the The Navy and Marines (Wills) Act, 1865.

2. In this Act—

The term "the Admiralty" means the Lord High Admiral of the United Kingdom; or the Commissioners for executing the office of Lord High Admiral:

The term "seaman or marine" means a petty officer or seaman, non-commissioned officer of marines or marine, or other person forming part in any capacity of the complement of any of her Majesty's vessels, or otherwise belonging to her Majesty's naval or marine force, exclusive of commissioned, warrant, and subordinate officers, and assistant engineers, and of Kroomen.

3. A will made after the commencement of this Act by any person at any time previously to his entering into service as a seaman or marine shall not be valid to pass any wages, prize money, bounty money, grant or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty.

4. A will made after the commencement of this Act by any person while serving as a seaman or marine shall not be valid for any purpose if it is written or contained on or in the same paper, parchment, or instrument with a power of attorney.

5. A will made after the commencement of this Act by any person while serving as a seaman or marine, or when he has ceased so to serve, shall not be valid to pass any wages, prize money, bounty money, grant, or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty, unless it is made in conformity with the following provisions:—

(1.) Every such will shall be in writing and be executed with the formalities required by the law of *England* in the case of persons not being soldiers in actual military service, or mariners or seamen at sea:

(2.) Where the will is made on board one of her Majesty's ships, one of the two requisite at-

testing witnesses shall be a commissioned officer, chaplain, or warrant or subordinate officer belonging to her Majesty's naval or marine or military force:

- (3.) Where the will is made elsewhere than on board one of her Majesty's ships, one of the two requisite attesting witnesses shall be such a commissioned officer or chaplain or warrant or subordinate officer as aforesaid, or the governor, agent, physician, surgeon, assistant surgeon, or chaplain of a naval hospital at home or abroad, or a justice of the peace, or the incumbent, curate, or minister of a church or place of worship in the parish where the will is executed, or a *British* consular officer, or an officer of customs, or a notary public.

A will made in conformity with the foregoing provisions shall, as regards such wages, money, or effects, be deemed to be well made for the purpose of being admitted to probate in *England*; and the person taking out representation to the testator under such will shall exclusively be deemed the testator's representative with respect to such wages, money, or effects.

6. Notwithstanding anything in this or any other Act, a will made after the commencement of this Act by a seaman or marine while he is a prisoner of war shall (as far as regards the form thereof) be valid for all purposes if it is made in conformity with the following provisions:

- (1.) If it is in writing and is signed by him, and his signature thereto is made or acknowledged by him in the presence of and is in his presence attested by one witness, being either a commissioned officer or chaplain belonging to her Majesty's naval or marine or military force, or a warrant or subordinate officer of her Majesty's navy, or the agent of a naval hospital, or a notary public:
- (2.) If the will is made according to the forms required by the law of the place where it is made:
- (3.) If the will is in writing and executed with the formalities required by the law of *England* in the case of persons not being soldiers in actual military service or mariners or seamen at sea.

7. Notwithstanding anything in this Act, in case of a will made after the commencement of this Act by any person while serving as a marine or seaman, and being either in actual military service or a mariner or seaman at sea, the Admiralty may pay or deliver any wages, prize money, bounty money, grant or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty, to any person claiming to be entitled thereto under such will, though not made in conformity with the provisions of this Act, if, having regard to the special circumstances of the death of the testator, the Admiralty are of opinion that compliance with the requirements of this Act may be properly dispensed with.

8. This Act shall commence on such day, not later than the first day of *January*, one thousand eight hundred and sixty-six, as her Majesty in council thinks fit to direct; nevertheless her Majesty in coun-

cil may, if it seems fit, with reference to any places out of the United Kingdom, direct that this Act do not commence there, respectively, until a time after that day, and with respect to every such place the time so appointed shall be deemed the time of commencement of this Act.

9. Every order in council under this Act shall be published in the *London Gazette*, and shall be laid before both Houses of Parliament within thirty days after the making thereof, if Parliament is then sitting, and if not, then within thirty days after the next meeting of Parliament.

### CAP. LXXIII.

An Act for regulating the Payment of Naval and Marine Pay and Pensions. [29th June, 1865.]

- Sec. 1. *Short title.*  
 2. *Interpretation of terms.*  
 3. *Payment of naval and marine pay and pensions according to order in council.*  
 4. *Prohibition of assignments of pensions, &c.*  
 5. *Prohibition of assignment of wages, &c.*  
 6. *Exemption from stamp duty.*  
 7. *Proof to be given by masters claiming pay of apprentices.*  
 8. *Saving for Naval Agency Act.*  
 9. *Saving for Naval Discipline Act.*  
 10. *Saving power of Secretary of State as to pensions.*  
 11. *Orders in council.*  
 12. *Orders in council to be published in London Gazette.*  
 13. *Commencement of Act.*

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as The Naval and Marine Pay and Pensions Act, 1865.

2. In this Act—

The term "the Admiralty" means the Lord High Admiral of the United Kingdom, or the Commissioners for executing the office of Lord High Admiral:

The term "officer" means a commissioned, warrant, or subordinate officer, or assistant engineer in her Majesty's naval or marine force:

The term "seaman or marine" means a petty officer or seaman, non-commissioned officer of marines or marine, or other person forming part in any capacity of the complement of any of her Majesty's vessels, or otherwise belonging to her Majesty's naval or marine force (not being an officer within the meaning of this Act).

3. All pay, wages, pensions, bounty money, grants, or other allowances in the nature thereof payable in respect of services in her Majesty's naval or marine force to a person being or having been an officer, seaman, or marine, or to the widow or any relative of a deceased officer, seaman, or marine, shall be paid in such manner and subject to such restrictions, condi-



tions, and provisions as are from time to time directed by order in council.

4. Any assignment, sale, or contract made after the commencement of this Act by an officer, seaman, or marine entitled to any naval pension,—or by a person entitled to a pension as the widow of an officer,—or by a person entitled to an allowance from the compassionate fund,—or by a person entitled to any marine half pay,—of or in relation to such pension, allowance, or half pay, shall be void.

5. Any assignment, sale, or contract, made after the commencement of this Act, of or relating to any pay, wages, bounty money, grants, or other allowances in the nature thereof, payable in respect of services in her Majesty's naval or marine force to a person being or having been a subordinate officer, seaman, or marine shall be void.

6. All bills, orders, receipts, and other instruments drawn, given, or made under the authority or in pursuance of an order in council under this Act by, to, or upon any person in the service of her Majesty or of the Admiralty shall be exempt from stamp duty.

7. If the wages of a seaman or marine are claimed under an indenture of apprenticeship by a master, they shall be paid to the seaman or marine, and not to the master, unless the master produces the indenture, with satisfactory proof that it was in full force during the period for which he claims the wages, and that the apprentice was at the time of the execution of the indenture under the age of eighteen years, and had not previously been at sea.

8. Nothing in this Act shall apply to any money distributable under the Naval Agency and Distribution Act, 1864.

9. Nothing in this Act shall authorize the making by order in council of any rule inconsistent with any provision affecting naval or marine pay or pensions contained in the Naval Discipline Act, 1864, or any Act for the like purposes for the time being in force.

10. Nothing in this Act shall take away or abridge any power vested in one of her Majesty's Principal Secretaries of State relative to naval pensions.

11. Her Majesty in council may from time to time make such order in council as may seem meet for the better execution of any of the purposes of this Act.

12. Every order in council under this Act shall be published in the *London Gazette*, and shall be laid before both Houses of Parliament within thirty days after the making thereof if Parliament is then sitting, and if not then within thirty days after the next meeting of Parliament.

13. This Act shall commence on such day, not later than the first day of *January*, one thousand eight hundred and sixty-six, as her Majesty in council thinks fit to direct.

Any order in council for the better execution of any of the purposes of this Act may nevertheless be made before that day, but not so as to commence before it.

#### CAP. LXXIV.

An Act to enable her Majesty's Secretary of State for the War Department to lay down and use a

Tramway or temporary Railway across certain public Roads in the county of *Devon*.

[29th June, 1865.]

#### CAP. LXXV.

An Act for facilitating the more useful application of Sewage in *Great Britain and Ireland*.

[29th June 1865.]

Sec. 1. *Short title.*

2. *Application of Act.*

3. *Definition of sewer authority.*

4. *Power of sewer authorities.*

5. *Power of entry.*

6. *Payment of expenses.*

7. *Power to take lands.*

8. *Compensation.*

9. *Power of sewer authorities to combine.*

10. *Sewer authority may take proceedings to prevent pollution of streams.*

11. *Sewers not to drain into any stream, &c.*

12. *Public Works Loan Commissioners may lend money.*

13. *Powers of Act cumulative.*

14. *Sewer authority may enter into contract for supply of sewage.*

15. *Application of 27 & 28 Vict. c. 114 to works, &c. for supply of sewage.*

16. *Board of Works in Ireland to have power of Secretary of State in sewage matters.*

‘WHEREAS it is expedient to remove difficulties under which local boards and other bodies having the care of sewers labour in disposing of the sewage of their districts so as not to be a nuisance, and to give facility to such authorities to make arrangements for the application of such sewage to land for agricultural purposes:’

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same:

1. This Act, for all purposes, may be cited as “The Sewage Utilization Act, 1865.”

2. This Act shall not extend to any part of the metropolis as defined by the Act of the session eighteenth and nineteenth years of the present reign, chapter one hundred and twenty, for better local management of the metropolis, and shall not, with the exception of clause fifteen, extend to any parish as defined in the schedule to this Act in a part of which parish the Public Health Act, 1848, and the Local Government Act, 1858, or one of such Acts, is in force at the time of the passing of this Act.

3. The expression “sewer authority” shall, in the several places in the schedule annexed hereto in that behalf mentioned, mean the persons or bodies of persons referred to in the first column of the schedule annexed hereto; and the term “district,” in relation to a sewer authority, shall, as respects each authority, mean the place in that behalf referred to in the second column of the said schedule.

“Local Board” shall mean a local board authorized in pursuance of the “Public Health Act, 1848,” and “The Local Government Act, 1858,” or one of such Acts.

4. Sewer authorities shall have power to construct such sewers as they may think necessary for keeping their district properly cleansed and drained, and shall, as respects all sewers constructed by them or under their control, whether the same were made before or after the passing of this Act, have all the powers that local boards have, in respect of sewers vested in or constructed by them, under the forty-fifth and forty-sixth sections of "The Public Health Act, 1848," the thirtieth section of "The Local Government Act, 1858," and the fourth section of "The Local Government Act, 1858, Amendment Act, 1861," subject to the provisions of the fifth and sixth sections of the last-mentioned Act, and to the saving clauses in "The Local Government Act, 1858," mentioned, from sixty-eight to seventy-four, both inclusive; and in *Scotland*, in addition to such of the aforesaid powers as are applicable to *Scotland*, all the powers contained in section seven (public sewers) of part four of "The General Police and Improvement (*Scotland*) Act, 1862."

5. The sewer authority shall have the powers of entry conferred by the one hundred and forty-third section of the "Public Health Act, 1848, for the purposes of making or keeping in repair any works made or to be made by them, as well as for the purposes specified in the said section.

6. A sewer authority shall pay all expenses incurred by them in carrying this Act into effect out of the fund or rate in the schedule in that behalf mentioned, and shall have all such powers of borrowing money on the security of such fund or rate as local boards have of borrowing money under "The Local Government Act, 1858," and the Acts amending that Act, on the security of the funds or rates in the said Acts, in that behalf mentioned, subject to the conditions and sanction under which such powers are exercised by local boards under the said Acts.

7. A sewer authority shall, for the purposes of this Act, have the powers of taking lands conferred on local boards by the seventy-fifth section of "The Local Government Act, 1858," and any Act amending the same.

8. Full compensation shall be made, out of any fund or rate applicable to the purposes of this Act, to all persons sustaining any damage by reason of the exercise of any of the powers of this Act; and in case of dispute as to amount, the same shall be settled by arbitration, as provided in "The Public Health Act, 1848," or any Act amending the same, or if the compensation claimed do not exceed the sum of twenty pounds, the same may be ascertained by and recovered before justices in a summary manner, in manner provided by the Acts mentioned in this section.

9. Two or more sewer authorities, including under that expression for the purposes of this section, local boards, may combine together for the purpose of executing and maintaining any works that may be for the benefit of their respective districts, and all monies they may agree to contribute for the execution and maintenance of such common works shall, in the case of each authority, be deemed to be expenses incurred by them in the execution of works within their district, and shall be raised accordingly.

10. A sewer authority, with the sanction of Her Majesty's attorney-general in *England*, and of the attorney-general for *Ireland* in *Ireland*, and of the lord advocate in *Scotland*, may, either in its own name or in the name of any other person, with the consent of such person, take such proceedings by indictment, bill in Chancery, action, or otherwise, as it may deem advisable, for the purpose of protecting any watercourse within its jurisdiction from pollutions arising from sewage either within or without its district; and the costs of and incidental to any such proceedings, including any costs that may be awarded to the defendant, shall be deemed to be expenses properly incurred by the sewer authority in carrying into effect the purposes of this Act.

11. Nothing contained in this Act, or in the Acts referred to therein, shall authorize any sewer authority to make a sewer so as to drain direct into any stream or watercourse.

12. The Public Works Loan Commissioners, as defined by "The Public Works Loan Act, 1853," may advance to any sewer authority, upon the security of any rate applicable to the purposes of this Act, without any further security, such sums of money as may be recommended by one of Her Majesty's principal secretaries of state, to be applied by such authority in carrying into effect the purposes of this Act.

13. All powers given by this Act shall be deemed to be in addition to and not in derogation of any other powers conferred on any sewer authority by Act of Parliament, law, or custom; and the sewer authority may exercise such other powers in the same manner as if this Act had not passed.

14. The sewer authority of any place may from time to time, for the purpose of utilizing its sewage, agree with any person or body of persons, corporate or unincorporate, as to the supply of such sewage, and works to be made for the purpose of that supply, and the parties to execute the same and to bear the costs thereof, and the sums of money, if any, to be paid for that supply; provided that no contract shall be made for the supply of sewage for a period exceeding twenty five years.

15. The making of works of distribution and service for the supply of sewage to lands for agricultural purposes shall be deemed an "Improvement of Land" authorized by the "Land Improvement Act, 1864," and the provisions of that Act shall apply accordingly.

16. The commissioners of public works in *Ireland* shall, in respect to any sewage authority or sewage matter in *Ireland*, have and exercise all the powers conferred by this Act, or any Act incorporated herewith, on one of her Majesty's principal secretaries of state; and all applications by this Act, or any Act incorporated herewith, authorized or directed to be made to one of her Majesty's principal secretaries of state in respect to sewage matters, or the powers conferred by this Act on sewage authorities, shall in *Ireland* be made to the Commissioners of Public Works, and all orders made on such applications by said commissioners shall have the same force and effect as orders made by one of her Majesty's principal secretaries of state on similar applications in *England* and *Scotland*.

## SCHEDULE.

## ENGLAND AND WALES.

Description of Local Authority.	Description of Places.	Rate or Fund out of which Expenses to be paid.
The Mayor, Aldermen, and Burgesses acting by the Council.	In Boroughs, with the Exception of the Boroughs of Oxford and Cambridge not within the Jurisdiction of a Local Board.	The Borough Fund or Borough Rate.
The Commissioners, Trustees, or other Persons intrusted by any Local Act of Parliament with Powers of improving, cleansing, lighting, or paving the Town.	The Boroughs of Oxford and Cambridge and any Town or Place not included within the above Descriptions, and under the Jurisdiction of Commissioners, Trustees, or other persons intrusted by any Local Act with Powers of improving, cleansing, lighting, or paving any Town.	Any Rate leviable by the Commissioners, Trustees, or other persons.
The Vestry, Select Vestry, or other Body of Persons acting by virtue of any Act of Parliament, Prescription, Custom, or otherwise, as or instead of a Vestry or Select Vestry.	In Parishes not within the Jurisdiction of any Sewer Authority herein before mentioned, and in which a Rate is levied for the Maintenance of the Poor.	The Poor Rate.

## SCOTLAND.

The Town Council.	Places within the Jurisdiction of any Town Council and not subject to the separate Jurisdiction of Police Commissioners, or Trustees.	The Revenue of the Burgh, or any Rate applicable to Sewers leviable by the Town Council.
The Police Commissioners or Trustees.	In Places where Police Commissioners or Trustees exercise the functions of Police Commissioners or Trustees under any General or Local Act.	Any Rate leviable by the Commissioners or Trustees, or any Fund belonging to them.
The Parochial Board.	Any Town or Village not included in the above Descriptions.	The Poor Rate.

## IRELAND.

The Right Hon. the Lord Mayor, Aldermen, and Burgesses.	The City of Dublin.	The District Sewer Rate.
The Mayor, Aldermen, and Burgesses.	Towns Corporate or Boroughs (with the Exception of Dublin).	Any Rate leviable by the Town Council, or any Fund belonging to them, applicable in the whole or in part to the making or repairing of Sewers within their Jurisdiction.
The Town Commissioners or other Governing Body.	Towns having Town Commissioners under 9 G. 4, cap. 83, or 17 & 18 Vict. cap. 103, or any Acts amending the same, or having Commissioners or other Governing Body under any Local Act.	Any Rate leviable by these Bodies, or any Fund belonging to them, applicable in the whole or in part to the making or repairing of Sewers within their Jurisdiction.
The Board of Guardians or any Committee thereof appointed by the Board.	Any Town or Village in any Union not included in the above Descriptions.	The Poor Rate; but the Expenses to be charged only on the Electoral Division in which the Town or Village is situated.

## CAP. LXXVI.

An Act for confirming, with Amendments, certain Provisional orders made by the Board of Trade under the General Pier and Harbour Act, 1861, relating to *Girvan, Mevagissey, and Stornoway.*

[29th June, 1865.]

## CAP. LXXVII.

An Act to amend the Act of the twenty-seventh and twenty-eight *Victoria*, chapter sixty-four, commonly called "The Public House Closing Act, 1864."

[29th June, 1865.]

Sec. 1. *Short title.*

2. *Power to justices to grant licences to licensed victuallers and refreshment house keepers suspending operation of recited Act.*

3. *Power to withdraw such licence.*

4. *Act to be in force in certain districts, &c.*

5. *Justices of the peace to grant licences.*

6. *Act to be construed with recited Act.*

"WHEREAS it is expedient to amend "The Public House Closing Act, 1864;" Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same as follows:

1. This Act may be cited for all purposes as the "Public House Closing Act, 1865."

2. It shall be lawful for the licensing justices at the time of granting or renewing any license, upon the production of such evidence as they shall deem sufficient to show that it is necessary or desirable, for the accommodation of any considerable number of persons attending any public market, or following any lawful trade or calling, if, in the discretion of such justices, they shall think fit, to grant to any licensed victualler or keeper of a refreshment house whose place of business is in the immediate neighbourhood of such market, or of the place where the persons follow such lawful trade or calling, a licence exempting him from the provisions of the herein-before mentioned Act between the hours of two and four o'clock in the morning, or any part of such hours, during such days, times, or hours as shall be specified in such licence; and no licensed victualler or keeper of a refreshment house to whom such licence has been granted under this Act shall be subject to any penalty for a contravention of the herein-before mentioned Act during the days or times to which such licence extends, but he shall not be exempted by such licence from any penalty to which he may be subject under any other Act of Parliament; provided that a printed notice stating the days and special hours during which and the class of persons for whom the house is open under such licence shall be affixed in a conspicuous position outside the house.

3. It shall be lawful for such justices, from time to time, as and when it may seem fit to them, either to withdraw such licence altogether, or to alter, vary, or amend the same in such manner as such justices may deem necessary or expedient.

4. The said Act, as herein amended, shall be in force in such districts under the operation of the Public Health Act, 1848, or the Local Government Act, 1858, as adopt the same; and local boards of health established under or by virtue of the said Public Health Act, 1848, and local boards established under or by virtue of the said Local Government Act, 1858, may adopt the said Public House Closing Act,

1864, in the same manner; and the same shall come into operation at the same time as is provided for the adoption and coming into operation of that Act by corporate boroughs, or boards of improvement commissioners; provided that this section shall not apply to any district which is a corporate borough, or within the jurisdiction of a board of improvement commissioners.

5. So much of the eight clause of the said recited Act as defines the local authority to be a commissioner, superintendent, or other chief officer of police shall be repealed, and instead thereof the local authority shall be, in any district, city, or town where petty sessions are held, except in the metropolitan police district, two justices of the peace sitting in petty sessions, and in any other district, city, or town, two justices of the peace acting in the district, city, or town.

6. This Act shall be deemed, construed, and taken as part of the said herein-before mentioned Act.

### CAP. LXXVIII.

AN ACT to enable certain Companies to issue Mortgage Debentures founded on Securities upon or affecting Land, and to make Provision for the Registration of such Mortgage Debentures and Securities. [29th June 1865.]

- Sec. 1. *Short title.*  
 2. *Extent of Act.*  
 3. *No company to avail themselves of Act unless it shall comply with provisions herein named.*  
 4. *Power to company to borrow money on mortgage debentures.*  
 5. *Nature of securities on which debentures may be founded.*  
 6. *Securities on which companies wish to issue debentures to be produced for registry.*  
 7. *Register of securities to be established in office of land registry.*  
 8. *Where business to be conducted.*  
 9. *Upon deposit with registrar of securities held by company, and the deeds relating thereto, and certificate of company, and declaration of surveyor, registrar may register deed creating security.*  
 10. *Form of declaration of surveyor.*  
 11. *Power to company to issue debentures not exceeding amount of registered securities, &c.*  
 12. *Before company shall register any mortgage debentures, it shall file a return containing particulars herein named.*  
 13. *Company may issue new debentures in lieu of those paid off.*  
 14. *Registered securities charged with payment of debentures, and not applicable for any other purpose until discharged from registration.*  
 15. *Rights of holders of mortgage debentures.*  
 16. *Proceedings on redemption of securities.*  
 17. *Owner of registered security upon default of company may obtain the discharge thereof from company's debentures.*  
 18. *Registrar to determine fees.*  
 19. *Collection of fees.*

20. *Inspection of register.*  
 21. *Company to make quarterly returns to registrar.*  
 22. *Quarter days for purposes of Act.*  
 23. *Quarterly returns made to registrar to be as in form (C.) in schedule, and to contain particulars herein named.*  
 24. *Estimate for returns of amount of annuities.*  
 25. *Total amount of registered securities.*  
 26. *Form of mortgage debenture.*  
 27. *Company to keep "register of securities."*  
 28. *Terms on which mortgage debentures may be issued.*  
 29. *Mortgage debentures to be numbered.*  
 30. *Indorsement to be made upon mortgage debenture.*  
 31. *List of mortgage debentures to be kept by company.*  
 32. *Register of mortgage debentures.*  
 33. *Registration of mortgage debentures.*  
 34. *Indorsement of registrar.*  
 35. *No notice of trust receivable, &c.*  
 36. *Entry in registrar of discharge of mortgage debentures.*  
 37. *Transfer of mortgage debentures.*  
 38. *Entry of transfers by deed of mortgage debentures to be made by company.*  
 39. *Stamp Acts applied to stamps under Act.*  
 40. *Further powers of investment to trustees.*  
 41. *Power to appoint receiver.*  
 42. *Terms on which power may be exercised.*  
 43. *Saving rights of mortgagees to sue.*  
 44. *Application for receiver.*  
 45. *Removal of receiver.*  
 46. *Powers and duties of receiver.*  
 47. *Court may stay order for receiver upon terms.*  
 48. *When company not to issue mortgage debentures.*  
 49. *Penalties in such event.*  
 50. *How penalties may be recovered.*  
 51. *Registrar, &c., not personally liable for executing Act.*  
 52. *Not exempt from Joint Stock Companies Acts.*  
 53. *Interpretation of terms.*

‘WHEREAS it is expedient that provisions should be made whereby such companies as are herein-after defined may be enabled to issue mortgage debentures founded upon the security of certain descriptions of property as herein-after defined, and for the registration in the office of land registry of such mortgage debentures and securities;’ Be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords, spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same as follows:

1. This Act may be cited for all purposes as “The Mortgage and Debenture Act, 1865.”

2. This Act shall extend and apply to, and the powers hereby conferred may be exercised by all such companies incorporated and carrying on business under “The Companies Act, 1862,” or under any Act of Parliament, as now or hereafter may be en-

titled to advance money on the security of land; and in the construction of this Act the expression "the Company," means any company to which this Act applies, and which shall for the time being be availing itself of the provisions of this Act.

3. No company shall be entitled to avail itself of this Act, unless it shall comply with the following provisions:

First. The company must, under its Act of Parliament or memorandum of association, be limited to one or more of the following objects:

1. The making of advances of money upon any of the following securities:—

(a.) Lands, messuages, hereditaments, and real property, and all estates and interests therein:

(b.) Rates, dues, assessments, and impositions upon the owners or occupiers of lands or real property imposed by or under the authority of any Act of Parliament, public or private, royal charter, commission of sewers or drainage, or other sufficient legal authority:

(c.) Charges and securities upon or affecting lands, messuages, hereditaments, and real property executed, made, given, or issued under the authority of any Act of Parliament, public or private:

2. The borrowing of money on transferable mortgage debentures, or on one or more of the securities above-mentioned:

Provided that any company already constituted under "The Companies Act, 1862," for the purpose of making advances on real securities, and whose memorandum of association includes but is not limited to the objects herein-before specified, may, by special resolution in accordance with the provisions of that Act, alter its memorandum for the purpose of limiting and so as to limit its objects and business to those so specified; and such company shall thereupon be and become a company constituting and carrying on business under such altered memorandum, and on its being shown to the satisfaction of the registrar herein-after mentioned that such alteration has been made, and that all obligations, if any, entered into by the company in respect of the business which prior to such special resolution it was empowered to transact, other than the business to which it will be limited after the passing of such special resolution, have been discharged, and that the articles of association of the company are in accordance with the altered memorandum, such company shall be deemed to be a company within this Act and entitled to the benefits thereof:

Second. The company must have a paid-up capital of not less than one hundred thousand pounds:

Third. Each share must be of the nominal value of not less than fifty pounds, of which not less than one tenth nor more than one half must have been paid up.

4. Subject to the provisions and restrictions of this Act, the company may from time to time borrow money upon mortgage debentures to be issued by it under the authority of this Act:

5. The securities upon and in respect of which

such mortgage debentures may be founded and issued shall be securities affecting property in *England* or *Wales* of the following descriptions:

(a.) Lands, messuages, hereditaments, or real property, or some estate or interests therein:

(b.) Rates, dues, assessments, or impositions upon the owners or occupiers of lands, messuages, hereditaments, or real property, imposed by or under the authority of any Act of Parliament, public or private, royal charter, commission of sewers or drainage, or other sufficient legal authority:

(c.) Charges upon or affecting lands, messuages, hereditaments, or real property executed, made, given, or issued under the authority of any Act of Parliament, public or private:

But, from the securities described in paragraph (a.) shall be excepted securities upon mines or mineral property, quarries, brickfields, and factories, mills, and other buildings or works for manufacturing purposes, and also securities upon leasehold estates, determinable upon a life or lives, and not renewable or held for a term, of which, at the date of the security, less than fifty years shall be unexpired, or which are subject to any rent beyond a nominal rent or a ground rent.

In construing this Act the word "securities" shall be deemed to mean such securities as above defined and restricted, and no others.

6. When and from time to time as the company may desire to use any securities in their possession for the purpose of founding and issuing mortgage debentures thereon, they shall produce the deeds or instruments, creating such securities, duly executed and stamped, to the office of land registry, established by the twenty-fifth and twenty-sixth *Victoria*, chapter fifty-three, in order to the same being duly registered in such office of land registry, in accordance with the provisions of this Act.

7. For the purposes of such registration there shall be established in such office of land registry, in respect of every company issuing mortgage debentures under this Act, a register, with the name of the company attached, which shall be called a register of securities under the "Mortgage Debentures Act, 1865."

8. The business of the registration shall be conducted in such office in accordance with such rules and regulations as the registrar, with the sanction of the Lord Chancellor, from time to time shall prescribe.

9. Upon production to and deposit with the registrar of the deeds or instruments purporting to be duly executed and stamped as aforesaid, together with a certificate under the common seal of the company and the hands of one or more directors and of the secretary or accountant of the company, in the form or to the effect of form (A.) in the schedule hereto, and in the cases herein-after mentioned of the certificate of a surveyor as herein-after provided, the registrar shall enter in the proper register of securities the date of every such deed or other instrument, its nature, whether mortgage, grant of annuity, rent-charge, or other security, the amount of the principal money or the amount and duration of the annuity thereby secured, and the tenure, extent, and situation of the property upon which the security is taken: Provided

always, that the registrar shall not register any deed or instrument relating to or affecting any property not situate in *England or Wales*.

10. The registrar shall not register any deeds or instruments for the purposes of this Act until there shall have been produced for his inspection, and left to be registered, a voluntary declaration made by a surveyor or valuer, approved by the inclosure commissioners for *England and Wales*, in the form (B.) in the said schedule hereto, or to the like effect; but when such deeds or instruments relate exclusively to any of the securities described in section 6 (*b* and *c*), the report of the surveyor or valuer shall state only the value at the time of his report of the securities to be valued. There shall also be delivered with the before-mentioned deeds or instruments a schedule under the hand of the secretary or one of the directors of the company, of the deeds and documents which were delivered to the company at the time when the security was executed to them, which deeds or documents shall be deposited with the registrar, to be retained by him until withdrawn as herein-after provided.

11. Upon the securities so from time to time registered, the company may found and issue its mortgage debentures, but so that the aggregate principal sum secured by all the mortgage debentures shall never exceed at any one time the then total amount (to be ascertained in the manner herein-after provided) of the registered securities of the company, and also shall never exceed ten times the amount for the time being uncalled of its subscribed share capital.

12. Before any company entitled to issue mortgage debentures under the provisions of this Act, shall register any such mortgage debentures under the provisions of this Act, such company shall file in the office of the Land Registry a return containing the following and such other particulars as the registrar may from time to time require, which returns shall be under the hand of one at least of the directors of the company and the secretary:

- (a.) The amount of the nominal capital of the company, and the number and amount of shares into which the same is divided:
- (b.) The amount *per share* and the aggregate amount paid up on the shares:
- (c.) The assets or property of the company at the date of the return, and how invested:
- (d.) The names, addresses, and occupations of the directors and auditors of the company:
- (e.) The registered office of the company.

13. If and whenever any of such mortgage debentures shall be paid off by the company, the company may issue new mortgage debentures in lieu thereof, and so from time to time, provided that the aggregate principal sum secured by all the mortgage debentures then issued and outstanding shall not exceed either of the before-mentioned limits.

14. All the registered securities for the time being of the company shall be charged with the payment of the principal monies and interest from time to time payable upon or in respect of all the mortgage debentures of the company for the time being issued and outstanding; and no registered security, until discharged therefrom as herein-after provided, shall be

applicable to or available for any other purpose than the satisfaction of such principal monies and interest, or be transferred, disposed of, or otherwise dealt with by the company, unless and until the same shall have been discharged from registration in the manner herein-after provided: Provided, nevertheless, that such registration shall not prevent the company from receiving, applying, and giving a valid discharge for any interest which may from time to time be receivable upon or in respect of any such security, unless where a receiver shall have been actually appointed under the provisions of this Act.

15. The persons from time to time entitled to the company's mortgage debentures shall, proportionably, according to the amount of the monies secured thereby, be entitled one with another to the benefit of the registered securities of the company upon which such mortgage debentures are founded, without any preference one above another by reason of priority of the date of any such mortgage debenture or otherwise.

16. Whenever any person who has executed a security which has been registered under the provisions of this Act is entitled to redeem such security, and has given notice to the company of his intention so to do, the company shall thereupon, and before the day appointed for the redemption, make application to the registrar for the purpose of having such security freed and discharged from the charge of the mortgage debentures issued by the company, and upon a security of at least equal value, as certified by a declaration of the surveyor or valuer before mentioned, being produced to him for registration and being registered accordingly, or its being shown to his satisfaction that at least an equivalent of mortgage debentures issued under the provisions of this Act has been cancelled, he shall allow the same to be so freed and discharged, and shall cause an entry to be made in the register of securities of the said security being discharged, and shall re-deliver to the company the several deeds or instruments to which such security relates, and which were delivered to the registrar for registration, under the provisions herein-before contained, and such entry shall be conclusive evidence of such discharge.

17. If the company shall not have procured such discharge on or before the day appointed for redemption, the mortgagor or other person entitled to redeem such security may apply to the High Court of Chancery by summons, calling upon the company to shew cause why such security is not so discharged, and upon hearing such summons the judge shall appoint a day by which the discharge shall be obtained, and in default thereof shall order that the amount of principal and interest money due upon such security shall, by a day to be named in the order, be paid into the bank to the credit of the accountant-general of the Court of Chancery, to the account of the company's mortgage debentures, and shall make such order as to the costs of and incidental to the application as the Court may deem just.

Upon production to and deposit with the land registrar of such order, together with the accountant-general's certificate of such payment into Court as aforesaid, the registrar shall make an entry in the proper register of securities of the discharge of such security from the company's mortgage debentures, and shall deliver to

the person named in such order the several deeds and instruments to which such security relates, and which were delivered to the registrar under the provisions herein contained.

Upon the company proving to the satisfaction of the Court, by the production of a certificate of the registrar, either that a security at least equal in value to the amount so paid into Court as aforesaid has been registered as aforesaid, or that an equivalent amount of the company's mortgage debentures has been cancelled, the Court shall direct the payment out of Court to the company of the amount so paid in, together with any dividends that may have accrued due thereon in the meantime.

18. There shall from time to time be paid by the company or others, in respect of business transacted under this Act by the registrar such fees as the registrar, with the sanction of the Lord Chancellor, from time to time prescribes; and there shall also be paid by the company to the registrar, the assistant registrar, and the other officers and servants of the office respectively, such remuneration for their respective services in the execution of this Act as the Lord Chancellor from time to time sanctions.

19. The following rules shall be observed with respect to the collection of fees:—

- (a.) All fees so payable shall be received by stamps denoting the amount of fees payable, and not in money:
- (b.) When a fee is payable in respect of a document, a stamp denoting the amount of the fee shall be affixed to the document and properly cancelled:
- (c.) The commissioners of inland revenue shall provide everything that is necessary for the collection of the monies by this Act directed to be paid by stamps.

20. Subject to such regulations and on payment of such fees as the registrar, with the sanction of the Lord Chancellor, from time to time prescribes, any person may inspect and make copies of and extracts from the registrar.

21. When and so long as the company issues any mortgage debentures under this Act, and from time to time so long as any mortgage debenture so issued remains outstanding, the company shall, within ten days after every quarter day as herein-after defined, make out and deliver to the registrar the quarterly return by this Act prescribed; and every quarterly return shall be verified by the statutory declaration of two directors and the manager, secretary, or accountant of the company.

22. The thirty-first day of *March*, the thirtieth day of *June*, the thirtieth day of *September*, and the thirty-first day of *December* in every year shall be the quarter days for the purposes of this Act.

23. Every quarterly return to be made by the company to the registrar shall be in the form set forth in form (C.) in the schedule to this Act, or as near thereto as circumstances may admit, and shall contain with reference to the then last quarterly day, the following particulars:

- (a.) An account of all the securities of the company's at that time registered, showing the aggregate of all principal sums remaining

secured thereby and unpaid, and showing also the aggregate amount or the aggregate estimated value of all annuities and other periodical payments secured thereby:

- (b.) An account showing the aggregate amount and the estimated value of the company's other investments, and also the total number and aggregate nominal amount of the shares of the company's capital held by persons registered in the company's books as the holders thereof, and the aggregate amount paid up in respect of those registered shares, and the aggregate amount remaining to be paid thereon:
- (c.) The numbers and dates of the several mortgage debentures issued by the company and remaining in force, and the several principal sums secured by those mortgage debentures respectively, and the aggregate amount thereof, and the rates of interest payable on those principal sums respectively, and the time or times for the repayment of those principal sums respectively.

24. The amount or value of the annuities and other periodical payments to be comprised in the quarterly returns shall be ascertained or estimated by an actuary approved by the registrar.

25. The aggregate of all principal sums remaining secured by the registered securities, together with the aggregate amount or value of the said annuities as so ascertained or estimated, shall for the purposes of this Act, be deemed to be the total amount for the time being of the registered securities of the company.

26. Every mortgage debenture from time to time issued by the company shall be a deed under the common seal of the company, duly stamped as a mortgage for the amount secured, and bearing the signature of at least two of the directors, and the counter-signature of the manager, secretary, or accountant of the company, and shall be in accordance with the form (D.) in the schedule to this Act, or as near thereto as circumstances admit.

27. The company shall keep a register, to be called the "register of securities," in which shall be entered the date of every deed or other instrument registered at the land registry for the purposes of this Act, its nature, whether mortgage, grant of annuity, rent-charge, or other security, the amount of the principal money, or the amount and duration of the annuity thereby secured, the tenure, extent, and situation of the property upon which the security is taken, and if there are any charges which take priority of the company's security, then the amount of such prior charges.

28. The mortgage debentures shall be for the payment of principal sums at a fixed time, to be named therein, not less than six months nor exceeding ten years from the date, with interest thereon in the meantime, at such rate as may be agreed, payable half-yearly or otherwise; and no mortgage debenture shall be issued for a less principal sum than fifty pounds.

29. The mortgage debentures shall be numbered consecutively, beginning with number one, and every mortgage debenture shall be distinguished by its appropriate number; and notwithstanding the cancellation, loss or destruction of a mortgage debenture,



no other mortgage debenture shall bear the number of that so cancelled, lost, or destroyed.

30. There shall be indorsed upon every mortgage debenture issued under the provisions of this Act—

- (a.) The amount of the nominal capital of the company issuing the same:
- (b.) The number and amount of the shares into which such capital is divided:
- (c.) The number of shares issued and the amount paid up in money upon each share so issued:
- (d.) The amount of the registered securities of the company as declared by the last quarterly return:
- (e.) The registered office of the company:

Provided that any inaccuracies or omissions in such indorsements shall not affect or invalidate the debenture.

31. A book containing a list of mortgage debentures shall be kept by the company's secretary, and on the issue of any mortgage debenture an entry of the number and date thereof, and of the principal money secured thereby, and the name, description, and residence of the person to whom it is issued shall be entered in such book.

32. There shall also be established and kept in the office of land registry, by or under the direction of the registrar, in respect of every company issuing mortgage debentures under this Act, a register of the mortgage debentures of the company.

33. When any mortgage debenture of the company is duly executed and stamped, the company shall produce it to the registrar, in order to its being registered, and thereupon the registrar shall enter in the register of mortgage debentures the number and the date of the mortgage debenture, the amount of the principal money thereby secured, and the time or times for repayment of the principal money thereby secured, and shall make on the mortgage debenture an indorsement stating the day on which the mortgage debenture was produced to him for registration, and of the page of the book in which the entry thereof is made; and without such an indorsement no mortgage debenture shall be a charge under this Act upon the registered securities of the company.

34. The indorsement of the registrar on any mortgage debenture as herein-before mentioned shall be conclusive evidence that it is a mortgage debenture duly registered under the provisions of this Act.

35. No notice of any trust in respect of any mortgage debenture shall be receivable by the company or the registrar.

36. When a mortgage debenture is produced by the company to the registrar, with a receipt of the monies secured thereby indorsed thereon, signed and stamped, he shall make in the register of mortgage debentures an entry of the discharge thereof.

37. Every mortgage debenture may be transferred by indorsement in the form (E.) in the schedule to this Act, or to the like effect.

38. Within thirty days after the date of every such transfer, if executed within the United Kingdom, or otherwise within thirty days after the arrival thereof in the United Kingdom, it shall be produced to the company's secretary, and thereupon the secretary shall make an entry thereof in a transfer book; and after the entry the transfer shall entitle the transferee to

the full benefit of the original mortgage debenture, so far as it is then in force; and no person having made the transfer shall have power to make void, release or discharge the mortgage debenture so transferred, or any money thereby secured; and for the entry the company may demand not exceeding two shillings and sixpence, and, until the entry, the company shall not be in any manner responsible to, or bound to take notice of, the transferee in respect of the mortgage debenture.

39. The several Acts from time to time in force relating to stamps under the care or management of the commissioners of inland revenue shall apply to the stamps to be provided in pursuance of this Act, and to documents on which the stamps are impressed, and to collecting and securing the sums of money denoted by stamps, and to preventing, detecting, and punishing all frauds, forgeries, and other offences relating thereto, as fully as if the provisions were in this Act repeated and specially enacted with reference to those stamps and sums of money respectively.

40. In all cases in which, by the instrument creating the trust, trustees have a general power to invest trust monies in or upon the security of shares, stock, mortgages, bonds, or debentures of companies incorporated by or acting under the authority of an Act of Parliament, they may invest such trust monies on the security of mortgage debentures duly issued under and in accordance with the provisions of this Act.

41. Any person for the time being entitled to any mortgage debenture of the company shall be empowered from time to time to enforce the payment of any arrears of interest or principal (as the case may be) due on such mortgage debenture by procuring the appointment of a receiver in the manner and subject to the conditions herein-after mentioned.

42. If within seven days after the interest accruing upon any mortgage debenture has become payable, and after demand thereof in writing made upon the company by the person entitled thereto, such interest be not paid, or if within three weeks after the principal money secured by any mortgage debenture has become payable, and after demand thereof in writing made as aforesaid, such principal money be not paid, the person at the time entitled to the receipt of such interest or principal respectively may apply for the appointment of a receiver, as herein-after provided.

43. No such application shall in any way prejudice or affect the right of any person entitled to any such mortgage debenture to sue for any such interest or principal money, as the case may be, in any court of law or equity.

44. Every application for a receiver in the cases aforesaid may be made to the High Court of Chancery by petition or by summons at chambers, and on any such application the Court of Chancery may appoint a receiver to act on behalf of the applicant and the other persons entitled to the company's mortgage debentures.

45. The Court may also remove the receiver, and appoint another in his stead and so from time to time, and may make such orders and give such directions as to the powers and duties of the receiver, and otherwise as to the disposal of the monies received by him, as may be thought fit.

46. Subject to any such orders and directions, the

receiver shall be entitled to receive or recover the whole or a competent part of the principal monies, instalments, annuities, interest, and other monies from time to time payable to the company upon or in respect of their registered securities, and also any monies standing to the account of the company's mortgage debentures under the provision of section 17, until the principal and interest due on all the debentures issued by the company, together with all costs, including the reasonable and proper charges of such receiver, shall have been fully paid; and upon such appointment being made, and notice thereof to the several persons liable upon such registered securities, all such monies from time to time payable upon or in respect of such registered securities shall be paid to and received or recovered by such receiver; and the receiver shall apply the same, as from time to time received or recovered by him, first to the payment of all such costs, and afterwards to the discharge and payment of all interest, or principal and interest, as the case may be, due upon such mortgage debentures; and after such costs, and such interest, or principal and interest, shall have been fully paid, the power of such receiver shall cease.

47. The court may order, as to any of the above-mentioned powers and duties, that the receiver shall not exercise the same without the sanction or further direction of the court; and the court may, at any time after an order for the appointment of a receiver has been made, make an order staying the same, either altogether or for a limited time, on such terms and subject to such conditions as it may deem fit.

48. In case any company shall cease to be entitled to issue mortgage debentures under this Act, such company shall nevertheless have the powers and be subject to the provisions of this Act with respect to all mortgage debentures then issued and outstanding; but no mortgage debentures shall be issued or renewed by such company upon any ground or pretence whatever, after it shall have ceased to be so entitled.

49. In case any company which shall not at the time being be entitled to avail itself of the provisions of this Act shall issue mortgage debentures under, or purporting to be under, the provisions of this Act, or in case any company entitled to avail itself of the provisions of this Act shall at any time issue mortgage debentures for an aggregate principal sum exceeding the limit to which at the time being they are entitled to issue, any person who shall knowingly or wilfully be concerned in such issue shall in every such case forfeit the sum of five hundred pounds.

50. Every penalty herein-before provided may be sued for and recovered by any person whosoever who will sue for the same by action in any of the superior courts of law in *England or Ireland or Scotland*, according as the offence has been committed in either of those parts of the United Kingdom, together with full costs of suit.

51. No person, being the registrar, assistant registrar, or other officer or servant of the office of land registry, shall be liable to any action, suit, or other proceeding, or any claim or demand, by reason of anything done *bonâ fide* by him in the execution of this Act.

52. This Act shall not exempt the company from

the provisions of any Act relating to joint stock companies, and applicable to the company.

53. In the construction of this Act all words meaning or applying to individuals only shall apply, *mutatis mutandis*, to corporations also.

The SCHEDULE referred to in the foregoing Act

FORM (A.)  
Form of Return to be made by the Company on Application to Registrar to Register Securities.

Is the Company's Charge a special or general charge? If special, of what property? If general, of what property?	Is the Return in Accordance with the Statute? If not, in what particulars?
Is the Charge a first or second charge? If first, is it a mortgage or a charge by way of legal mortgage? If second, is it a mortgage or a charge by way of legal mortgage?	Is the Return in Accordance with the Statute? If not, in what particulars?
Is the Charge a charge by way of legal mortgage? If so, is it a mortgage or a charge by way of legal mortgage?	Is the Return in Accordance with the Statute? If not, in what particulars?
Is the Charge a charge by way of legal mortgage? If so, is it a mortgage or a charge by way of legal mortgage?	Is the Return in Accordance with the Statute? If not, in what particulars?
Is the Charge a charge by way of legal mortgage? If so, is it a mortgage or a charge by way of legal mortgage?	Is the Return in Accordance with the Statute? If not, in what particulars?
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Is the Charge a charge by way of legal mortgage? If so, is it a mortgage or a charge by way of legal mortgage?	Is the Return in Accordance with the Statute? If not, in what particulars?
Is the Charge a charge by way of legal mortgage? If so, is it a mortgage or a charge by way of legal mortgage?	Is the Return in Accordance with the Statute? If not, in what particulars?

We hereby certify that the above Return is correct.  
A.B.  
C.D.

#### FORM (B.)

##### FORM OF SURVEYOR'S OR VALUER'S DECLARATION.

[Here insert a copy of the return to be made by the company on application to register securities, distinguishing each security by a separate letter or number.]

I of do solemnly and sincerely declare, that the information above contained with respect to the security numbered or lettered *is*, to the best of my information and belief, correct, and that the value of the property above described, (and, if the borrower's interest is of a limited nature, the value of the borrower's estate and interest or the property above described,) exceeds the amount of £ , the advance made by the company in respect thereof (if there are prior charges, and of the prior charges thereon), to the extent of one third at least of such value.

[A separate declaration may be made in respect of each security, and where the mortgage or charge is secured exclusively upon any of the securities comprised in Sec. 5 (b and c), omit from the word "declare" to the end, and insert "to the best of my information and belief the security above described, and numbered , is now of the value of £ ."]

## FORM (C.)

## FORM OF QUARTERLY RETURN.

*Mortgage Debenture Act, 1865.*

The first quarterly return of the \_\_\_\_\_ company,  
with reference to the 30th day of December,  
1865.

The registered securities of the company.

1. Aggregate securities under clause 5—*a* £150,000
2. Aggregate securities under clause 5—*b* 20,000
3. Aggregate securities under clause 5—*c* 10,000

£180,000

4. Other investments (to be specifically enumerated) - - - £16,500

5. 40,000 shares of £50 each held by registered holders - £2,000,000
- Paid up thereon - 200,000

Remaining unpaid thereon £1,800,000

## LIABILITIES.

*Mortgage Debenture issued and in force.*

No.	Date.	Yearly Rate per cent of interest.	Time for Repayment of Principal.	Principal sum secured.
	1865			£
1	Aug. 1, 65	Four	Aug. 1 1869	10,000
2	„ 1, 65	Four	Aug. 1 1869	5,000
3	„ 10, 65	Three & three quarters	Aug. 10 1871	20,000
		and so on		
			Total	£

We hereby certify that the above return is correct.

A.B.  
C.D.

## FORM (D.)

## FORM OF MORTGAGE DEBENTURE.

The \_\_\_\_\_ Company.  
Mortgage Debenture, No \_\_\_\_\_

By virtue of the Mortgage Debenture Act, 1865,  
we, the \_\_\_\_\_ company, in consideration of  
£ \_\_\_\_\_ paid to us by A.B. of \_\_\_\_\_, do hereby  
charge all the registered securities of the company with  
the payment to the said A.B. his executors, ad-  
ministrators, and assigns, of the sum of £ \_\_\_\_\_,  
and interest thereon at the rate of \_\_\_\_\_, which  
sum of £ \_\_\_\_\_ is to be paid and payable to  
the said A.B., his executors, administrators, and  
assigns, at the \_\_\_\_\_ [place], on the \_\_\_\_\_  
day of \_\_\_\_\_ with interest on the same  
at the rate of \_\_\_\_\_ per cent. per annum, payable half-  
yearly, at said place, on every \_\_\_\_\_ day of \_\_\_\_\_  
and \_\_\_\_\_ day of \_\_\_\_\_ and  
we hereby undertake to pay said sum of £ \_\_\_\_\_  
and interest at the rate aforesaid, as above-men-  
tioned.

Given under our common seal, this \_\_\_\_\_ day  
of \_\_\_\_\_ A.B., Director.

C.D., Director.

Countersigned G.F., Secretary.

Registered

## FORM (E.)

## FORM OF TRANSFER OF MORTGAGE DEBENTURE.

I A.B. of \_\_\_\_\_ in consideration of £ \_\_\_\_\_  
[state true consideration] hereby transfer to C.D.  
of \_\_\_\_\_ his executors, administrators, and  
assigns, the within mortgage debenture.

(Signed) A.B.

## CAP. LXXIX.

An Act to provide for the better Distribution of the  
Charge for the Relief of the Poor in Unions.

[29th June, 1865.]

## CAP. LXXX.

An Act to explain and amend "The Lunatic Asy-  
lum Act, 1853," and "The Lunacy Act Amend-  
ment Act, 1862," with reference to Counties of  
Towns which have Courts of Quarter Sessions, but  
no Recorder.

[29th June, 1865.]

## CAP. LXXXI.

An Act to render valid Marriages heretofore sole-  
mized in the Chapel of Ease called *Saint James-  
the-Greater* Chapel, *Eastbury* in the Parish of  
*Lamborne* in the County of *Berks*.

[5th July, 1865.]

## CAP. LXXXII.

An Act to amend "The Endowment and Augmenta-  
tion of Small Benefices (*Ireland*) Act, 1860."

[5th July, 1860.]

23 & 24 Vict. c. 72.

- Sec. 1. *Short title.*  
2. "*Church offices.*"  
3. *Patronage, &c. of newly formed benefice, on endowment of £700, may be assigned to contributor.*  
4. *Certain provisions of original Act extended to contracts.*  
5. *Registration and effect of contracts.*  
6. *Incumbent to have exclusive cure of souls.*  
7. *As to money given in the offertory.*  
8. *Fees for church offices.*  
9. *Application of fees.*  
10. *Bishop of diocese to determine proportion of fees, &c. in certain cases.*

'WHEREAS by an Act passed in the session of Par-  
liament held in the twenty-third and twenty-fourth  
years of the reign of her present Majesty, intituled  
"Endowment and Augmentation of Small Benefices  
Act (*Ireland*), 1860," provision was made for the  
augmentation of small benefices, and the acquisition  
of patronage thereby; and it is expedient that further  
facilities should be given for the same purposes, and  
that provision should also be made authorizing the  
payment of fees for church offices performed in certain  
benefices: be it enacted by the Queen's most  
excellent Majesty, by and with the advice and

consent of the lords spiritual and temporal and commons in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as "Endowment and Augmentation of Small Benefices Act (*Ireland*) Amendment Act, 1865," and shall with the said recited Act, herein-after called the original Act, constitute one Act.

2. In the construction of this Act the words "church offices" shall mean marriages, burials, and churchings.

3. The bishop of the diocese may, at his absolute discretion, by an instrument under his hand and seal, which shall be filed in the registry, assign the right of patronage of any benefices formed out of one or more parishes or places, and the nomination of the incumbent thereof, either in perpetuity or for one or more nominations, to any body or person, or their or his nominee or nominees, in consideration of such body or person contributing money or other property not less in amount or value than seven hundred pounds, to be invested or secured, according to the directions of the ecclesiastical commissioners for *Ireland*, towards the permanent endowment of such benefice, or towards providing a church or chapel for the use of the inhabitants of the district; and until any such assignment shall be made, and subject to it when made, the said right of patronage and nomination shall be dealt with according to the provisions of the Acts of the Fourteenth and fifteenth years of the Queen, chapter seventy-two, and the twenty-third and twenty-fourth years of the Queen, chapter seventy-two.

4. The provisions contained in the original Act or this Act for the endowment and assignment of the advowson, right of patronage of or nomination or presentation to any benefice, by the ecclesiastical person seised thereof, shall extend to a contract for the like purposes, whether entered into before or after such benefice shall be fully constituted, or before or during the building of a church for any such benefice, or previous to or after the consecration thereof, or previous to or after the appointment of an incumbent thereto.

5. The contract shall be by deed, and be entered in the registry of the diocese, and enrolled in the rolls office of the High Court of Chancery in *Ireland*, and thereupon such contract, so far as it is in accordance with the provisions of the original Act and not repugnant thereto, shall be binding upon the parties to it, their heirs, executors, administrators, and successors in office, and shall without any further assignment, upon the fulfilment of the terms of the contract and upon the provisions of the original Act being complied with, absolutely vest the patronage of the benefice contracted for in the nominee of the person or persons or body endowing the same, in such mode as may be provided by such contract and be in accordance with the original Act: provided always, that every such contract shall, at the expiration of six years from its date, be null and void, unless in the meantime the provisions thereof for the endowment of the benefice shall have been fully performed.

6. When a benefice has been endowed and the patronage thereof vested or assigned under this or the

original Act, the incumbent of such benefice shall have exclusive cure of souls within the same, and where formed out of any other parish or place shall not be in anywise subject to the control or interference of the incumbent of the mother church of the parish or place out of which such benefice shall be taken.

7. The money given in the offertory of the church of any benefice of which the patronage has been vested or assigned under this or the original Act, shall be disposed of by the incumbent and churchwardens of such church in the same manner as the money given at the offertory in any ancient parish church may be disposed of, any law or usage for the payment of the same to a mother church notwithstanding.

8. The accustomed fees for the performance of church offices in any benefice formed out of another parish or place the patronage of which has been acquired under this or the original Act, which would be payable for the like offices had they been performed in the mother church of the parish or place out of which such benefice shall have been taken, shall be payable and be paid to the incumbent of the benefice, and the several laws, statutes, and customs in force relating to the publications of banns of matrimony and to the performance of church offices, and the registering thereof, and to the suing for and recovering of fees, oblations, or offerings in respect thereof, shall apply to the church of such benefice and the incumbent thereof.

9. Such fees shall, where the benefice has been formed out of another parish or place, belong to the incumbent of the mother church during his incumbency; and an account of such fees shall be kept by the incumbent of the benefice, who is hereby required to receive and every six months pay over the same (or such proportion thereof as shall be payable) to the incumbent of the mother church. And from and after the avoidance of the original mother church next after the formation of the benefice such fees shall belong and be paid to the incumbent of the benefice.

10. Where any such benefice, the patronage of which is acquired under this or the original Act, shall be formed out of more parishes than one, the bishop of the diocese shall, by writing under his hand, determine in what proportion the fees for church offices performed in the benefice, and directed by this Act to be paid over to the incumbent of the mother church, shall be divided between the incumbents of such parishes.

#### CAP. LXXXIII.

An Act for further regulating the Use of Locomotives on Turnpike and other Roads for agricultural and other Purposes. [5th July, 1865.]

24 & 25 Vict. c. 70.

- Sec. 1. *Commencement of Act.*  
 2. *Certain sections of 24 & 25 Vict. c. 70, repealed.*  
 3. *Rules for the manner of working locomotives on turnpike roads and highways as herein stated. Penalty on non-compliance with rules.*

4. *Limit or speed of locomotives on turnpike roads and highways.*
5. *Size and weight of locomotives which may be used.*
6. *Restrictions as to the use of steam engines within 25 yards of roads not to apply to locomotives used for ploughing purposes.*
7. *Name, &c. of owner to be on locomotives.*
8. *Power to local authorities to make orders as to hours, &c. Locomotives may pass through cities, &c. Penalty on acting contrary to such orders.*
9. *In Ireland the county surveyor to be deemed the conservator of the roads in his county, and proceedings for damage to be taken in his name.*
10. *How penalties to be recovered and applied in Ireland.*
11. *Ses. 41 of 25 & 26 Vict., c. 93, not to be affected.*
12. *Saving as to actions at law.*
13. *Short title.*

WHEREAS by the "Locomotives Act, 1861," certain provision was made for regulating the use of locomotives on turnpike and other roads, and it is expedient that further and fuller provision should be made for that object: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act shall not come into operation till the first day of *September* one thousand eight hundred and sixty-five, which day is herein-after referred to as the commencement of the Act, and shall cease and determine on the first of *September* one thousand eight hundred and sixty-seven.

2. After the commencement of this Act, and so long as the same shall continue in force, the fifth, ninth, eleventh, and fifteenth sections of the said recited Act, and all orders made in pursuance of the said fifth section, are hereby repealed.

3. Every locomotive propelled by steam or any other than animal power on any turnpike road or public highway shall be worked according to the following rules and regulations, *viz.*

Firstly, at least three persons shall be employed to drive or conduct such locomotive, and if more than two waggons or carriages be attached thereto, an additional person shall be employed, who shall take charge of such waggon or carriages:

Secondly, one of such persons, while any locomotive is in motion, shall precede such locomotive on foot by not less than sixty yards, and shall carry a red flag constantly displayed, and shall warn the riders and drivers of horses of the approach of such locomotives, and shall signal the driver thereof when it shall be necessary to stop, and shall assist horses, and carriages drawn by horses, passing the same:

Thirdly, the drivers of such locomotives shall give as much space as possible for the passing of other traffic:

Fourthly, the whistle of such locomotive shall not be sounded for any purpose whatever; nor shall the cylinder taps be opened within sight of any person riding, driving, leading, or in charge of a horse upon the road; nor shall the steam be allowed to attain a pressure such as to exceed the limit fixed by the safety valve, so that no steam shall blow off when the locomotive is upon the road:

Fifthly, every such locomotive shall be instantly stopped, on the person preceding the same, or any other person with a horse, or carriage drawn by a horse, putting up his hand as a signal to require such locomotive to be stopped:

Sixthly, any person in charge of any such locomotive shall provide two efficient lights to be affixed conspicuously, one at each side on the front of the same, between the hours of one hour after sunset and one hour before sunrise:

In the event of a non-compliance with any of the provisions of this section, the owner of the locomotive shall, on summary conviction thereof before two justices, be liable to a penalty not exceeding ten pounds; but it shall be lawful for such owner, on proving that he has incurred such penalty by reason of the negligence or wilful default of any person in charge of or in attendance on such locomotive, to recover summarily from such person the whole or any part of the penalty he may have incurred as owner.

4. Subject and without prejudice to the regulations herein-after authorized to be made by local authorities, it shall not be lawful to drive any such locomotive along any turnpike road or public highway at a greater speed than four miles an hour, or through any city, town, or village at a greater speed than two miles an hour; and any person acting contrary thereto shall for every such offence, on summary conviction thereof, forfeit any sum not exceeding ten pounds.

5. Subject to the provisions of this Act, any locomotive which shall not exceed nine feet in width or fourteen tons in weight may be used on any turnpike road or public highway, provided that the wheels of such locomotive be constructed according to the requirements of the said recited Act; and no locomotive exceeding nine feet in width or fourteen tons in weight shall be used on any such road, except subject to the provisions contained in the third section of the said Act as to the use of locomotives exceeding seven feet in width and twelve tons in weight.

6. Any provision in any Act contained prohibiting, under penalty, the erection and use of any steam engine, gin, or other like machine, or any machinery attached thereto, within the distance of twenty-five yards from any part of any turnpike road, highway, carriageway, or cartway, unless such steam engine, gin, or other like engine or machinery be within some house or other building, or behind some wall, fence, or screen sufficient to conceal or screen the same from such turnpike road, highway, carriageway, or cartway, shall not extend to prohibit the use of any locomotive steam engine for the purpose of ploughing within such distance of any such turnpike road, highway, carriageway, or cartway, provided a person shall be stationed in the road, and employed to signal the driver when it shall be necessary to stop, and to assist

horses, and carriages drawn by horses, passing the same, and provided the driver of the engine do stop in proper time.

7. The name and residence of the owner of every locomotive shall be affixed thereto in a conspicuous manner. If it is not so affixed, the owner shall, on summary conviction, be liable to a penalty not exceeding two pounds.

8. The following local authorities, (that is to say,)

1. In the city of *London* and liberties thereof, the court of the lord mayor and aldermen;
2. In the metropolis, as defined by the Act of the session of the eighteenth and nineteenth years of her present Majesty, chapter one hundred and twenty (except the city of *London*), the metropolitan board of works;
3. In any borough in *England* the population of which shall have exceeded five thousand at the last census, the council of the borough;
4. In any borough or town in *England* the population of which shall have exceeded five thousand at the last census, not within the jurisdiction of a council, but within the jurisdiction of any trustees or improvement commissioners appointed under any public or private Act of Parliament, the trustees or commissioners;
5. In any borough or town in *Scotland* the population of which shall have exceeded ten thousand at the last census, within the jurisdiction of a town council, the town council, and in any such town in *Scotland* not within the jurisdiction of a town council, but subject to the jurisdiction of police commissioners, or of trustees exercising under any public or private Act of Parliament the functions of police commissioners, the police commissioners, or where there are no police commissioners, then the trustees,—

may make orders as to the hours during which (and as to the speed, not in any case to exceed two miles an hour, at which,) locomotives are to pass through the city or place subject to their respective jurisdictions; and any person in charge of a locomotive acting contrary to such regulations shall, on summary conviction, be liable to a penalty not exceeding ten pounds:

Every order made in pursuance of this section shall be reduced into writing, and shall have affixed thereto the common seal of the local authority, where they have a common seal, and shall be signed by the members of the local authority, or any two of them, where they have not a common seal:

A copy of such order shall be affixed to some public place within the jurisdiction of the local authority, and advertised in some newspaper circulating within the jurisdiction of the local authority, and the production of a newspaper containing such advertisement shall be evidence of the copy having been advertised in pursuance of this Act.

9. For the purposes of this Act, the county surveyor of each county in *Ireland* shall be deemed to be the conservator of all the roads in the county of which he is surveyor, made or repaired by grand jury presentment; and it shall not be lawful to use any

locomotive, other than those specially authorized by this Act, on any such road in any county in *Ireland*, without the consent in writing of the county surveyor thereof, approved of by one or more justices sitting at petty sessions: and all compensation for damage done by any locomotive to any bridge, gullet, or arch, or any of the walls, buttresses, or supports thereof, on any such road in any county in *Ireland*, shall be recoverable in the name of the county surveyor thereof, for and on behalf of the county, from the party liable to pay the same, such compensation, if not exceeding ten pounds, to be recovered in a summary way by summons at petty sessions, and if over ten pounds to be recovered by process in the civil bill court.

10. Every penalty imposed by the provisions of this Act shall, in *Ireland*, be recoverable before a justice or justices of the peace in petty sessions, subject and according to the provisions of "The Petty Sessions (*Ireland*) Act, 1851," and any Act amending the same, and shall be applied according to the provisions of "The Fines (*Ireland*) Act, 1851," and any Act amending the same.

11. Nothing in this Act contained shall repeal, alter, or in any way affect the provisions of the forty-first section of "The *Thames* Embankment Act, 1862."

12. Nothing in this Act contained shall authorize any person to use a locomotive which may be so constructed or used as to be a public nuisance at common law, and nothing herein contained shall affect the right of any person to recover damages in respect of any injury he may have sustained in consequence of the use of a locomotive.

13. This Act may be cited as "The Locomotives Act, 1865;" and "The Locomotives Act, 1861," and this Act, shall be construed together as one Act.

#### CAP. LXXXIV.

An Act to amend the Prisons (*Scotland*) Administration Act, 1860, and to explain the Fifty-second and Seventy-seventh sections of the said Act.  
[5th July, 1865.]

#### CAP. LXXXV.

An Act to amend the Laws relating to Procurators in *Scotland*.  
[5th July, 1865.]

#### CAP. LXXXVI.

An Act to amend the Law of Partnership.  
[5th July, 1865.]

- Sec. 1. *Lender not a partner by advancing money for share of profits.*
2. *Remuneration of agents, &c. by profits not to make them partners.*
3. *Certain annuitants not to be deemed partners.*
4. *Receipt of profits, &c. not to make the seller a partner.*
5. *In case of bankruptcy, &c. lender not to rank with other creditors.*
6. *Interpretation of "person."*

'WHEREAS it is expedient to amend the law relating to partnership:' be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not, of itself, constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such.

2. No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking shall, of itself, render such servant or agent responsible as a partner therein, nor give him the rights of a partner.

3. No person being the widow or child of the deceased partner of a trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of or to be subject to any of the liabilities incurred by such trader.

4. No person receiving by way of annuity or otherwise a portion of the profits of any business in consideration of the sale by him of the goodwill of such business, shall, by reason only of such receipt be deemed to be a partner of or be subject to the liabilities of the person carrying on such business.

5. In the event of any such trader as aforesaid being adjudged a bankrupt, or taking the benefit of any Act for the relief of insolvent debtors, or entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan, nor shall any such vendor of a goodwill as aforesaid be entitled to recover any such profits as aforesaid until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied.

6. In the construction of this Act the word "person" shall include a partnership firm, a joint stock company, and a corporation.

#### CAP. LXXXVII.

An Act to enable Her Majesty's Postmaster General to acquire a Site for the Extension of the General Post Office in *St. Martin's-le-Grand* in the city of London.

[5th July, 1865.]

#### CAP. LXXXVIII.

An Act for the recording of Titles to Land in Ireland.

[5th July, 1865.]

Sec. 1. *Short title and extent of Act.*

2. *Construction of terms.*

3. *Record of title to be established under Landed Estates Court.*

4. *Any conveyance from the court may be recorded under this Act.*
5. *Extension of the powers of the court as to granting declarations of title. 21 & 22 Vict. c. 72.*
6. *Every declaration of title may be recorded, and need not be registered in the deeds registry.*
7. *Any person obtaining a conveyance or declaration may decline to have his title recorded under this Act.*
8. *Conveyances and declarations when recorded to be entered, each to form, with subsequent entries, a folio.*
9. *Duplicates of conveyances or declarations may be issued.*
10. *Books of record not to be inspected without leave. Index to be made.*
11. *Questions arising on the record to be disposed of by a judge, who may decide or deal with the same as may seem right.*
12. *Recorded owners to be entitled to the estates mentioned on the record free from all other claims.*
13. *Informality not to prejudice entry in record of title.*
14. *Every charge, &c. to be entered in record of title.*
15. *Estates of proprietors subject to existing law.*
16. *Acts relating to registry of deeds not to apply to recorded land.*
17. *Power to amend the record on fiat of a judge, and the like amendment to be made in land certificate. Power to order a certificate to be brought in to be amended or a new one substituted.*
18. *Officer to deliver land certificates. Certificates of charge to be also issued.*
19. *Officer to compare certificate with the record.*
20. *Recorded owner desirous of selling, &c. may obtain special land certificate.*
21. *Certificate to be evidence, and may be deposited as security.*
22. *Power of subdividing land or charge, and of obtaining new certificate.*
23. *Procedure on transfer of part of an estate.*
24. *Apportionments may be made and surveys directed for the purposes of subdivision.*
25. *On proof of loss, &c. of certificate a new one may be given.*
26. *Modes by which recorded estates and charges may be dealt with.*
27. *Attendance of parties at the office to transfer or deal with recorded land, &c.*
28. *Transfer, &c. may be by the statutory forms, which shall be effectual.*
29. *Other deeds may be recorded on evidence of due execution. Originals or copies to be retained in court.*
30. *When deed signed, &c. the interest thereunder to be deemed recorded, and an official note to be made.*
31. *Vesting orders may be made as under the Trustees Acts.*
32. *Power to recorded owner of closing the re-*



- cord, and remitting his estate to the operation of the old law relating to the registry of deeds, &c. in Ireland.
33. Jurisdiction of court declared in cases of actual fraud.
  34. Devisee of deceased recorded owner may apply to be recorded as owner. Notice to be given to heir, &c.
  35. Heir-at-law of deceased owner may apply to be recorded. Court may appoint a representative of estate of a deceased owner. Powers of the representative.
  36. Personal representative may be recorded.
  37. Assignees may be recorded instead of owner. As to marriage of female owner.
  38. The judge may direct estates and interests under settlements to be separately recorded.
  39. Interests, &c. separately recorded to be recorded estates or charges.
  40. Interests, &c. may be recorded by reference. No appeal to lie if the judge declines to record separately.
  41. Trustees with power of sale may be recorded as owners, and a person may be recorded as "consenting party" to any sale, &c.
  42. No judgments, Crown bonds, *lis pendens*, &c. to affect recorded land, unless duly entered on the record. Judgments need not be registered by affidavit.
  43. Judgment recognizances, &c. to be re-entered before five years. If not entered they shall not affect purchasers for valuable consideration.
  44. Part payment of charge to be noted. Interest from the last gale day only shall be deemed to be due on the occasion of a transfer. No release necessary where the payment of a charge is noted.
  45. Sale by sheriff of any recorded land or lease to be noted.
  46. Power to any person interested to lodge a caveat prohibiting dealing with land, &c.
  47. Caveat to cease unless extended. Power to a judge to extend the operation of a caveat.
  48. In certain cases a note to be made on certificate as to disposition of land.
  49. Mode of leasing or demising recorded land. Consent of any persons entitled to a charge to be obtained, otherwise the rights of such person to be expressly reserved. Certain leases to be excepted from operation of the Act.
  50. Title of lessor in lease not to be indefeasible, unless the Court shall direct a note to be entered to that effect.
  51. Power in certain cases to record land although an interval has elapsed since such land was the subject of a conveyance or declaration by the court.
  52. Officer not to be restrained by injunction, &c.
  53. Indemnity for acts done bona fide.
  54. Days and hours when the office shall be open for business.
  55. General rules to be made and approved of, and submitted to Parliament.
  56. Seal of record of title office.
  57. Persons making false statement guilty of misdemeanour.
  58. No proceeding, &c. declared a misdemeanour to affect remedies of persons aggrieved.
  59. Answers to questions, &c. not admissible in evidence.
  60. Provisions as to applications made by married women.
  61. Provision for other persons under disability.
  62. Record to be under management of certain officers of the court. Arrangements to be made for constant attendance, &c. Power to appoint additional clerks to assist in the office if necessary.
  63. Practice before the judge, and right of appeal.
  64. Address of recorded owners, &c. to be given for the purpose of serving notices.
  65. A scale of costs may be framed for professional services in regard to recorded land.
  66. Forms in schedules to be used, but may be varied.
  67. Return of business done to be sent in annually by the judges.
  68. Judges to frame a schedule of fees.
  69. Rules with regard to the collection of fees.
  70. Stamp Acts in force to apply to stamps provided under this Act.
- ‘WHEREAS it is expedient that titles conferred by the Landed Estates Court, Ireland, should be kept free from complication, so that subsequent dealings with the estates held under such titles may be more simple and economical:’ Be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this present Parliament assembled, and by the authority of the same as follows:—
1. This Act may be cited for all purposes as “The Record of Title Act (Ireland), 1865;” it shall apply to Ireland only, and shall come into operation on the second day of November, one thousand eight hundred and sixty-five.
  2. In the construction of this Act (except where the context or other provisions of this Act require a different construction)—
 

The word “judge” shall mean one of the judges of the Landed Estates Court, Ireland:

The word “court” shall mean the Landed Estates Court, Ireland:

The word “officer” shall mean the officer for the time being of the Landed Estates Court, Ireland, whose duty it shall be to carry out this Act, under the direction of the said Court:

The word “record” shall mean the book or books to be provided and kept for the recording of titles, pursuant to this Act, in the Landed Estates Court:

The word “land” shall extend to manors, messuages, advowsons, rectories, tithes, lands, tenements, and hereditaments, and to rents or annuities charged upon hereditaments, whether subject to any fee-farm or other perpetual rent, with or without condition of re-entry for securing

the same, or otherwise, and whether corporeal or incorporeal, and to any undivided share thereof: The word "lease" shall include an agreement for a lease, and the estate or interest created or agreed to be created by a lease or agreement in the whole or any part of the land therein comprised, and shall include any term of years:

The word "owner," as applied to land, shall include any person entitled in possession in fee-simple or in tail or quasi in tail, and any person who has a power of appointing or disposing of the fee, or appointing or granting in fee-farm, and whether with or without the consent of another person, and any person entitled as a trustee for sale or having a power of sale, or of granting in fee-farm, and whether with or without consent as aforesaid, and as applied to a lease shall include any person entitled in possession to the interest thereunder, or having power to appoint or dispose thereof, and to any person entitled thereto as a trustee for sale or having a power of sale:

The words "person" or "owner" shall extend to a body politic or corporate:

The word "charge" or "incumbrance" shall include any legacy, portion, lien, or other charge whereby a sum of money is secured to be paid, and also any annual or periodical charge, and also any charge hereafter to be imposed on land under any public Act for promoting drainage or land improvement, and also every other charge upon land which is deemed an incumbrance in a court of equity.

The word "certificate" or "land certificate" shall include the counterpart of a conveyance, or the duplicate of a judicial declaration of title recorded pursuant to this Act:

The word "settlement" shall include any instrument under which any land or lease shall be at law or in equity so limited as to create partial or limited estates or interests:

The expression "recorded estate" shall mean any land or lease the title to which shall be recorded under the provisions of this Act.

*Record of title to be established of land which has been the subject of conveyance or declaration by the Landed Estates Court.*

3. There shall be established a record of title, to be kept under the control and direction of the Landed Estates Court; and the office in which such record is kept shall be called "the record of title office" of the said court.

4. Any person upon obtaining a conveyance from the court of any land or lease, or of any interest therein, shall be entitled to have such conveyance entered in the record, and on the same being so entered the land or lease, or interest therein, comprised in such conveyance, shall be and be deemed to be for the purposes of this Act a "recorded estate."

5. 'And whereas the court has power to grant a judicial declaration of title to a fee-simple estate, and it is desirable to extend such power:' Be it therefore enacted, that notwithstanding anything contained in an Act of the twenty-first and twenty-second years

of the reign of her Majesty, intituled *An Act to facilitate the Sale and Transfer of Land in Ireland*, the court may, on the application of the owner of any land or lease of any tenure in Ireland, proceed to investigate his title to the estate or interest or power in respect of which he claims to be such owner, and grant such declaration, in the manner directed by the said Act.

6. Any person, upon obtaining a declaration of title from the court, shall be entitled to have such declaration entered upon the record, and thereupon the land or lease comprised therein shall be and be deemed to be a recorded estate; and no declaration of title so entered upon the record shall be registered in the office for registering deeds in Ireland; and it shall not be necessary to keep in the court any other record or copy of any such declaration of title than that hereinafter mentioned, anything in the said recited Act, or in any rule or order made pursuant thereto, notwithstanding.

7. Any person to whom any conveyance or declaration of title shall be given by the court may, by requisition under his hand, lodged in the proper office of the court within seven days after the execution of such conveyance or declaration by a judge, require that the title so conferred shall not be recorded under this Act; and on such requisition the court shall deliver out such conveyance or declaration, and the same shall not be recorded: The provisions of the said Act of the twenty-first and twenty-second years of the reign of her present Majesty, as to the registration of declarations of title in the office for registering deeds, shall in that case take effect as though this Act had not been passed: Provided always, that any declaration of title made after the passing of this Act, and not recorded pursuant to this Act, may be registered in the said office for registering deeds at any time within fourteen days after the execution thereof by the judge.

8. All conveyances and declarations which are retained for the purpose of being recorded under this Act shall be entered in the book or books forming the record, and bound up therein, leaving space for further entries; and each of such conveyances and declarations, together with the further entries (if any) thereunder, shall form a division (hereinafter called a folio) of the record, distinguished by a separate number, or in such other manner as the officer may determine.

9. A counterpart of every conveyance and a duplicate of every declaration of title, recorded as aforesaid, signed by a judge, and under the seal of the court, may be issued to the person entitled thereto; and every such counterpart or duplicate so issued shall be marked by the officer with a memorandum of the recording as aforesaid; and every such counterpart or duplicate so marked shall as of the date thereof be and be deemed to be for all purposes as effectual as a "land certificate" granted as hereinafter mentioned, and shall for the purposes of this Act be regarded as a land certificate.

10. The record shall be kept in the office, and shall not be removed therefrom for any purpose unless the court shall direct. The record may be inspected by the recorded owners of the estates and

interests, or of the mortgages and incumbrances recorded therein respectively, or by their solicitors or agents. No other person shall be permitted to inspect or to take copies of or extracts from the record unless authorised by any such owner or by fiat of a judge. An index to recorded estates shall be made and regularly entered up; and such index may be inspected by any person without payment of any fee.

11. If in making up or continuing such record of title as aforesaid any question shall arise as to the true construction or legal validity or effect of any deed, will, or instrument, or as to the persons entitled, or the extent or nature of the estate, right, or interest, power or authority, of any person or class of persons, or the priority of any charge or incumbrance, claim, or interest, or as to the mode in which any entry ought to be made in the record of title, such questions shall be disposed of by the judge, who may either decide the same, or direct any proceeding at law or in equity for that purpose, or, at his discretion, and without deciding such question, may direct such entry to be made on the record as shall appear to be right; and the judge may direct the estate or interest of any person to be recorded by reference to the deed, will, or instrument creating the same, or copy thereof made and retained in court, as hereinafter directed.

12. Subject to any qualification mentioned in such record of title, and to any recorded charges, incumbrances, tenancies, or leases, and to any tenancy or lease not required to be noted on the record, the recorded owner for the time being shall be and be deemed to be absolutely and indefeasibly possessed of and entitled to such recorded estate, against all persons, and free from all rights, interests, claims, and demands whatsoever, including any estate, claim, or interest of her Majesty, her heirs and successors: Provided always, that nothing herein contained shall prejudice or affect any rentcharge in lieu of tithe, or any crown rent or quit rent to the Crown, or any charge imposed before the day of the passing of this Act under any public Act or Acts for promoting drainage or land improvement in *Ireland*.

13. No entry of such record of title as aforesaid shall be set aside or called in question as against any person who may afterwards become interested under any sale, mortgage, or contract for valuable consideration, by reason of any irregularity or informality therein, or in the proceedings previous to the making thereof.

14. From and after the recording of any land or lease, every settlement, transfer, mortgage, charge, lease, or sub-lease granted or in any manner created in or affecting such land or lease or any part thereof (except as herein excepted), shall be entered or noted in the record of title to be kept as aforesaid. Recorded charges on the same land or lease shall, as between themselves, rank according to the date of their being recorded, and not according to the date of their creation.

15. Subject to the enactments herein contained the estates and interests of all recorded owners shall remain subject to the existing law, and may be dealt with, assured, devised, and transmitted by descent or representation according to the ordinary rules of law and equity.

16. The provisions of the several Acts of Parliament now in force relating to the registry of deeds in *Ireland* shall cease to be applicable to any land so soon as it has been placed on the record under the provisions of this Act, and so long as it remains thereon; and the said several Acts shall not be applicable to any lease, charge, or incumbrance on the record, so far as the same affects any recorded estate: Provided always, that so soon as any conveyance or declaration of title has been recorded under this Act, a memorial of the placing of the land or lease on the record shall be prepared specifying the recorded ownership and full description of the lands, which memorial shall be certified under the seal of the court, and shall be forthwith handed to the registrar of the registry of deeds in *Ireland*; and such registrar is hereby authorised and directed to file such memorial, when duly verified, in the same way as memorials of deeds, and shall receive such fees thereon as now chargeable for memorials of deeds, and the said registrar shall duly enter in the registry the name of the said owner and the description of the lands, and shall make the usual return on any requisition as with regard to memorials of deeds. Such memorial, when registered, shall be conclusive evidence of the several matters therein contained.

17. The officer shall, when directed by a fiat of a judge, but not further or otherwise, make, any amendment or correct any error in the record or in any map thereto annexed, as the judge shall consider just; such amendment or correction shall be made after such notices; and on such terms as to costs or otherwise as the judge may think fit. Every such amendment or correction in the record shall be marked by the officer with the date of making the same, and with the initials of his name; and any certificate which may have been issued as hereinafter mentioned, or other instrument of title, shall be amended in like manner; and the judge may direct and compel any such certificate or instrument of title to be brought to the office by any person for the purpose of amendment, or for the purpose of having a new certificate granted in lieu thereof; and such amendment of the old or substitution of a new certificate shall be without prejudice to any claim of lien or other claim thereon, and shall be on such terms as to costs as may be just.

#### *As to land certificates and certificates of charges.*

18. The officer shall, upon request, deliver to every person who is named or described in the record as the owner of any recorded estate a certificate, herein called a "land certificate," under the seal of the office, which certificate shall contain a copy of the description of the estate and particulars of the incumbrances, leases, and other matters in force relating thereto, and a copy of the map (if any); the officer shall also, upon request, deliver to every person who is named or described in the record as the owner of any charge or incumbrance a certificate of charge: Provided always, that no certificate shall be issued until any duplicate conveyance or declaration or former certificate (as the case may be) which may have been issued shall be returned to the officer to be cancelled.

19. At the request of the holder the officer shall at any time compare any such certificate with the record,

and, if there has been no alteration, shall certify at the foot of such certificate that it contains a true statement of the entries in the record, and shall sign the same and add the date of such signature. Any alteration or omission which can be conveniently made in a certificate, or any addition thereto, so as to make the same correspond with any alteration in the record, may be made and signed by the officer, if he shall think fit. Before recording any transfer or other dealing (except a lease) the officer shall serve a notice thereof on the recorded owner in the manner directed by section sixty-four of this Act, unless such owner shall appear in person, and be identified to the satisfaction of the officer; and the officer shall also require the production of the certificate or other instrument of title equivalent thereto that may have been issued; and when such transfer or disposition has been completed such certificate or instrument of title (if re-issued) shall be made up so as to correspond with the record. A new certificate may be granted on the delivery up of the former certificate.

20. Whenever any recorded owner shall be desirous of selling or mortgaging any recorded estate he may, on giving up to the officer his land certificate, obtain a "special land certificate" for that purpose, which shall contain the particulars given in the land certificate. Such special certificate shall be conclusive evidence of the title of the recorded owner as appearing by the record. No entry shall be made by the officer in the record of any deed, instrument, act, or transaction affecting the estate comprised in such special certificate, except on the delivery up of such special certificate, until fourteen days have expired from and after the day of the date thereof. A note of such special certificate shall be entered in the record.

21. Every land certificate, or certificate of charge, duly signed and sealed, shall be conclusive evidence of the several matters therein contained as of the date of such certificate. The deposit of the certificate by the person entitled thereto shall, for the purpose of creating a lien on his estate and interest, be a valid security in the terms of any letter or memorandum or agreement accompanying such deposit; and such letter or memorandum or agreement shall be chargeable with the same stamp duty as a mortgage would have been according to the Stamp Acts now in force.

22. Any owner of a recorded estate or charge, on making application to the officer, and upon giving up his certificate to be cancelled, and on producing the consent of any incumbrancer or other person whose consent shall be deemed necessary, may obtain separate certificates for separate parcels of land, or for separate portions of any charge, or may obtain one certificate comprising several parcels of land or charges; and in such case the old folio of the record may be cancelled, and new folios or chapters relating to such sub divisions may be opened therein.

23. On the transfer of part of a recorded estate a new folio shall be opened in respect of such part, and a new land certificate issued; and a suitable entry shall at the same time be made on the folio and map relating to the residue and on the certificate thereof; or, if the officer shall deem it more convenient, he may cancel the old folio, and open a new one, and

issue a new certificate in respect of the residue of the estate.

24. If for any purpose mentioned in the last section any apportionment of head rent or of tenant's rent shall be desirable, the court may apportion such rent, whether the same be reserved by a fee-farm grant or by a lease, according to its usual practice with regard to apportionments, and on the like notices or consents being produced: Provided always, that the officer may, if he deem it necessary, require a new boundary survey to be made and new maps furnished before proceeding to open new folios in the record as to separate parcels of land.

25. If any land certificate or certificate of charge be lost or destroyed, the officer may, upon the fiat of the judge who shall be satisfied of the fact of such loss or destruction, and shall direct such public advertisement for the recovery of the same as he may consider expedient, give a new certificate, and shall state thereon that it is given in substitution for the former certificate, and the same fees shall be chargeable for the new as for the former certificate; but no such new certificate shall be of any avail against any person who may have already derived title under the former certificate.

#### *Transfer and transmission of recorded estates and charges.*

26. Recorded estates and recorded charges may be conveyed, charged, settled, dealt with, or affected—

By a statutory deed or disposition in either of the forms in the schedule annexed to this Act;

By indorsement on the certificate;

By deposit of the certificate as aforesaid;

By deed, will, decree, order, or other means by which such land or charge, if not recorded, might now, according to law, be dealt with or affected;

but no estate, interest, contract, or dealing not noted on the record shall prevail against the title of any owner or of the proprietor of any estate, interest, charge or incumbrance duly recorded under this Act; and no equitable mortgage or lien on recorded land shall be created by deposit of title deeds.

27. On the occasion of any transfer, mortgage or other disposition of a recorded estate, or of any charge or incumbrance thereon, the parties or their attorneys lawfully authorized may attend at the office to complete the transaction. The description of the land and of the estate or charge proposed to be transferred or dealt with shall be taken from or refer to the record, and shall be inserted, under the superintendence of the officer, in one of the statutory forms set out in the schedule hereto; and such transfer or disposition shall be executed by the owner or transferrer, or by his attorney lawfully authorized, and duly attested by a solicitor, and shall then and there, together with the power of attorney (if any), be delivered to the officer for the purpose of having an official note entered in the record.

28. The recorded owner of any estate, charge, or incumbrance may transfer or charge the same by one of the forms in the schedule hereto, and the same shall be as complete and effectual as any other form of transfer, charge, or mortgage would have been either

at law or in equity. Persons taking under either of the said statutory forms shall take as fully and effectually as if the estates and rights expressed to be created and given by such forms respectively had been created or granted by any of the modes of assurance now known to the law.

29. Any person claiming under a deed or instrument affecting recorded land executed elsewhere than in the office may apply to have the same recorded as to such land, on giving sufficient evidence of the due execution thereof; and when the officer has received such deed or instrument he shall forthwith note the same on the record, and shall retain in court either the original or a counterpart, or a copy, made and compared in such manner as the court may by general rule direct, and under the hand of the grantor; and the original, if handed back to the person entitled thereto, shall be so marked or indorsed by the officer as to show that it has been noted on the record; and so far as relates to the recorded estate or charge thereby affected it shall not be necessary to register any memorials of such deed or instrument in the office for registering deeds in *Ireland*: provided always, that the officer may decline to receive and note any deed or instrument which is not made in one of the forms in the schedule hereto, unless a judge has, by fiat indorsed thereon, directed the same to be received and noted.

30. So soon as any deed or instrument has been duly executed, and has been received by the officer, such deed or instrument, and the estate and right created thereby, shall be deemed to have been duly entered on the record, and an official note of reference thereto shall forthwith be made by the officer in the proper folio of the record: provided always, that such deed or instrument, and the estate and right created thereby, shall not be deemed to have been entered on the record so as to affect any land, lease, or charge comprised in any such "special land certificate" as herein-before mentioned until after the expiration of the time herein-before limited for the entry of any deed, act, or transaction affecting such land or charge.

31. For the purpose of authorizing or of compelling a transfer to be made of any recorded estate or charge or any part thereof, the court or a judge may make such orders and give such directions as to the appointment, removal, or change of trustees, or as to the vesting in them or in any other person of any land or charge, as the Lord High Chancellor is empowered to make or give under "The Trustee Act, 1850," or any Act amending or extending the same.

32. The owner of any recorded estate may at any time by a requisition under his hand, and with the consent of all persons who may appear to be interested as having charges or otherwise, and whose consent shall be deemed necessary, require the record to be closed, and on such requisition and consent being examined and found to be a sufficient memorial of the closing of the record shall be prepared, specifying the ownership and full description of the lands, which memorial shall be signed by the officer and by the said owner, and shall be forthwith handed to the registrar of the registry of deeds in *Ireland*; and such registrar is hereby authorized and directed to file such memorial, when duly verified, in the same way as

memorials of deeds, and shall receive such fees thereon as now chargeable for memorials of deeds, and the said registrar shall duly enter in the registry the name of the said owner and the description of the lands, and shall make the usual return on any requisition as with regard to memorials of deeds. Such memorial, when registered, shall be conclusive evidence of the several matters therein contained. After the registration of such memorial the record shall be deemed to be closed as to such estate, but shall for all purposes be deemed to have conferred an indefeasible title upon the person last therein described as owner (subject as therein and as in this Act, is excepted).

33. Notwithstanding anything contained in this Act, the Landed Estates Court shall have the same jurisdiction that Courts of Equity now have on the ground of actual fraud, and it may alter or amend the record on such terms as may be just.

34. On the death of the recorded owner of any real estate, any person claiming as devisee may apply to the judge for a fiat directing the officer to record the applicant as owner, in the place of the deceased person; but the judge shall withhold such fiat until the applicant shall have lodged in the office the probate or a true copy of the will or codicil under which he claims; and no transfer or disposition by any such devisee shall be recorded, except after the service of such notice on the heir-at-law and executors (if any) as the judge may deem necessary; and the judge may also, if he shall see fit, suspend such fiat until a decision of some other competent court in favour of the title claimed by such devisee shall have been obtained.

35. On the death of the recorded owner of real estate, any person claiming as heir-at-law may apply to the judge for a fiat directing the officer to record the applicant; but no such person shall be recorded as owner until at least six calendar months from the date of such application shall have expired, and such notice of every such application shall be given, by advertisement and otherwise, as the judge may think necessary or proper; If there shall be any doubt, dispute, or litigation touching the ownership of the estate of a deceased owner, the court may appoint a person to be recorded in his place as the representative of such estate, and shall give directions to such representative from time to time touching the management and letting of the estate; and all acts of such representative in pursuance of the directions of the court shall be valid and binding on all parties interested in the estate.

36. On the death of the recorded owner of a chattel interest in or of a charge affecting land, his personal representative may apply to be recorded in the place of the deceased person.

37. On the bankruptcy or insolvency of any recorded owner, the assignee or assignees of his estate shall be entitled to be recorded in his place. On the marriage of any female owner of a recorded estate or charge, her husband may apply to be recorded a co-proprietor in right of his wife.

#### *Power to record estates and interests under settlements*

38. Upon the application of any person claiming under any settlement of a recorded estate a judge may make an order directing the officer to record separately

rately any vested estate under the settlement, either in possession or in remainder after the dropping of a life or lives, which can be aliened by the owner thereof without the consent of any other person, and which is not liable to be defeated or affected at law or in equity by the act of any other person or by any other contingency. Upon any such application the judge shall ascertain whether any power of sale or exchange or power of charging exists with respect to such estate, and if so the record shall be qualified by stating the existence of such power; the judge may also direct the officer to record separately any vested and ascertained charge or incumbrance under the settlement.

39. Any estate, interest, or charge under a settlement, when separately recorded, shall be, for the purposes of this Act, and shall be deemed to be a "recorded estate" or a "recorded charge," and a separate folio or division (as the case may be) of the record shall be opened therefor, and a separate certificate issued to the person entitled.

40. On any application to record separately any estate, interest, or charge under a settlement, the judge may decline to have the same separately recorded, or he may (at his option) direct that the same be recorded by means of a note of reference to the whole or any portion of the settlement or counterpart, or the copy retained in court as herein-before provided for; and no appeal shall lie from any decision of the judge given under this section.

41. Trustees with a power of sale may be recorded as joint owners, and any tenant for life or other person may by their consent, or by direction of a judge, be entered as a "consenting party," and without the consent of the person so inscribed as last aforesaid no transfer or disposition shall be made: provided always, that the judge shall have full power (after such inquiries and notices as it shall deem just) to direct the name of any person to be removed as a "consenting party," and to direct the name of any other person to be inserted in lieu thereof; and any person interested in preventing any sale or disposition by such joint owners may lodge a caveat with the officer in manner herein-after mentioned.

#### *Judgments and other claims on recorded estates.*

42. No judgment, recognizance, crown bond, lis pendens, acceptance of office, inquisition, decree, or order shall be a charge upon recorded land, or in any manner affect the same, unless and until a memorandum of the same, in such form and with such verification or other evidence as the court may by general rule direct, shall be lodged with the officer; and the officer shall, on such memorandum being lodged, and such information given as will enable him to identify the land sought to be charged, make an official note thereof on the record. It shall not be necessary to register or file any affidavit in the registry of deeds office for the purpose of making a judgment a charge on recorded land.

43. Judgments, recognizances, crown bonds, lis pendens, acceptances, and inquisitions, decrees, and orders, entered on the record by the lodgment of a verified memorandum, and the entry of an official note as aforesaid, shall be re entered before the end of every

five years from the entry thereof, by the like means; and no judgment, recognizance, crown bond, lis, acceptance, inquisition, decree, or order shall be of any force or affect as against a purchaser for valuable consideration, or mortgagee of a recorded estate, unless the same shall have been entered or re-entered on the record within five years previous to the date of the recording of his purchase or mortgage; and no such purchaser or mortgagee shall be affected by notice, express or implied, of any judgment, recognizance, crown bond, lis, acceptance, inquisition, decree, or order.

44. Whenever payment is made of any part of the principal money due on a recorded charge or incumbrance, the officer may, on production of a receipt signed by the recorded owner of the charge and duly verified, make an official note thereof on the record. Unless and until such note be made, the entire principal sum expressed to be due shall, on the occasion of any transfer for valuable consideration, be considered as due. Interest on the principal sum since the last gale day shall be considered as due, unless the fact of the payment of such interest be recorded. If in any instrument of transfer any further interest be expressed to be due, such transfer of arrears of interest shall be valid only to the extent to which such interest shall be actually due and recoverable from the land. On the application of any recorded owner or incumbrancer, and on finding that any charge, incumbrance, or claim upon a recorded estate has been paid off or satisfied, the officer may make an entry of the fact on the record, and no release or re-conveyance shall in that case be necessary.

45. Whenever any recorded land or lease shall be sold by the sheriff under any writ, or shall be sold under any direction, decree, or order of any competent court, the officer, on production to him of the conveyance or assignment, and of an office copy of the writ, direction, decree, or order, may record the purchaser as owner of such land or lease.

#### *Caveats against transfer, &c.*

46. Any person interested in any land, lease, or charge recorded in the name of any other person may lodge a caveat with the officer, which caveat shall be in such form and shall be verified and noted on the record in such manner as the court shall by general rule direct. A caveat shall remain in force for a period of twenty-one days from the date thereof if the court shall be then sitting, or if the court shall not be sitting then for twenty-one days from the next sitting of the court. Any transfer or other disposition recorded during such period shall, unless a judge shall otherwise direct, be made expressly subject to the title and claim (if any) of the cautioner.

47. After the expiration of such period the caveat shall cease, and the officer shall cancel any note thereof on the record, unless a fiat continuing it be made by a judge; and upon the caveat so ceasing the land, lease, or charge shall be dealt with in the same manner as if no caveat had been lodged. If before the expiration of the said period the cautioner or his solicitor appears before a judge, and gives such undertaking or security, or lodges such sum in court as such judge may consider sufficient to indemnify every person against any damage that may be sus-

tained by reason of any disposition of the property being delayed, then and in such case such judge may direct the officer to delay recording any dealing with the land, lease, or charge for a further period, to be specified in such order, or make such other order, as may be just. If any caveat be lodged without reasonable cause, such judge may order payment by the cautioner of such sum by way of compensation or costs as he may deem just.

48. Where two or more persons are recorded as owners of any estate or charge, a note may, with their consent or by direction of the judge, be made by the officer on the record to the effect that when the number of such owners is reduced below a specified number, no disposition of such land or charge shall be made by the survivors unless the judge shall otherwise direct; and such note shall appear on every copy or certificate issued by the officer.

*Leases and demises of recorded land.*

49. Whenever recorded land is intended to be leased or demised, the lease and a counterpart thereof, after being executed by the recorded owner, and attested, may be brought to the officer, who shall make an official note of the terms of such lease in the proper folio of the record, and shall mark or indorse on such lease and counterpart a note that they have been recorded. A lease granted by any person having power to lease, but not being the recorded owner, may, on the fiat of the judge, be noted on the record in like manner. On the application of the lessee, and after notice to the record owner, any such lease may be entered in a sub-division or chapter of the said folio, and such lease shall in that case be deemed to be a "recorded estate" within the meaning of this Act: provided always, that if the lessor's interest shall be subject to any recorded charge, either the consent of the person appearing entitled to such charge shall be obtained before a lease or demise of recorded land shall be noted or entered on the record, or, if such consent be not obtained, the officer shall enter a note to the effect that the granting or recording of such lease is "without prejudice to the title and claim" of the person entitled to such charge; and the interest of the lessee shall remain subject to such qualification as last aforesaid, but the officer may at any time, on such consent being obtained, and proved to his satisfaction, cancel such qualification, and thereupon the title of the lessee shall become indefeasible, subject only to the reservations, clauses, and covenants contained in the lease: provided also, that any tenancy or lease lawfully made at a rackrent without fine for a term not exceeding thirty-one years, and under which the tenant is in possession, or any assignment thereof, shall be valid for all purposes, although not entered or recorded under this Act.

50. On the recording, pursuant to this Act, of any land held under lease, the indefeasible title shall not extend to the title of any lessor or grantor under whom the same is held, unless the court, having investigated the title of such lessor or grantor shall direct an official note to be entered to the effect that the title of such lessor or grantor is guaranteed, and in such case the validity of such lease shall not afterwards be impeached on the ground of any want of

power or title in the said lessor or grantor to make the same, or by reason of any clause, condition, or covenant in the same, or by reason of the same not having been duly registered.

*Land heretofore conveyed, &c., may be brought upon the Record.*

51. Any person who has heretofore obtained a conveyance from the court of commissioners for the sale of incumbered estates in *Ireland*, or has obtained or may hereafter obtain a conveyance or declaration of title from the Landed Estates Court, or the assign or representative of any such person may apply in a summary manner, without petition, to the Court, to be recorded as owner, pursuant to this Act; and on producing such conveyance or an office copy of such declaration, and on furnishing such search or other evidence of title, and after the publication of such advertisement as the court may direct, such person may, if the court think fit, be recorded as owner of the whole or part of the land or lease comprised in such conveyance or declaration, and such land or lease, or part thereof, shall thereupon become a recorded estate within the meaning of this Act: provided always, that an interval of two calendar months shall elapse between such first application and the final recording of the title as aforesaid; and that the officer may, if he think fit, require a new survey of the land to be made, and a new map, for the purpose of entry on the record.

*General Provisions, Practices of the Office, Rules, Forms, Fees, &c.*

52. No Act, entry, or proceeding under this Act shall be restrained nor shall the officer be restrained by order or injunction of a court of equity or by writ of prohibition; nor shall the officer be required by writ of mandamus to do any act, or make any official note or entry under this Act; nor shall the record or any book or document be liable to be removed from the office under any writ or process of any other court, unless a judge shall so direct.

53. The judge shall not nor shall the officer, or any person acting under the authority of either of them, be liable to any action, suit, or proceeding for or in respect of any act or matter *bona fide* done or omitted in the exercise or supposed exercise of the powers of this Act.

54. The "record of title office" of the court shall be open for business on every day of the year except the following days; *viz.*, *Sundays, Christmas Day, New Year's Day, Good Friday, Easter Monday, and Whit Monday*, and any day duly appointed to be kept as a day of general fast or thanksgiving. The said office shall be open during such hours, and such officer and clerks shall attend therein, as the court shall from time to time direct.

55. The court shall, on or before the first day of *January* next, frame a code of general rules and of forms for carrying out the objects of this Act. Such general rules shall further provide for the sale, transfer, partition, and exchange of "recorded estates" by the court. Such rules and forms shall be submitted to the Lord Chancellor of *Ireland*, and approved of by him before they shall be binding, and when made



and approved of as aforesaid they shall be laid before Parliament forthwith, if Parliament is sitting, or if not within fourteen days after the next sitting of Parliament; and such rules and forms may from time to time be added to, rescinded, or altered by the like authorities respectively; and all such rules shall take effect as general rules of the court.

56. A seal shall be prepared for the record of title office of the court, and shall be kept in the custody of the officer, and all certificates and other documents purporting to be sealed with such seal shall be admissible as evidence, without further proof.

57. If in any proceeding to obtain the recording of any land, or to obtain any certificate, or otherwise in any transaction relating to land which is or is proposed to be put upon the record, any person acting either as principal or agent shall, knowingly and with intent to deceive, make or assist or join in or be privy to the making of any material false statement or representation, or suppress, conceal, or assist or join in or be privy to the suppressing, withholding, or concealing from any judge or the officer, or any person assisting the officer, any material document, fact, or matter of information, every person so acting shall be deemed to be guilty of a misdemeanor, and on conviction shall be liable to be imprisoned for a term not exceeding three years, and either with or without hard labour, or to be fined such sum as the court by which he is convicted shall award. The act or thing done or obtained by means of such fraud or falsehood shall be null and void to all intents and purposes, except as against a purchaser for valuable consideration without notice.

58. No proceeding or conviction for any act hereby declared to be a misdemeanor shall affect any remedy which any person aggrieved by such Act may be entitled to, either at law or in equity, against the person who has committed such act.

59. Nothing in this Act contained shall entitle any person to refuse to make a complete discovery by answer or otherwise to any bill or petition in equity, or to answer any question or interrogatory in any civil proceeding in any court of law or equity, or in the Court of Bankruptcy; but no answer to any such bill, question, or interrogatory shall be admissible in evidence against such person in any criminal proceeding.

60. Where any married woman is desirous of making any application, giving any consent, or doing any act, or becoming party to any proceeding under this Act, her husband's concurrence shall be required, and she shall be examined apart from her husband touching her knowledge of the nature and effect of the application and other act, and it shall be ascertained that she is acting freely and voluntarily, and such examination may be taken by the judge. A married woman entitled to her separate use, and not restrained from anticipation, shall, for the purposes of this Act, be deemed a feme sole.

61. Where any person who (if not under disability) might have made any application, given any consent, done any Act, or been party to any proceeding under this Act, is a minor, idiot, or lunatic, the guardian or committee of the estate respectively of such person may, with the assent of a judge, make such applications, give such consents, do such acts, and be party

to such proceedings as such person respectively if free from disability might have made, given, done, or been party to, and shall otherwise, with such assent as aforesaid, represent such person for the purposes of this Act. Where there is no guardian or committee of the estate of any such person as aforesaid, being infant, idiot, or lunatic, or where any person, the committee of whose estates if he were idiot or lunatic would be authorized to act for and represent such person under this Act, is of unsound mind or incapable of managing his affairs, but has not been found idiot or lunatic under an inquisition, it shall be lawful for a judge to appoint a guardian of such person for the purpose of any proceedings under this Act, and from time to time to change such guardian; and where a judge sees fit he may appoint a person to act as the next friend of a married woman for the purpose of any proceeding under this Act, and from time to time remove or change such next friend.

62. The record shall be under the management of the following principal officers of the Landed Estates Court: *viz.*, the examiners and the registrar, or of such one of them as the judges shall from time to time direct, and in case of his absence the judges shall appoint one or other of the said officers to supply his place; and the judges shall adjust the duties now performed by the said officers in such manner as may appear expedient for the purposes aforesaid, and shall so arrange the same that some one of said officers shall be in attendance daily (except as aforesaid) throughout the year; and there shall be paid to such officers or any of them, or to any other officer or clerk of the court whose duties shall be increased by the operation of this Act, such sum by way of increased annual salary as the commissioners of her Majesty's treasury shall approve, on the recommendation of the said judges. If the Lord Chancellor of Ireland shall now or at any time hereafter consider it necessary or expedient, having regard to the business of the court, that additional clerks should be appointed, it shall be lawful for the judges, with the consent of the said commissioners, to appoint such additional clerks to assist in carrying out this Act, and there shall be paid to such clerks such salaries as the judges, with the assent of the said commissioners, shall appoint; and such clerks shall be removable by the joint order of the said judges, with the sanction of the Lord Chancellor, and shall be subject to the same regulations, and shall hold their offices during pleasure, and in other respects on the same conditions and shall be paid out of the same funds, and in the same manner, as the other clerks of the court; and all other expenses of carrying out this Act shall be paid out of such monies as shall be provided by Parliament.

63. All applications to the judge under this Act shall be made in chamber, and such judge may direct any matter before him to be argued in court. Any order or decision or direction of the judge, excepting a decision or direction given under the fortieth section of this Act, shall be subject to the like appeal to the Court of Chancery Appeal in Ireland, and thence to the House of Lords, as is provided by the said recited Act of the twenty-first and twenty-second years of the reign of her Majesty.

64. A place of address in Ireland shall be entered

in a book to be kept for that purpose in the court for every person whose name is entered on the record as owner of land or of a charge, or as a cautioner, or as entitled to receive any notice; or any such person may, at his option, give from time to time the name and address of any solicitor of the court to act on his behalf. Notices shall be deemed sufficiently served if sent through the notice office of the court, or by registered post letter to such address as aforesaid.

65. The judges of the court may frame a scale of costs to be paid to solicitors or certificated conveyancers in respect of any service rendered by them in relation to any recorded estate or charge, or any matter connected therewith. Such scale shall be framed with regard to the skill and trouble involved, and the amount of property affected, and not with regard to the length of the documents prepared. Such scale shall be submitted to the Lord Chancellor of *Ireland*, and shall be approved of by him before it shall be binding, and with the like approval it may be varied. Such scale shall be acted on by all persons having by law or by consent of parties authority to tax or moderate costs.

66. The forms contained in the Schedule hereto may be used, but they may be modified or altered to suit the circumstances of every case, and deeds made in such altered forms shall be equally valid and effectual.

67. On the second of *November* of each year after this Act shall come into operation the judges shall furnish to the Lord Lieutenant or other chief governor or governors of *Ireland*, a return to be laid before Parliament showing the number of estates recorded under the Act during the year, distinguishing those which are brought in and recorded under the fifty-first section of this Act, and distinguishing estates and interests under settlements separately recorded as aforesaid; and the return shall also show the amount of fees received during the year pursuant to this Act.

68. The judges of the Court shall, with the consent of the commissioners of her Majesty's treasury, frame a schedule of fees to be received by the recording officer in respect of the following matters, viz.:

1. Transfers, transmission, and other dealings with recorded estates and charges, having regard to the value of the estates and the amount of the charges;
2. Recording of estates under the fifty-first section of this Act, having regard to the value of such estates;
3. Entry and cancellation of official notes or entries; lodgment of caveats, and of deeds and other documents; issue of certificates, and other acts to be done by the recording officer:

The judges may, with the consent of the said commissioners, from time to time lower or raise such fees, or any of them; all fees shall be paid over so as to form part of the consolidated fund of *Great Britain* and *Ireland*; the recording officer may also charge any sum actually payable, according to a scale to be sanctioned by the judges, to a surveyor, printer, or scrivener, for services or work necessarily done in respect of any map, entry, certificate, or copy under this Act; except as aforesaid, no fees or sums shall

be received by any officer or clerk of the court in respect of proceedings under this Act.

69. The following rules shall be observed with respect to the collection of fees:

1. All fees payable shall be received by stamps denoting the amount of fees payable, and not in money;
2. When any fee is payable in respect of a document, a stamp denoting the amount of fee shall be affixed to or impressed on such document;
3. Whenever an adhesive stamp shall be used to denote payment of any fee, such stamp shall be effectually cancelled in such manner as the recording officer shall direct, so as to be incapable of being used again;
4. The commissioners of inland revenue shall provide everything that is necessary for the collection of the monies hereby directed to be paid by stamps.

70. The several Acts for the time being in force relating to stamps under the care or management of the commissioners of inland revenue shall apply to the stamps to be provided in pursuance of this Act, and to any document on which such stamps may be affixed or impressed, and to collecting and securing the sums of money denoted by stamps, and to preventing, detecting, and punishing all frauds, forgeries, and other offences relating thereto, as fully as if such provisions had been herein repeated and specially enacted with reference to the last-mentioned stamps and sums of money respectively.

#### SCHEDULE.

##### No. 1.—FORM OF TRANSFER OF RECORDED LAND.

I *A.B.*, the recorded owner of the under-mentioned land, pursuant to the "Record of Title Act, *Ireland*, 1865," in consideration of £ sterling paid to me by *C.D.* of &c., do grant to the said *C.D.* all [insert description of land taken from or referring to the record, and refer to map (if any)], to hold to him and his heirs for ever [or otherwise, according to the nature of the interest transferred].

Dated this day  
Signed and sealed at the  
record of Title office,  
Landed Estates Court,  
*Ireland*, in my presence, *E. F.* of  
a solicitor of the  
court.

Signature,  
(Seal)

I hereby accept the above transfer.

Signature.  
Address.

##### No. 2.—FORM OF CHARGE.

I *A.B.*, the recorded owner of the under-mentioned land, pursuant to the "Record of Title Act, *Ireland*, 1865," in consideration of £ sterling, lent to me by *G.H.* of do charge in favour of the said *G.H.* the hereditaments described in the Schedule hereto with the principal sum of £ together repayable on the day of, with interest thereon at the rate of per cent. [reducible to if paid within a month after

and payable half-yearly, every day of  
 Dated this day of  
 Witness, &c. } Signature,  
 as above. } (Seal.)  
 I hereby accept the above charge.  
 Signature and Address.

Schedule above referred to.

N.B.—This Form may be adapted to the case of an annuity charged on land.

### No. 3.—FORM OF TRANSFER OF CHARGE.

I, the within-named *G.H.*, the recorded owner of a charge under the "Record of Title Act, Ireland, 1865," in consideration of £ sterling paid to me by *J.K.* of do transfer to the said *J.K.* the [within mentioned] charge, on which £ now remains due [together with interest from the last gale day of interest].

Witness, &c. } Signature,  
 as above. } (Seal.)  
 I hereby accept the above transfer.  
 Signature and Address.

### No. 4.—FORM OF POWER OF ATTORNEY TO TRANSFER.

I *A.B.*, the recorded owner of land [or a charge] pursuant to the "Record of Title Act, Ireland, 1865," do hereby appoint *L.M.* of &c., solicitor, my attorney, for the purpose of [transferring to *S.T.* of &c., absolutely] all my hereditaments, as entered and described in the record of title, under folio [Tyrone, No. 129], and my estate therein [or my charge, describing it].

Witness, &c. } Signature,  
 (Seal.)

### CAP. LXXXIX.

An Act to provide for the better Government of *Greenwich* Hospital, and the more beneficial Application of the Revenues thereof.

[5th July, 1865.]

### CAP. XO.

An Act for the Establishment of a Fire Brigade within the Metropolis.

[5th July, 1865.]

### CAP. XCI.

An Act to confirm certain Provisional Orders made under an Act of the Fifteenth Year of Her present Majesty, to facilitate Arrangements for the Relief of Turnpike Trusts.

[5th July, 1865.]

### CAP. XCII.

An Act to shorten the Time for the Election of Members to serve in Parliament for the *Ayr* District of Burghs.

[5th July, 1865.]

### CAP. XCIII.

An Act to consolidate the Offices of Comptroller General of the Exchequer and Chairman of the Commissioners for auditing the Public Accounts; and for other Purposes.

[5th July, 1865.]

### CAP. XCIV.

An Act to amend the Carrier's Act.

[5th July, 1865.]

Sec. 1. The term "*lace*" in 11 G. 4 & 1 W. 4, c. 68, not to include machine made lace.

2. Commencement of Act.

3. Short title.

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. In the Carrier's Act (that is to say, the Act of the session held in the eleventh year of the reign of King *George* the Fourth, and the first year of the reign of King *William* the Fourth, chapter sixty-eight, "for the more effectual protection of mail contractors, stage-coach proprietors, and other common carriers for hire, against the loss of or injury to parcels or packages delivered to them for conveyance or custody, the value and contents of which shall not be declared to them by the owners thereof,") the term "*lace*" shall, with respect to any parcel or package delivered after the commencement of this Act, be construed as not including machine-made lace.

2. This Act shall commence from and immediately after the thirtieth day of *September* one thousand eight hundred and sixty-five.

3. This Act may be cited as The Carriers Act Amendment Act, 1865.

### CAP. XCV.

An Act to amend the Law relating to the duties on Sugar, and the Drawbacks on those duties.

[5th July, 1865.]

Sec. 1. Duties on cane juice.

2. Drawbacks on refined sugar.

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. That on and after the first of *September*, one thousand eight hundred and sixty-five, provided that the ratifications of a convention between her Majesty, the King of the *Belgians*, the Emperor of the *French*, and the King of the *Netherlands*, for regulating the drawbacks on sugar, which was signed at *Paris* on the eighth day of *November*, one thousand eight hundred and sixty-four, shall then have been exchanged—

In lieu of the duties of customs now charged on the undermentioned article, the following duties of customs shall be charged thereon, on importation into *Great Britain* or *Ireland* (that is to say),

	£	s.	d.
Cane juice, the cwt.	-	-	0 8 2

2. That from and after the day on which the ratifications of a convention between her Majesty, the King of the *Belgians*, the Emperor of the *French*, and the King of the *Netherlands*, for regulating the drawbacks on sugar, which was signed at *Paris* on the eighth day of *November*, one thousand eight hundred and sixty-four, shall be exchanged,—

In lieu of the drawbacks of twelve shillings and ten pence now allowed on certain descriptions of refined sugar, the following drawbacks shall be paid and allowed on the undermentioned descriptions of refined sugar on the exportation thereof to foreign parts, or on removal to the *Isle of Man* for consumption there, or on deposit in any approved warehouse, upon such terms and subject to such regulations as the Commissioners of Customs may direct, for delivery from such warehouse as ship's stores only or for the purpose of sweetening *British* spirits in bond; (that is to say)

Upon sugar refined in *Great Britain* or *Ireland*, in loaf complete and whole, or lumps duly refined, having been perfectly clarified and thoroughly dried in the stove, and being of an uniform whiteness throughout; and upon such sugar pounded, crushed, or broken in a warehouse approved by the Commissioners of Customs, such sugar having been first inspected by the Officers of Customs in lamps or loaves, as if for immediate shipment, and then packed for exportation in the presence of such officers, and at the expense of the exporters; and upon candy:

	£	s.	d.
For every cwt. -	-	0	12 4

Upon sugar refined in *Great Britain* or *Ireland* by the centrifugal or any other process, and not in any way inferior to the export standard No. 3, approved by the Lords of the Treasury:

	£	s.	d.
For every cwt. -	-	0	12 4

Provided, that if refined sugar, not being in any way inferior to No. 1 standard export sample approved by the Lords of the Treasury, be not thoroughly dried in the stove, but shall be found to contain moisture not exceeding five *per centum* over and above what the same would contain if thoroughly dried in the stove, then the above drawback shall be allowed thereon, subject to a deduction in respect of such moisture of five *per centum*, in lieu of any other drawback now allowed thereon.

#### CAP. XCVI.

An Act to amend the Laws relating to the Inland Revenue. [5th July 1865.]

- Sec. 1. *Scale of stamp duties on conveyances, in lieu of scale in 13 & 14 Vict. c. 97.*
2. *Scale of stamp duties on appraisements, in lieu of scale in 55 G. 3, c. 184.*
3. *Scale of stamp duties on awards, in lieu of duties in 23 & 24 Vict. c. 111.*
4. *Stamp duty reduced on certain licences granted by ecclesiastical authority.*

5. *Agreements for letting small tenements chargeable with one penny stamp duty.*
6. *Duty on certificates taken out by conveyancers and special pleaders within the first three years of their practice reduced.*
7. *Stamp duty on charter parties reduced. If stamp not cancelled charter parties invalid. Terms on which certain charter parties may be stamped after being signed.*
8. *Reduction of duty on certain time policies of sea insurance. Insurances on a voyage and also for time, how chargeable.*
9. *Limitation of time for making application for allowance of stamp duty on policies of re-assurance repealed.*
10. 55 G. 3, c. 184. "*Policies.*" 23 & 24 Vict., c. 111. *Stamp duties granted on certain policies of assurance in lieu of former duties thereon.*
11. *Accidental death policy not to be chargeable as life assurance. Not to repeal duties payable by the railway passengers assurance company.*
12. *Sections 8 of 23 & 24 Vict. c. 111, and section 29 of 24 & 25 Vict., c. 91, repealed.*
13. *Provisions for preventing frauds in relation to the stamp duties imposed by this Act on Policies of Insurance.*
14. *Meaning of the Terms "Assurance" and "Policy."*
15. *Policies and instruments of insurance made abroad on behalf of insurers in the United Kingdom, when chargeable with stamp duty. Policies executed abroad to be brought to be stamped within two months after being received in the United Kingdom.*
16. *Receipts given for sums deposited on allotments of shares, or for calls on scrip or shares, not to be exempted from stamp duty.*
17. *Stamp duties on transfers of mortgages.*
18. *Hawkers licenses may be renewed before expiration and new licence to stand in place of licence surrendered.*
19. *Certain appointments not chargeable with stamp duty.*
20. *Certain declarations exempt.*
21. *Stamp duties on certificates of marriage and of having received the Holy Sacrament repealed.*
22. *Appeals against adjudications on stamp duties may be heard in Scotland and Ireland.*
23. *British spirits in warehouse may be transferred on production of delivery order.*
24. *Sect. 122 of 23 & 24 Vict. c. 114, repealed.*
25. *Amending the law respecting appeals under Excise Acts on complaints before commissioners and justices.*
26. *Persons convicted of the illegal manufacture of goods liable to excise duty may be afterwards sued for collateral penalties under sect. 33 of 7 & 8 G. 4, c. 53.*
27. *Liquids containing purified methylic alcohol to be deemed low wines for distilling pur-*

poses, and persons distilling the same to be deemed distillers.

28. Preparation of mahylic alcohol for distilling spirits to be carried on only in a licensed distillery.

29. Rules and regulations under which the distilling of spirits from such low wines is to be carried on. Spirits to be chargeable with excise duty.

30. Stamp duty of 6d. only on certain contracts under Highway Acts.

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same as follows:

1. For and in lieu of the scale of stamp duties chargeable under the title "conveyance" in the schedule of the Act passed in the thirteenth and fourteenth years of her Majesty's reign, chapter ninety-seven, the following scale of stamp duties shall be chargeable; (that is to say,)

	£	s.	d.
Where the purchase or consideration money expressed in or upon the principal or only deed, instrument, or writing of conveyance shall not exceed £5	-	-	0 0 6
And where the same shall exceed	£5 and not exceed £10	0 1 0	
"	10 " 15	0 1 6	
"	15 " 20	0 2 0	
"	20 " 25	0 2 6	
"	25 " 50	0 5 0	
"	50 " 75	0 7 6	
"	75 " 100	0 10 0	
"	100 " 125	0 12 6	
"	125 " 150	0 15 0	
"	150 " 175	0 17 6	
"	175 " 200	1 0 0	
"	200 " 225	1 2 6	
"	225 " 250	1 5 0	
"	250 " 275	1 7 6	
"	275 " 300	1 10 0	

And where the purchase or consideration money shall exceed £300, for then every £50, and also for any fractional part of £50

0 5 0

2. And for and in lieu of the scale of stamp duties chargeable under the title "appraisement" in the schedule to the Act passed in the fifty-fifth year of the reign of King George the Third, chapter one hundred and eighty-four, the following scale of stamps duties shall be chargeable; (that is to say,)

	£	s.	d.
Where the amount of the appraisement or valuation shall not exceed £5	-	-	0 0 3
And where it shall exceed	£5 and not exceed £10	0 0 6	
"	10 " 20	0 1 0	
"	20 " 30	0 1 6	
"	30 " 40	0 2 0	
"	40 " 50	0 2 6	

"	50	"	100	0	5	0
"	100	"	200	0	10	0
"	200	"	500	0	15	0
"	500	"	-	1	0	0

3. And for and in lieu of the scale of stamp duties chargeable under the title "award" in the schedule to the Act passed in the twenty-third and twenty-fourth years of her Majesty's reign, chapter one hundred and eleven, the following scale of stamp duties shall be chargeable; (that is to say,)

	£	s.	d.
For and upon every award in England or Ireland, and award or decreet arbitral in Scotland, where the amount or value of the matter in dispute shall not exceed £5	-	0	0 3
And where it shall exceed	£5 and not exceed £10	0 0 6	
"	10 " 20	0 1 0	
"	20 " 30	0 1 6	
"	30 " 40	0 2 0	
"	40 " 50	0 2 6	
"	50 " 100	0 5 0	
"	100 " 200	0 10 0	
"	200 " 500	0 15 0	
"	500 " 750	1 0 0	
"	750 " 1000	1 5 0	

And where it shall exceed £1,000, and also in all other cases not above provided for

- 1 15 0

4. And in lieu of the stamp duty of two pounds now chargeable by law for or upon licence to be granted by any archbishop, bishop, chancellor, or other ordinary, or by any ecclesiastical court, in *England* or *Ireland*, or by any presbytery or other ecclesiastical power in *Scotland*, for any of the following purposes; (that is to say,)

1. To hold the office of lecturer, reader, chaplain, church clerk, chapel clerk, parish clerk, or sexton;
2. For licensing a building for the performance of Divine service within an ecclesiastical district formed under the provisions of the New Parishes Act;
3. For licensing any chapel for the solemnization of marriages therein pursuant to the provisions of the Act sixth and seventh *William* the Fourth, chapter eighty-five;
4. For licensing or authorizing any matter which regards a consecrated building or ground, or anything to be constructed, set up, taken down, or altered therein, or to be removed therefrom;

There shall be charged and paid for or upon any such license as aforesaid the stamp duty of ten shillings: Provided always, that nothing herein contained shall extend to charge with duty any license expressly exempted from stamp duty by any Act of Parliament now in force.

5. Any agreement or memorandum for the letting of a dwelling house or tenement, or part of a dwelling house or tenement, for any period less than a year, at a rent payable weekly or monthly, and not exceeding the rate of three shillings and sixpence *per* week, shall be chargeable with the stamp duty of one penny only

In lieu of any other stamp duty now chargeable on any such agreement or memorandum.

6. 'And whereas by an Act passed in the sixteenth and seventeenth years of her Majesty's reign, chapter sixty-three, certain stamp duties specified in the Schedule to the same Act annexed are imposed upon a certificate to be taken out yearly by every person, being a member of one of the Four Inns of Court in *England*, and by every person in *Ireland*, who, in the character of conveyancer, special pleader, draftsman in equity, or otherwise, shall, for or in expectation of any fee, gain, or reward, draw or prepare any conveyance of or deed or instrument relating to any estate or property, real or personal, or any other deed or contract whatever, or any pleadings or proceedings in any court of law or equity:' be it enacted that any such certificate to be taken out by any such person as aforesaid within the period of three years after he shall first begin to practise in manner aforesaid, shall be charged with only one half of the said duties respectively.

7. In lieu of the stamp duty of five shillings now chargeable by law on any charterparty, or any document chargeable with stamp duty as a charterparty, there shall be charged and paid thereon the stamp duty of sixpence, which may be denoted either by an impressed stamp upon the charterparty or document or by an adhesive stamp affixed thereon; provided, that if an adhesive stamp be used the person who shall last sign the charterparty or document, or whose signature shall complete the same as a binding contract, shall at the time of his so signing the same cancel the said stamp by writing thereon his name or the name of his firm, together with the true date of his so writing the same; and in default of so canceling the adhesive stamp in manner aforesaid, such charterparty or document shall not be good, valid, or available for any purpose whatever: provided always, that if any charterparty or other such document as aforesaid which shall be brought to the commissioners of inland revenue to be stamped within the respective times herein-after mentioned after the same shall bear date and shall have been first signed, the commissioners shall stamp the same with an impressed stamp on the following terms; (that is to say,) if within seven days, on payment of the duty and four shillings and sixpence; and if after that time, and within one calendar month after such date and first signing, then on payment of the duty and the sum of ten pounds; but after the expiration of the last-mentioned period it shall not be lawful to stamp such charterparty or other document as aforesaid on any pretence whatever: provided always, that if any charterparty, whether printed or written, shall be first signed by any party thereto out of the United Kingdom, such charterparty being unstamped, it shall be lawful for any party thereto within ten days after it shall have been received in this kingdom, and before the same shall have been signed by any person here, to affix thereto an adhesive stamp denoting the duty chargeable thereon, and to cancel such stamp by writing across the same his name and the date when he shall so affix such stamp, and thereupon such charterparty shall be deemed to be duly stamped.

8. 'And whereas by an Act passed in the seventh

year of her Majesty's reign, chapter twenty-one, certain stamp duties contained in the Schedule to the same Act were imposed on policies of sea insurance in relation to ships or vessel, for or upon any voyage, and also for any certain term or period of time:' be it enacted, that there shall be charged and paid, in lieu of the duties chargeable under the said last-mentioned Act, for and in respect of any such insurance made for a certain term or period of time upon or in relation to any ship or vessel, the following reduced rates of duty for every one hundred pounds and also for any fractional part of one hundred pounds whereof the same shall consist; (that is to say,)

	Duty.		
	£	s.	d.
Where any insurance shall be made upon or in relation to any ship or vessel lying or being in any dock, harbour, or river, for any certain term or period of time not exceeding one calendar month	0	0	6
And where any such insurance as aforesaid shall be made for any term or period of time exceeding one month, and not exceeding three months, and also where any insurance shall be made upon or in relation to any ship or vessel lying or being elsewhere than as aforesaid for any term or period of time not exceeding three months	0	1	0
And where any insurance shall be made upon or in relation to any ship or vessel, wheresoever the same may be, for any term or period of time exceeding three months and not exceeding six months	-	0	2
Exceeding six months	-	0	4

And any sea insurance made for or upon a voyage and also for any certain term or period of time, or to extend to or cover any certain term or period of time beyond twenty-four hours after the ship shall have arrived at her destination and been there moored at anchor, is hereby declared to be an insurance for a certain term or period of time as well as an insurance made upon a voyage, and the policy to be chargeable with duty accordingly.

9. 'And whereas by an Act passed in the last session of Parliament, chapter fifty-six, section one, the time for making application to the commissioners of inland revenue for the allowance for the stamp duty impressed on a policy of re-assurance is limited to a period of three calendar months next after the termination of the risk:' Be it enacted, that so much of the said section as limits the time for making such application as aforesaid shall be and the same is hereby repealed.

10. And whereas by the said Act passed in the fifty-fifth year of the reign of King *George* the Third, certain stamp duties contained in the schedule to the same Act were imposed, under the head or title of "policy," on various descriptions of insurance commonly known by the several names of life insurance, fire insurance, and sea insurance respectively, specifically described and charged with duty as in the said schedule

is mentioned; and lastly certain duties were imposed upon any policy of assurance whereby any other lawful insurance whatsoever than as aforesaid should be made upon any property or interest whatever from loss of damage of any kind: And whereas by the said Act passed in the twenty-third and twenty-fourth years of her Majesty's reign, chapter one hundred and eleven, certain other stamp duties, described under the head or title of "policy" in the schedule to the last-mentioned Act, were also granted and imposed: Be it enacted, that in lieu of the duties so granted and imposed by the said two last-recited Acts respectively as last aforesaid, so far as they relate to any insurance on which duties are imposed by this Act, there shall be charged and paid for and upon any policy of assurance whereby any unlawful insurance not chargeable with stamp duty as life insurance, fire insurance, or sea insurance shall be made upon any property or interest whatever from loss or damage of any kind, or whereby any sum of money shall be assured or agreed to be paid only upon the death of any person from accident or violence, or otherwise than from a natural cause, or as compensation for a personal injury, or whereby any sum of money shall be assured or agreed to be paid as or for loss or damage or compensation for or indemnity against loss or damage arising from or consequent upon the happening of any accident, the following duties; (that is to say),

If the premium or consideration for	£	s.	d.
such assurance shall not exceed			
2s. 6d.	-	0	0
And if the same shall exceed 2s. 6d.			
and shall not exceed 5s.	-	0	0
And if the same shall exceed 5s.,			
then for every 5s., and also for any			
fractional part of 5s. of such pre-			
mium or consideration	-	0	0

And where any such assurance as aforesaid shall be made on such terms or conditions that the rates of duty aforesaid cannot be applied to the same or the policy charged therewith, then, in lieu of the foregoing rates of duty, there shall be charged and paid upon such policy in respect of the amount of the sum insured the same rate of stamp duty as is now chargeable by law on a policy of life assurance.

11. Provided always, That no policy of assurance for payment of any sum of money upon the death of any person only from accident or violence, or otherwise than from a natural cause, shall be deemed to be a policy of life assurance chargeable otherwise than under this Act; and provided also, that nothing herein contained shall extend to repeal or alter the duty chargeable under an Act passed in the twelfth and thirteenth years of her Majesty's reign, intituled, *An Act to confer certain powers on the Railway Passengers Assurance Company* on the sums received by the said company in respect of the insurance tickets issued by them, or to impose any other duty upon or in respect of such tickets.

12. Section eight of the said Act of the twenty-third and twenty-fourth years of her Majesty's reign, and section twenty-nine of an Act passed in the twenty-fourth and twenty-fifth years of her Majesty's reign, chapter ninety-one, shall be and the same are hereby

repealed, save and except as to any arrear of duty or any penalty incurred before the passing of this Act.

13. And for preventing frauds in respect of the stamp duties by this Act imposed on policies of insurance, the provisions and penalties contained in section six of the Act passed in the sixteenth and seventeenth years of her Majesty's reign, chapter fifty-nine, shall be observed, applied, and put in force in relation to policies of insurance of any descriptions (other than sea insurance) whereon duties are imposed by this Act; and further, if any person shall make, sign, or deliver out any policy not duly stamped for denoting the duty by this Act charged thereon he shall forfeit the sum of twenty pounds; and where any insurance shall be made by or for any society or company the person who shall be a managing director or the secretary or other principal officer thereof at the time of committing any offence or unlawful act, neglect, or default for which any penalty is by this or any other Act imposed shall be held to be a person committing such offence, or doing or suffering such unlawful act, neglect, or default, and shall, as well as the said society or company, be subject and liable to any and every such penalty as aforesaid.

14. The term "assurance" used in this Act shall mean and include insurance, and the term "policy" shall mean and include any agreement or other instrument, by whatever name the same shall be called, whereby any such assurance as aforesaid shall be made or agreed to be made.

15. The stamp duties chargeable under this or any other Act for the time being in force upon or in respect of any policy of insurance of any description shall extend to and be deemed to be payable upon and in respect of any policy or other instrument of insurance which shall be made or signed out of the United Kingdom by or on behalf of any person carrying on the business of insurance within the United Kingdom, or by which, according to any stipulation, agreement or understanding, expressed or implied, any loss or damage or any sum of money shall be payable or recoverable in the United Kingdom upon the happening of any contingency whatever; and no such policy or other instrument of insurance shall be valid or available in the United Kingdom for any purpose whatever, unless the same shall be duly stamped for denoting the duties chargeable thereon as aforesaid: Provided always, that if such policy or instrument shall be brought to the commissioners of inland revenue for the purpose of being stamped as aforesaid within two calendar months next after the same shall have been received in the United Kingdom, and upon proof of that fact to the satisfaction of the said commissioners, they shall cause such policy or instrument to be duly stamped on payment of the duties chargeable thereon; but after the expiration of the said period it shall not be lawful for the commissioners to permit the said policy or instrument to be stamped on any pretence whatever.

16. And whereas by the laws in force receipts given for money deposited in any bank, or in the hands of any banker, to be accounted for, are exempted from stamp duty, except receipts or acknowledgements for sums paid or deposited for or upon letters of allotment of shares, or in respect of calls upon scrip or



shares, of or in any joint stock or other company, or proposed or intended company:’ Be it enacted, That such exception shall be deemed to apply wheresoever any such company may be, and shall also extend to receipts and acknowledgements for sums paid or deposited for or in respect of allotments of shares, and calls upon scrips or shares, of or in any loan or proposed or intended loan raised or proposed to be raised by or on behalf of any foreign or colonial government, state, corporation, or company; all which said receipts and acknowledgements, so excepted as aforesaid, by whomsoever given, shall be chargeable with the duty imposed on receipts.

17. ‘And whereas by the said Act passed in the thirteenth and fourteenth years of her Majesty’s reign, chapter ninety-seven, certain stamp duties specified in the schedule to the same Act were granted and imposed upon any transfer or assignment, disposition or assignation, of any mortgage or wadset, or of any such other security as in the said schedule is described, or of the benefit thereof, or of the money or stock thereby secured:’ Be it enacted, That in lieu of the said last-mentioned duties there shall be charged and paid for and upon every such transfer of assignment, disposition or assignation, as aforesaid, the following stamp duties; (that is to say),

For every 100*l.* or any fractional part of 100*l.* of the amount or value of the principal money or stock already secured by such mortgage, wadset, or other such security as aforesaid, thereby transferred or assigned or disposed, the duty of sixpence:

And if any further sum of money or stock shall be added to the principal money or stock already secured as aforesaid there shall be charged and paid also the same duty as on a mortgage or wadset for the amount or value of such further money or stock.

18. Any hawker, pedlar, or petty chapman may apply for a renewed licence under the provisions of the statute in that behalf at any time before the expiration of his current licence; and on production and surrender of his current licence, and payment of the duty chargeable on a new licence, it shall be lawful for the officer to grant to him a renewed licence, and such officer shall insert therein the days of the commencement and termination of the period for which the same shall be granted, and the day of granting the same, and shall endorse thereon a memorandum of the date and place of surrender of the current licence; and such renewed licence, so endorsed, shall stand in the place of and be of the same force and effect as the surrendered licence during the unexpired term thereof, as well as for the whole of the term for which the renewed licence shall have been granted.

19. No stamp duty shall be chargeable upon the first grant or appointment of any person to the office or employment of outdoor officer, boatman, waterman, or watchman in the service of the customs, or upon any commission or deputation granted to him in pursuance of such appointment.

20. No declaration required to be made pursuant to any Act relating to marriages in order to a marriage without licence shall be chargeable with any stamp duty.

21. ‘And whereas under the title “certificate” in

the schedule to the Act passed in the fifty-fifth year of the reign of King George the Third, chapter one hundred and eighty-four, a stamp duty of five shillings is imposed on a certificate of marriage, and the like duty on a certificate of any person’s having received the Holy Sacrament:’ Be it enacted, that the said respective stamp duties last mentioned shall be and the same are hereby repealed.

22. ‘And whereas by the statutes in that behalf Her Majesty’s Court of Exchequer at Westminster is required to hear appeals against adjudications of the commissioners of inland revenue relating to the stamp duty on deeds as in the said statutes is mentioned:’ Be it enacted, that in cases where deeds shall be presented for the opinion of the said commissioners at their offices in *Edinburgh* and *Dublin* respectively; appeals against their adjudications may be heard and determined by Her Majesty’s Court of Exchequer in *Scotland* and *Ireland* respectively, in the same manner and subject in all respects to the like provisions as in the said statutes are respectively enacted with regard to appeals to Her Majesty’s Court of Exchequer at Westminster.

23. Any British spirits deposited in a general warehouse, in the name of a distiller or dealer in spirits, may be transferred in the book kept by the officer of excise in charge of such warehouse into the name of a purchaser, upon his producing to the officer an order in writing from such distiller or dealer, countersigned by the proprietor of the warehouse or his known servant, for the delivery of the spirits to such purchaser, and all spirits so transferred shall be discharged from all claim in respect of any duties, penalties, or forfeitures to which the distiller or dealer from whom such transfer has been made may be liable, but no spirits shall be delivered out of warehouse for home consumption until payment shall be made of the full duties of excise chargeable thereon.

24. Section one hundred and twenty-two of the Act passed in the twenty-third and twenty-fourth years of her Majesty’s reign, chapter one hundred and fourteen, is hereby repealed.

25. In the case of any complaint brought before the commissioners of inland revenue or justices of the peace respectively, by virtue of the provisions contained in the twenty-seventh section of the Act passed in the fourth and fifth years of the reign of King William the fourth, chapter fifty-one, in respect of any matter or thing which may be the subject of complaint under the said section, if the complainant, or the solicitor, collector, or supervisor to whom notice of such complaint is by law required to be given in such case, shall feel aggrieved by the judgment and determination of the said commissioners or justices respectively, it shall be lawful for either party aggrieved thereby to appeal from such judgment and determination in like manner, and upon giving such notices, and upon such terms, conditions, and regulation (so far as the same shall be applicable), as are prescribed in cases of appeals by the several Acts passed respectively in the seventh and eighth years of King George the Fourth, chapter fifty-three, the fourth and fifth years of King William the fourth, chapter fifty-one, and the fourth year of her present Majesty, chapter twenty; provided that no such appeal shall

be allowed when the sum in dispute shall not exceed fifty pounds.

26. 'And whereas by an Act passed in the seventh and eighth years of the reign of King George the Fourth, chapter fifty-three, section thirty-three, any person discovered as therein mentioned aiding or assisting or concerned in the private manufacturing of goods or commodities subject to any duty of excise is liable to the penalty of thirty pounds, over and above other penalties mentioned or referred to in the same section of the said Act: And whereas doubts are entertained whether a person who has been convicted in the said penalty of thirty pounds can afterwards be lawfully prosecuted for and convicted in any such other penalties as aforesaid: Be it declared and enacted, that it shall be lawful to proceed against any person for the recovery of all or any of such last-mentioned penalties, notwithstanding he may have been previously convicted in the said penalty of thirty pounds.

27. 'And whereas it is discovered that potable spirits may be obtained from methylic alcohol by distilling the same after certain processes of purification, by which it is freed from the unpalatable flavours which pertain to it in its crude state, and it is expedient to subject such spirits to the duty of excise chargeable on spirits: Be it enacted, that any liquid containing or having mixed therewith methylic alcohol which shall have been purified or prepared for distillation by means of filtration, or any other process which may free it, or be intended to free it, wholly or partially from any flavour or odour which might otherwise pertain to it, shall be deemed to be low wines, for the purpose of distillation within the meaning of the laws of excise relating to the distilling of spirits; and every person making, preparing, or having in his possession any such low wines, and having also a still, shall be deemed to be a distiller liable to the several duties, penalties, and forfeitures imposed by law on distillers of spirits.

28. Methylic alcohol which shall have undergone any such process of filtration or purification as aforesaid shall be deemed to have been so prepared for the purpose of distilling spirits therefrom, and no person other than a person duly licensed as a distiller of spirits shall so prepare or purify any methylic alcohol, nor shall any such process as aforesaid be commenced or carried on elsewhere than on premises duly licensed as a distillery, and of which, together with the stills, vessels, and utensils to be used therein, due entry shall have been made with the officers of excise, under pain of such penalties and forfeitures and liability to seizure for any breach of his enactment as would or might be incurred by any Act done in contravention of the third section of the Act passed in the twenty-third and twenty-fourth years of her Majesty's reign, chapter one hundred and fourteen.

29. The distilling of spirits from any such low wines as aforesaid shall be carried on under and subject to the like rules, regulations, and conditions as are prescribed by the laws in force in relation to the distilling of spirits, and the spirits produced by such distillation shall be deemed to be *British* spirits chargeable with the duties of excise, and shall be subject to all the laws, provisions, and regulations relating to *British* spirits: Provided always, that where

it shall be made to appear to the commissioners of inland revenue that any of such rules, regulations, or conditions are inapplicable to the making, preparing, or distilling of such low wines as aforesaid, or impose too great a restriction on such distillation, it shall be lawful for the said commissioners to relax or dispense with any of such rules, regulations, or conditions, and to frame others in lieu thereof for the purpose of regulating and facilitating the business of the said distillation, and otherwise in relation thereto, as they shall see fit in that behalf.

30. No contract to be made or entered into pursuant to the Highway Acts for or relating to the making, maintaining, or repairing of highways shall be chargeable with any higher stamp duty than sixpence.

#### CAP. XCVII.

An Act to indemnify such Persons in the United Kingdom as have omitted to qualify themselves for Offices and Employments, and to extend the time limited for those purposes respectively.

[5th July, 1865.]

#### CAP. XCVIII.

An Act to allow *British* Compounded Spirits to be warehoused upon Drawback. [5th July, 1865.]

1. *Compounded spirits may be deposited in customs or excise warehouses.*
2. *Spirits of wine may be deposited in customs warehouse for exportation or ship stores.*
3. *Strength of compounded spirits to be deposited in warehouse, and regulations as to casks, certificates, &c.*
4. *Entry to be made of spirits deposited in warehouse, and officer to give receipt for the same, and transmit certificate to collector of excise, who is to pay drawback of duty on the spirits.*
5. *Spirits warehoused under this Act may be delivered for home consumption in the same manner as plain British spirits.*
6. *Rates payable on delivery of spirits from warehouse for home consumption.*
7. *Rectifier may add sweetening or colouring matter to spirits in customs warehouse for exportation.*
8. *Spirits of wine not to be delivered for home consumption, nor any spirits unless upon repayment of allowances.*
9. *Spirits in customs warehouse may be used for fortifying wines, &c.*
10. *Compounded spirits may be vatted or bottled in warehouse.*
11. *Provisions of Acts relating to warehousing of British spirits to apply to compounded spirits warehoused under this Act.*
12. *Allowance of 3d. per gallon on British compounds not to be paid until exportation or use in customs warehouse.*
13. *Warehouses to be for public accommodation and of approved dimensions.*

14. Sections 141 to 145, inclusive of 23 & 24  
*Vict. c. 114 repealed.*

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. A licensed rectifier or compounder of spirits may, under such regulations as the commissioners of customs and inland revenue respectively may from time to time make, warehouse for exportation, or for ships stores, or for home consumption, in any customs or excise warehouse approved for that purpose by the commissioners of customs or commissioners of inland revenue, *British* compounds as defined by section one hundred and forty-eight of the Act passed in the twenty-third and twenty-fourth years of the reign of her present Majesty, chapter one hundred and fourteen, and compounded by him from spirits on which the duties of excise have been charged and paid, and the strength of such spirits as denoted by *Syke's* hydrometer shall be deemed to be the true strength thereof at the time of warehousing the same, and such spirits, when so warehoused, may, upon security being given by bond to the satisfaction of the commissioners of customs and inland revenue respectively, and under such regulations as the said commissioners respectively, may from time to time make in that behalf, be removed to and deposited in any other warehouse of customs or excise approved as aforesaid: Provided always, that all compounded spirits exported on drawback under this Act shall on their re-importation into the United Kingdom be deemed to be foreign spirits and chargeable with duties of importation accordingly.

2. A rectifier of spirits may, under such regulations as the commissioners of customs and inland revenue respectively may from time to time make, warehouse for exportation or for ships stores in any customs warehouse approved for that purpose by the commissioners of customs at a warehousing port, spirits of wine which shall have been rectified by him from spirits on which the duties of excise have been charged and paid, and such spirits of wine may, under such regulations as the commissioners of customs shall appoint, be removed to any other approved customs warehouse at any other warehousing port for either of the purposes aforesaid.

3. Compounded spirits to be warehoused as aforesaid shall be of a strength not more than eleven *per centum* over proof, and spirits of wine shall be of a strength not less than forty-three *per centum* over proof, as denoted by *Syke's* hydrometer, and shall be contained respectively in casks of not less than nine gallons content, every cask to be marked on each end thereof in letters and figures, legibly cut, branded, or painted with oil colour thereon, with the name of the rectifier or compounder, or the name of the firm, or with the mark of such rectifier, compounder, or firm, the progressive number of such cask according to the number of casks warehoused, and the year when the same was warehoused, and the full content thereof in gallons, and in quarters of a gallon when the content thereof shall be less than eighty gallons, and with the true number of gallons, and the denomination and strength of the spirits contained therein, and every

such cask being full, or on ullage of one gallon or two gallons, and not otherwise, at the time of sending the same from the premises of such rectifier or compounder to the warehouse; and all such spirits when removed from the said premises for the purpose of being warehoused shall be accompanied with a lawful certificate, otherwise the same shall be forfeited, and the rectifier or compounder removing the same shall forfeit the sum of two hundred pounds, over and above all other penalties.

4. Before any spirits shall be received into any customs or excise warehouse, under the provisions of this Act, the rectifier or compounder intending to deposit the same shall deliver to the proper officer of customs or excise at such warehouse a warehousing entry or a note in writing, specifying the particulars of the spirits as set forth in the certificate accompanying the same, and the name of the rectifier or compounder, and of the place where the rectifying or compounding premises are situated from which the spirits were sent; and after the spirits have been duly examined and warehoused by such officer, he shall deliver to the rectifier or compounder a receipt, specifying the marks, number, and content in gallons of the several several casks received into such warehouse, the strength (as denoted by *Sykes's* hydrometer), of the spirits contained in the said casks respectively, the description of the spirits, and the total number of gallons at proof received with such certificate; and such officer shall forthwith despatch to the collector of excise of the collection in which the rectifying or compounding premises are situated, a certificate, setting forth the name of the rectifier or compounder, and the place where the rectifying or compounding premises are situated, together with the other particulars required to be inserted in such receipt as aforesaid; and the collector to whom such certificate is sent shall, on receiving three days notice in writing of the time when payment is required, and upon production to him of the receipt before mentioned, pay to the rectifier or compounder named in the certificate, or to any person authorized on his behalf, a drawback of the duties of excise on such spirits at the rate of duty charged and paid thereon, computed at the strength indicated by *Sykes's* hydrometer.

5. Compounded spirits warehoused by a rectifier or compounder under the provisions of this Act may be delivered for home consumption under the same rules and regulations and upon payment of the same duties of excise as are now by law applicable to and payable upon plain *British* spirits on delivery from customs or excise warehouses for home consumption, computed at the strength indicated by *Sykes's* hydrometer; and the duties upon compounded spirits delivered from any warehouse of customs shall be collected by the officers of customs, and accounted for and paid over in the same manner as is now by law directed in the case of duties on any other *British* spirits delivered out of customs warehouses for home consumption.

6. The rates and charges directed by the first section of the Act passed in the twenty-third and twenty-fourth years of her Majesty's reign, chapter one hundred and ten, to be paid for every one hundred pounds of customs duty payable on goods (not being tobacco)

delivered for home consumption from any warehouse in which the same have been deposited for the security of the duties of customs, shall be charged and paid for and in respect of every one hundred pounds of the excise duty which shall be payable upon the delivery for home consumption of spirits warehoused in any customs or excise warehouse under the provisions of this Act; provided that in the case of a delivery from an excise warehouse the same rates and charges shall be payable as would be payable if the delivery had been from a customs warehouse situated at the same place; and such rates and sums of money shall be deemed to be duties of customs or excise, according as the same shall become payable on spirits delivered from a customs or excise warehouse respectively.

7. A rectifier or compounder warehousing spirits in a customs warehouse as aforesaid may, on giving one day's notice to the officer in charge of such warehouse, add to such spirits any sweetening or colouring matter, or any other ingredient that he may think proper, subject nevertheless to such regulations and restrictions as the commissioners of customs may make from time to time: Provided always, that such spirits, after any matter or ingredient has been added as aforesaid, shall not be removed to any other warehouse, or be delivered out otherwise than for exportation or ships stores, directly from the warehouse, on board the vessel in which the same are to be exported, or used as stores.

8. No spirits of wine upon which a drawback of the duties of excise has been paid upon the deposit of the same in a customs warehouse shall be delivered for home consumption; and no rectified or compounded spirits which at the time of the commencement of this Act shall be in any customs warehouse shall be delivered for home consumption, unless the rectifier or compounder or proprietor of such last-mentioned spirits shall, in addition to the duties payable upon compounded spirits taken out of warehouse for home consumption under the provisions of this Act, repay to the commissioners of customs or inland revenue respectively the allowance of three pence per gallon paid on the deposit of such spirits under the statute in that behalf.

9. Any spirits which shall have been deposited in a customs warehouse under the provisions of this Act may be used in such warehouse for fortifying wines, or for any other purpose to which foreign or colonial spirits may be applied under the laws or regulations of the customs.

10. Compounded spirits deposited in an excise warehouse under the provisions of this Act may be vatted or racked under and subject to the same conditions, regulations, and penalties as are contained in or authorized by sections one hundred and nineteen and one hundred and twenty of the before-mentioned Act of the twenty-third and twenty-fourth years of her Majesty's reign, chapter one hundred and fourteen, and in sections five and six of the Act passed in the twenty-seventh year of the same reign, chapter twelve, in relation to the spirits mentioned in such sections respectively; and any compounded spirits deposited as aforesaid may be bottled, packed, and removed for exportation, or for use as ships stores, under and subject to the same conditions and regula-

tions as are contained in or authorized by the said last-mentioned Act.

11. The provisions, penalties, and forfeitures contained in and imposed by any Act in force at the time of the commencement of this Act, relating to the removal, warehousing, custody, and transfer in any excise warehouse of *British* spirits, and to the proprietor or tenant of any such warehouse for the deposit of *British* spirits, and to the proprietor of any *British* spirits deposited therein (except so far as the same shall be repealed or altered by or be repugnant to the provisions of this Act), shall extend and be applied to the removal, warehousing, custody, and transfer in any excise warehouse of compounded spirits and spirits of wine, and to the proprietor or tenant of any such warehouse in which the same respectively shall be deposited, and to the rectifier or compounder warehousing such spirits, who shall be deemed to be the proprietor thereof; and any bond entered into by the proprietor or tenant of any such warehouse as aforesaid for the deposit of *British* spirits, and in force at the time of the commencement of this Act, shall extend to and shall be available for any breach of the condition thereof committed in relation to any compounded spirits deposited in the warehouse in respect of which such bond shall have been given.

12. The allowance of threepence *per* gallon granted by section four of the Act passed in the twenty-third and twenty-fourth years of her Majesty's reign, chapter one hundred and twenty-nine, to any licensed rectifier, in respect of rectified spirits of the nature of *British* compounds not exceeding eleven degrees over proof as ascertained by *Sykes's* hydrometer, shall be payable to any licensed rectifier or compounder in respect of any compounded spirits deposited under the provisions of this Act in any warehouse of customs or excise, and exported to foreign parts, or used in a customs warehouse for fortifying wines, or for any other purpose to which foreign or colonial spirits may be applied under the laws or regulations of the customs; but such allowance shall not be paid until a certificate from the proper officer of customs shall be produced to the officer of excise appointed to pay the said allowance, that such spirits have been actually exported or used as aforesaid.

13. After the passing of this Act, no warehouse for the deposit of plain or compounded *British* spirits shall be approved by the commissioners of customs or inland revenue, except for the general accommodation of any traders or others having occasion to deposit spirits therein, nor unless the said commissioners of customs or inland revenue shall be of opinion that the dimensions of such warehouse shall be sufficient for the wants of the town where it is situated.

14. Sections one hundred and forty-one, one hundred and forty-two, one hundred and forty-three, one hundred and forty-four, and one hundred and forty-five of the Act passed in the twenty-third and twenty-fourth years of her Majesty's reign, chapter one hundred and fourteen, shall be and the same are hereby repealed, except as to anything done or which ought to be done, or as to any offence committed or any penalty or forfeiture incurred, before the commencement of this Act.

## CAP. XCIX.

An Act to confer on the County Courts a limited Jurisdiction in Equity. [5th July, 1865.]

## CAP. O.

An Act to transfer from the Admiralty to the Board of Trade Power and Duties relative to certain Harbours. [5th July, 1865.]

## CAP. OI.

An Act for authorising Transferable Debentures to be charged upon Land in Ireland. [5th July, 1865.]

1. *Extent of Act.*
2. *Short title.*
3. *Interpretation of terms.*
4. *Court may certify land to be chargeable with debentures.*
5. *Owner of land may issue debentures with sanction of Court.*
6. *Form and effect of debenture.*
7. *Transfer of debentures.*
8. *Coupons.*
9. *Debentures on unincumbered land.*
10. *Debentures on incumbered land.*
11. *Priority of debentures.*
12. *Debentures mutilated or injured.*
13. *Debentures destroyed or lost.*
14. *Limitation of principal and interest.*
15. *Debentures, personal or real estate.*
16. *Debenture to be a charge by way of mortgage.*
17. *Provisions as to the payment of money into Court.*
18. *Trusts affecting debentures.*
19. *When interest due, application may be made for sale.*
20. *Option to be paid out of sale.*
21. *Indemnity to trustees as to option.*
22. *When debenture due, application may be made for sale.*
23. *On consent new debenture may be issued.*
24. *Indemnity to trustees as to consent.*
25. *Owner of overdue debenture may be paid off.*
26. *In certain cases court may appoint guardian.*
27. *Court may dismiss proceedings.*
28. *Debenture holder to have no claim on court, &c.*
29. *Stamp duties.*
30. *Court may frame forms and rules.*
31. *General powers.*

‘WHEREAS it is expedient to authorize the creation of transferable debentures to be charged upon land in Ireland’ Be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this present Parliament assembled, and by the authority of the same as follows:—

1. This Act shall apply to Ireland only.
2. In any Act of Parliament, document, or proceeding, this Act shall be sufficiently designated as “The Land Debentures (Ireland) Act, 1865.”
3. In the construction of this Act, and of this section thereof, the following words and expressions shall have the meanings hereby assigned to them respec-

tively, unless there be something in the subject or context requiring a different construction:

The word “court” means the Landed Estates Court of Ireland:

The word “certificate” means a certificate declaring land chargeable with debentures under this Act:

The word “debenture” means a debenture charged upon land under this Act.

The word “person” extends to and includes a body politic or corporate, whether aggregate or sole, and any company as well as a private individual, and includes also the assignees of any bankrupt or insolvent:

The word “possession” includes the receipt of rents and profits:

The word “land” includes and extends to lands, tenements, and hereditaments held in fee-simple or fee-farm, also inappropriate rentcharges in lieu of tithe, and other perpetual rentcharges or annuities and fee-farm rents issuing out of land in Ireland, whether subject or not subject to any incumbrance:

The words “recorded lands” means any land the title to which shall be recorded under the “Record of Title Act (Ireland), 1865:”

The word “owner,” as applied to land or recorded land, means the person or persons entitled for his or their own benefit, at law or in equity, in possession, to a fee-simple, fee-farm, or perpetual interest in any land or recorded land as above defined:

The word “incumbrance” means any legal or equitable charge by mortgage, lien, judgment, decree, rule, or order, crown bond, recognisance, legacy, portion, trust, or otherwise, whereby any sum of money is secured upon or made payable out of any land, and includes also any easement, and any rentcharge, annuity, or other annual or periodical charge or payment, except only quit and crown rents, rentcharges in lieu of tithe, and charges imposed by any Act for the drainage or improvement of land:

And the word “incumbrancer” means any person entitled to an incumbrance, or to require the payment, discharge, or benefit thereof.

4. It shall be lawful for the owner of any recorded land to apply to the court to have such land declared chargeable with debentures under this Act. Thereupon the court shall investigate the title to the land and its existing state and circumstances. If upon such investigation it appears proper to grant the application, as to the whole or any part of the land, the court shall certify to that effect, and shall cause an entry of such certificate to be made in its books, in such form as it may deem fit.

5. After the entry of such certificate it shall be lawful for the owner of the land described therein, at any time and from time to time, to issue debentures under this Act pursuant to such certificate, on satisfying the court that no just rights of other parties which have accrued since the date of the certificate will be injuriously affected thereby. The sanction of the court to the issue of any debenture shall be signi-

fed in such manner as the court may by any general order authorise for that purpose.

6. A debenture, when issued under the sanction of the court, shall be well charged upon the land described in the certificate under which it is issued.

All debentures shall be in such form as the court may approve of; for such sums of money, bearing interest at such rate or rates, or not bearing interest, and payable or redeemable at such time or times, not being less than six months nor more than ten years from the date of the certificate, as to the court may seem fit.

7. Before sanctioning the issue of any debenture the court shall cause an entry thereof to be made in its books. After the issue of any debenture under the sanction of the court the owner of the land charged therewith may transfer such debenture, by means of a memorandum to that effect entered in the books of the court. Every transferee of a debenture may also transfer it by means of a memorandum in the books of the court. The transfer shall be in such form as the court may approve of. It shall vest in the person to whom it is made the ownership of the debenture, and all rights of action or suit which the transferor had at the time of such transfer. Every debenture shall be for a sum of not less than fifty pounds, and shall specify the place where the principal and interest shall be payable.

8. A debenture may have annexed to it coupons, entitling the bearer to the interest payable in respect thereof. The payment to the bearer of any coupon of the amount expressed therein shall be a full discharge to the person paying the same of all liability in respect of the coupon and the interest represented thereby.

9. In the case of unincumbered land no debenture shall be charged for such a principal sum as, either solely or together with the amount of the principal sum or sums charged on the same land by virtue of any other debenture or debentures, shall be more than ten times the sum which may appear to the court to be the yearly value of such land, not exceeding in any case the value fixed by the public valuation of lands in *Ireland*, having regard, amongst other matters, to any lease then affecting the same; nor shall there be reserved by any debenture upon such unincumbered land interest of such annual amount as, either solely or together with the annual interest reserved and charged by any other debenture or debentures upon the same land, shall exceed one-half of what may appear to the court to be its yearly value as aforesaid.

10. If the charge proposed to be created by debenture is to be puiſne or subject to any other incumbrance the court shall have regard thereto, and shall estimate such other incumbrance at its full value; and shall so limit the debentures which it may think fit to issue, that their amount shall be as amply secured as debentures would be if charged on unincumbered land to an amount not exceeding ten times the yearly value thereof.

11. Debentures upon any land shall be puiſne and subject to the several incumbrances specified or referred to in the certificate; also to quit or crown rents, to rentcharges in lieu of tithe, and to charges imposed

by any Act heretofore made for the drainage or improvement of land. With those exceptions, all debentures charged upon any land shall be the first incumbrances thereon. Where there shall be more than one debenture charged on the same land there shall be no priority as between the several debentures, notwithstanding any priority in the date or number thereof.

12. In case any debenture shall be given up to the court in a mutilated or injured state, it shall be lawful for the court to cancel such debenture, and to sanction the issue in its place of a new debenture, on such terms and the payment of such fees as the court may consider just.

13. In case it shall be proved to the satisfaction of the court that any debenture was destroyed or lost, it shall be lawful for the court to sanction the issue in its place of a duplicate debenture, marked as such, on such terms and the payment of such fees as the court may consider just; but without prejudice to the rights of any holder of the original debenture, by whom it may afterwards be actually produced. Such duplicate debenture shall be transferable by entry only in the books of the court.

14. Every debenture shall be deemed a sum of money charged upon land within the meaning of sections forty and forty-two of the Act of the third and fourth years of the reign of King *William the Fourth*, chapter twenty-seven, intituled *An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the remedies for trying the Rights thereof*, and shall be subject to the periods of limitation prescribed by those sections as to principal and interest respectively.

15. Every debenture, when vested in any person other than the owner of the land charged therewith, shall be deemed personal estate; and when vested in the owner of the land shall be deemed real estate.

16. A debenture shall be deemed to be a charge by way of mortgage, and the money payable under a debenture a mortgage debt within the operation of the Act passed in the seventeenth and eighteenth years of the Queen, intituled *An Act to amend the Law relating to the Administration of the Estates of deceased persons*.

17. On the application of the owner of the land charged with any debenture, and on being satisfied by affidavit or otherwise that the principal money has remained unpaid for thirty days by reason of failure on the part of the debenture holder to receive payment, or that there is other proper ground for the application, the court may, if and on such terms as it shall think fit, order that the applicant be at liberty, within seven days or such other time as it shall consider reasonable, to pay the principal due and the interest up to the date of such payment into the bank of *Ireland*, to the account of such matter as the court may direct, with the name of the owner of the land, but in trust to attend the orders of the court.

The payment of the money into bank pursuant to such order shall, as regards the owner of the land, be deemed a payment by him to the holder of the debenture.

18. The land charged, or the owner thereof, shall not be affected by any trust affecting a debenture, or

by any notice whatever of such trust; but the party entitled to the benefit of such trust may nevertheless proceed to establish the same as against the holder of the debenture.

19. The owner of any debenture to whom any interest shall remain due for the term of one month after the time appointed for the payment thereof shall be at liberty to apply to the court for a sale of the land charged with such debenture.

20. The court shall thereupon give to the holder of every debenture the option either to have the sum due for principal and interest on his debenture paid out of the proceeds of the sale, according to the priority of his demand, or to have the interest only paid, and to permit the principal to remain a charge on the unsold lands until the time appointed by the debenture for payment of the principal.

21. If the owner of any over-due debenture shall be a trustee, he shall not be deemed guilty of a breach of trust, nor be accountable for the manner in which he may exercise such option.

22. The owner of any debenture which shall remain unpaid at the time appointed by such debenture for payment of the principal thereof may apply to the court for a sale of the land charged therewith.

23. In case the owner of any debenture, and the owner of the land charged therewith shall so consent, it shall be lawful for the court to sanction the issue of a new debenture in place of such over-due debenture, which new debenture shall bear such interest and shall be payable at such time as shall be therein expressed.

24. If the owner of any over-due debenture shall be a trustee, he shall not be deemed guilty of a breach of trust by reason of his giving or withholding his consent to the acceptance of such new debenture.

25. In case the owner of any over-due debenture shall refuse to accept a new debenture in lieu thereof, the owner of the land charged therewith may pay off the same, and apply to the court to sanction the issue of a new debenture in lieu thereof.

26. If the owner of any land shall be under any disability, the court may appoint a guardian *ad litem* for such owner; and the consent and directions of such guardian shall have the same effect as if the owner had been under no disability, and had given such consent or directions.

27. The court shall have authority to dismiss any proceeding upon payment of interest and costs, or on such further or other terms as it may deem equitable.

28. Under no circumstances shall the holder of a debenture have any claim whatever upon the court, or upon any public funds in respect of any mistake or omission relating to the value, quality, or title of or to the estate, or otherwise howsoever.

29. Within the meaning of the several Acts in force relating to stamps, a certificate under this Act shall be deemed to be a deed not specifically charged nor expressly exempted. A debenture shall be deemed to be a mortgage made as a security for the amount of the principal money thereby secured, and a transfer of a debenture shall be deemed to be a transfer of a mortgage.

Provided that no debenture shall be transferred by means of a memorandum in the books of the court

until it shall have been stamped with the amount of stamp duty applicable in the case of mortgages given by public companies, as mentioned in the fourteenth section of the Act of the sixteenth and seventeenth years of the reign of her present Majesty, chapter fifty-nine.

30. The court may frame and promulgate all such forms, rules, and directions as it shall consider requisite or expedient for the assistance and guidance of persons acting under this Act; for annulling certificates; for regulating the transfer of debentures; for calling in or cancelling debentures, and for the issue of others, in case of forgery, abstraction, destruction, defacement, or other like inconvenience; for the giving of notices; and generally for facilitating or regulating the course of procedure, or giving effect to the purposes and provisions of this Act.

31. The court shall also have the same or the like powers and authorities for the purposes of this Act as it has for those of the Act or Acts of Parliament under which it is at present constituted, as well in relation to the appointment or removal and to the salaries of necessary officers, as also to the making of general orders, the conduct or costs of proceedings, the production of documents or examination of witnesses, and to any other matter requisite for effecting the objects of this Act.

#### CAP. CII.

An Act to amend an Act of the Twentieth and Twenty-first Years of her Majesty, for the Abatement of the Nuisance arising from the Smoke of Furnaces in *Scotland*, and an Act of the Twenty-fourth Year of her Majesty, to amend the said Act. [5th July, 1865.]

#### CAP. CIII.

An Act to provide for the Discontinuance of a separate Court of Quarter Sessions and a separate Gaol in the Borough of *Falmouth*. [5th July, 1865.]

#### CAP. CIV.

An Act to amend the Procedure and Practice in Crown Suits in the Court of Exchequer at *Westminster*, and for other purposes. [5th July, 1865.]

#### CAP. CV.

An Act to continue the Poor Law Board for a limited Period. [5th July, 1865.]

#### CAP. CVI.

An Act to authorize Loans in aid of the Construction of Docks in *British Possessions*. [5th July, 1865.]

#### CAP. CVII.

An Act to continue certain Turnpike Acts in *Great Britain*. [5th July, 1865.]



## CAP. OVIII.

An Act to confirm certain Provisional Orders under "The Local Government Act, 1858," relating to the Districts of *Nottingham, Rusholme, Plymouth, Redcar, Cardiff, Kingston-upon-Hull, Guildford, Ramsgate, Ryde, Workington, and Oxford*, and for other Purposes relative to certain Districts under the said Acts. [5th July, 1865.]

## CAP. CIX.

An Act for transferring the *Ulster Canal* to the Commissioners of Public Works in Ireland.

[5th July, 1865.]

6 G. 4, c. 193. 9 G. 4, c. 96. 10 G. 4, c. 109.  
1 & 2 W. 4, c. 56. 6 W. 4, c. 72. *Indenture of demise dated 26th March, 1851.*

- Sec. 1. *Canal and undertaking transferred to the commissioners of public works in Ireland.*  
2. *Commissioners of public works to be a corporation for purposes of this Act.*  
3. *Power to acquire water and lands, &c.*  
4. *Railway Companies Acts available.*  
5. *Commissioners may sell or demise.*  
6. *Sale or lease valid.*  
7. *Commissioners to possess the powers of the canal company.*  
8. *Application of tolls, rates, &c.*  
9. *Enactments in 1 & 2 W. 4, c. 33, extended to this Act.*

\* WHEREAS an Act was passed in the sixth year of the reign of his late Majesty King *George the Fourth*, being an Act for making and maintaining a navigable canal from *Lough Erne* in the County of *Fermanagh* to the River *Blackwater* near the village of *Charlmon* in the County of *Armagh*, which Act was amended by an Act of the session held in the ninth year of his said late Majesty, chapter ninety-six, and by a further Act of the session held in the tenth year of his said late Majesty, chapter one hundred and nine, and by a further Act of the session held in the second year of his late Majesty King *William the Fourth*, chapter fifty-six: and whereas considerable progress was made in the execution of the said canal, being commonly called the *Ulster Canal*, by the company authorized to be formed and incorporated by the said firstly-recited Act, under the style of the *Ulster Canal Company*: and whereas the commissioners acting in the execution of an Act made and passed in the fifty-seventh year of the reign of his late Majesty King *George the Third*, being an Act to authorise the issue of exchequer bills, and the advance of money to a limited amount out of the Consolidated Fund for the carrying on of Public works and fisheries in the United Kingdom, and of the subsequent Acts amending the same (which commissioners were then commonly called the exchequer loan commissioners), did on or about the twelfth day of *August* one thousand eight hundred and thirty-three, under the provisions of the said last-mentioned Acts or some of them, consent to advance to the said *Ulster Canal Company* a loan of one hundred and twenty thousand pounds, by six several instalments of twenty thousand pounds each: and whereas three of the said instalments were respec-

tively advanced to the said canal company on the twelfth day of *August* one thousand eight hundred and thirty-three, the fourteenth day of *April* one thousand eight hundred and thirty-five, and the thirteenth day of *October* one thousand eight hundred and thirty-five, and the repayment thereof secured to the said loan commissioners by three several indentures of mortgage, under the common seal of the said canal company, bearing date respectively the twelfth day of *August* one thousand eight hundred and thirty-three, the fourteenth day of *April* one thousand eight hundred and thirty-five, and the thirteenth day of *October* one thousand eight hundred and thirty-five, whereby, for the considerations therein mentioned respectively, the said canal company conveyed to *John Strettel Brickwood*, the secretary of the said commissioners, all the rates and tolls of the said canal receivable under the said Acts authorizing and enabling the construction of the same and all the freehold and leasehold tenements and premises of the said company, subject to redemption on payment by the said company of the said principal sums so advanced, and of all interest thereon, by such instalments as were thereby provided: and whereas an Act was passed in the sixth year of his said late Majesty King *William the Fourth*, being an Act to amend and enlarge the powers and provisions of the several Acts for making and maintaining the *Ulster canal* in the counties of *Fermanagh, Monaghan, and Armagh in Ireland*, and thereby the said canal company was empowered to make certain deviations from the line or course of the said canal, and to make and maintain a certain reservoir at *Quigalough* in the county of *Monaghan* for the purpose of supplying the said canal with water, with aqueducts, pipes, and other works necessary for such reservoir, and for the purpose of such deviations and of such reservoir and other works; and the said company was empowered to acquire other lands as therein provided; and it was thereby enacted, that all powers, authorities, lands, works, and property whatsoever which should become vested in the said company by virtue of the said Acts should form part of the premises and property so assigned and conveyed by way of mortgage to the said *John Strettel Brickwood* as aforesaid: and whereas three several further sums of twenty thousand pounds each were advanced by the said loan commissioners to the said canal company, and by three several further indentures of mortgage of the said canal and undertaking, bearing date respectively the seventh day of *June* one thousand eight hundred and thirty-six, the eleventh day of *October* one thousand eight hundred and thirty-six, and the ninth day of *May* one thousand eight hundred and thirty-seven, the repayment of the said three several last-mentioned sums was secured to the said commissioners, payable by instalments as therein respectively provided: and whereas by virtue of the provisions of the said six several indentures of mortgage it was provided that the said six several sums of twenty thousand pounds should be repaid by the payment of six several sums of five thousand pounds each on the twelfth day of *August* one thousand eight hundred and thirty-eight, and by fifteen subsequent equal yearly instalments on the twelfth of *August* in the fifteen subsequent years: and whereas

by a certain indenture of mortgage bearing date the thirty-first day of *October* one thousand eight hundred and forty, and made between the said *Ulster Canal Company* of the first part, *Sir John Fox Burgoyne, Brooke, Taylor, Otley, and John Radcliffe*, esquires, commissioners of public works in *Ireland*, of the second part, and *Henry Richard Paine*, then secretary to the said commissioners of public works, of the third part, in consideration of a further sum of ten thousand pounds agreed to be advanced by the said commissioners of public works to the said *Ulster Canal Company*, all the said canal and undertaking, and the rents and tolls thereof, and all the several hereditaments and premises in the said indenture of mortgage particularly described, and acquired by the canal company for the purpose of their said undertaking, were conveyed to the said *Henry Richard Paine* as such secretary as aforesaid (subject nevertheless to the said securities of the said loan commissioners), by way of mortgage, and in order to secure the repayment of the said sum of ten thousand pounds by certain half-yearly instalments as therein provided: and whereas by a certain indenture of demise bearing date the twenty-sixth day of *March* one thousand eight hundred and fifty-one, and made between the said *John S. Brickwood* of the one part, and *William Dargan* of the other part, after reciting the said six several indentures of mortgage firstly herein-before mentioned, and reciting, as the fact was, that the whole of the said sum of one hundred and twenty thousand pounds was due and unpaid, the said *John Street Brickwood*, as such secretary as aforesaid, and by virtue of the statutes enabling the said commissioners in that behalf, demised all the said canal and undertaking, and the rates and tolls thereof, to the said *William Dargan*, for the term of fourteen years, computed from the first day of *January* one thousand eight hundred and fifty-one, subject to the yearly rent of four hundred pounds, and to a further rent of twenty pounds for every one thousand tons of traffic on the said canal exceeding twenty thousand tons, in manner therein mentioned: and whereas the said lease expired by effluxion of time on the first day of *January* one thousand eight hundred and sixty-five: and whereas no part of the said sum of one hundred and twenty thousand pounds so advanced by the said public loan commissioners, or of the said sum of ten thousand pounds advanced by the said commissioners of public works, has ever been repaid, but the same, together with large arrears of interest thereon respectively, still remain due and owing, and the whole amount so due on foot of the said securities greatly exceeds the value of the said canal and undertaking and premises so subject to the said mortgages, and said canal has long since ceased to be occupied or worked by the said canal company, and the same is now in possession of the said public works loan commissioners: and whereas the said canal and works have fallen into disrepair in many places, and it is expedient that provision should be made for the repair thereof, and it may be necessary to acquire further rights in water for the supply of the same, and also to construct further works in connexion with the said canal, and it is expedient to transfer the said canal and undertaking and all property thereof to the commissioners of public works in *Ireland*, for the purposes

herein-after expressed: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. All the said canal called the *Ulster* canal, and all the undertaking of the same, together with all the powers, privileges, and authorities vested in the said *Ulster Canal Company* by any of the Acts constituting or enabling such company, whether of levying and receiving tolls, rates, or otherwise, and all the works and property of the said company, and all lands, tenements, and hereditaments at any time heretofore acquired by or vested in the same company, together with all the appurtenances thereof, and all the estate, right, title, and interest of the said company in or to the same, shall, from and after the passing of this Act, be vested in the commissioners of public works in *Ireland*, freed and discharged from all estates, charges, and incumbrances heretofore made, permitted, or suffered by the said canal company.

2. The said commissioners of public works, for the purposes of this Act, shall be incorporated under the style of the commissioners of public works in *Ireland*, and by that name shall have perpetual succession and a common seal, to be by them made, and from time to time altered, as they shall think fit.

3. It shall be lawful for the said commissioners, with the sanction of the lords commissioners of her Majesty's treasury, to acquire any waters, lands, tenements, and hereditaments which may be necessary or convenient for the said canal, either by purchase or by way of lease.

4. For the purpose of empowering the said commissioners to purchase or take any such waters, lands, or hereditaments, and of enabling all corporations, bodies politic, and other persons to convey the same, and for the purpose of ascertaining the purchase money or compensation to be paid for the same, and the disposition of such purchase money or compensation, all and every the statutory enactments now in force, and enabling any railway company in *Ireland* to acquire lands for the purpose of its undertaking, shall be deemed to be incorporated with this Act, and the said commissioners shall be deemed the promoters, and this Act shall be deemed the special Act, within the meaning of the said statutory enactments.

5. It shall be lawful for the said commissioners of public works, with the sanction of the lords commissioners of her Majesty's treasury, to sell and convey or lease the said canal and undertaking, and all the lands, tenements, waters, and other matters and things appurtenant to the same, for such price, or, in the case of any such lease, for such term of years, at such rent, and with or without the payment of any fine, and generally upon such terms as the said commissioners of public works may think proper; and every conveyance or lease of the said canal and undertaking in pursuance of this Act shall be effectual to transfer to the purchaser or lessee all the premises expressed to be thereby conveyed or demised, for all the estate purporting to be thereby transferred, freed and discharged of all prior estates, charges, and incumbrances created or suffered by the said canal company or their assigns.

6. Any such sale and conveyance or lease, (as the

case may be) may be made to any person or persons, or to any public company which may be empowered to purchase the said canal and premises, or to take the same on lease.

7. The said commissioners of public works, so long as they may manage the said canal, and every such person or persons or public company as aforesaid, from and after such purchase or lease, and so long as the said canal and premises shall be vested in such purchasers or lessees, shall possess all the rights, authorities, and privileges, and be subject to all the liabilities, which the said canal company would have possessed or would have been subject to had such canal company continued to possess and manage the said canal and premises.

8. All sums of money received by the said commissioners of public works in respect of any such sale or lease as aforesaid, and the surplus of all monies received by them for rates, tolls, and profits in the management of the said canal, and which shall remain after defraying the current expenses thereof, shall be applied in the first place to the payment of all sums due for principal and interest on foot of the advances of public money so made to the said canal company in the manner herein-before mentioned, and the interest due thereon, and in the next place to the payment of all sums advanced and expenses incurred by virtue of this Act, with interest thereon at the rate of four *per centum per annum* from the time such advances shall have been made or expenses incurred, or in such other manner as the lords commissioners of her Majesty's treasury may from time to time direct.

9. And be it enacted, that the several enactments contained in an Act passed in the session of Parliament holden in the first and second years of the reign of his late Majesty King William the Fourth, intituled *An Act for the Extension and Promotion of Public Works in Ireland*, which affect or relate to any action or suit to be commenced against the commissioners for the execution of the last recited Act, or any person or persons, for anything done by virtue of or in pursuance of the last-recited Act, or any proceedings in any such action or suit, or any limitation of time for the commencement thereof, or any costs thereof, or any evidence to be given therein, or any notice of action or suit, or satisfaction or tender thereof, or any action or suit to be commenced by the said commissioners, or any proceedings therein, or any abatement or discontinuance of any such action or suit, or to the court in which, or to the terms or conditions on which, any such action or suit shall be brought against the said commissioners, collectively or individually, shall so far as the same are applicable, be held to apply to and extend to any action or suit to be commenced against the commissioners of public works in Ireland, or any person or persons, for anything done by virtue of, or in pursuance of, or on account of this Act, or to any proceedings in or relating to any such action or suit.

#### CAP. CX.

An Act to confirm a certain Provisional Order under "The Local Government Act, 1858," relating to the *Hastings District*. [5th July, 1865].

#### CAP. CXI.

An Act to regulate the disposal of money and effects under the control of the Admiralty, belonging to deceased officers, seamen, and marines of the Royal Navy and marines, and other persons.

[5th July, 1865.]

Sec. 1. *Short title.*

2. *Interpretation of terms.*

3. *Residue belonging to deceased officers, seamen, or marines.*

4. *Residue belonging to deceased persons in civil service of navy.*

5. *Residue exceeding £100 to be paid to representative.*

6. *Residue not exceeding £100 to be paid to representative, if any.*

7. *Power to require certificate, &c. before representation.*

8. *Residue not exceeding £100 and no representation, power to pay it to widow, &c.*

9. *Admiralty not bound to pay to nominee of representative.*

10. *Admiralty not to dispose of residue for three months, &c.*

11. *Provision for payment of debts out of residue.*

12. *Saving for existing claims.*

13. *Provision as to unsold effects, &c.*

14. *Disposal of medals and decorations.*

15. *Exemptions from duty.*

16. *Validity of payments, sales, &c. under this Act.*

17. *Her Majesty may make orders in council.*

18. *Orders in council to be published in the London Gazette.*

19. *Commencement of Act.*

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as The Navy and Marines (Property of Deceased) Act, 1865.

2. In this Act—

The term "the Admiralty" means the Lord High Admiral of the United Kingdom, or the Commissioners for executing the office of Lord High Admiral:

The term "officer" means a commissioned, warrant, or subordinate officer, or assistant engineer, in her Majesty's naval or marine force:

The term "seaman or marine" means a petty officer or seaman, non-commissioned officer of marines or marine, or other person forming part, in any capacity, of the complement of any of her Majesty's vessels, or otherwise belonging to her Majesty's naval or marine force (not being an officer within the meaning of this Act), or a petty officer or man of the royal naval reserve or naval coast volunteers:

The term "representation" includes probate and letters of administration, with or without will annexed:

The term "representative" means any person taking out representation.

The term "person" includes a corporation.

3. On the death of any person being or having been an officer, seaman, or marine, the amount (if any) to the credit of the deceased in the books of the Admiralty, in respect of sale of effects, arrears of pay, wages, prize money, bounty money, grants, or other allowances in the nature thereof, or other money payable by the Admiralty (which amount is hereafter in this Act, with reference to every such case, called the residue), shall be disposed of according to the provisions of this Act.

4. On the death of any person being or having been employed in any of her Majesty's dockyards or other naval establishment, or in any of the civil departments of the navy, or entitled to an allowance from the Compassionate Fund, or of any widow entitled to a pension on the establishment of the navy, the amount (if any) due by the Admiralty (which amount is hereafter in this Act, with reference to every such case, called the residue), shall be disposed of according to the provisions of this Act.

5. Where the residue exceeds one hundred pounds the Admiralty shall dispose thereof by paying it to the representative of the deceased.

6. Where the residue does not exceed one hundred pounds it shall not be necessary for any purpose that representation to the deceased be taken out; but in any case the Admiralty may, if they think fit, require representation to be taken out, and, if on that requisition or otherwise, representation is taken out, then the Admiralty shall dispose of the residue by paying it to the representative.

7. In the case, nevertheless, of a seaman or marine, the Admiralty shall not be bound to pay the residue (whatever be its amount) to the representative of the deceased, if representation has been taken out either by a creditor as such, or by any person without such certificate respecting the title to representation having been first obtained from the Admiralty, or such other regulations or conditions having been duly observed or performed, as is or are prescribed by order in council; and in any such case the Admiralty shall dispose of the residue in pursuance of this Act as if representation had not been taken out.

8. Where the residue does not exceed one hundred pounds, and representation is not taken out, then, subject to the other provisions of this Act, the Admiralty shall, as soon as may be, dispose of the residue as follows:—

- (1.) They shall, if they think fit, pay the residue to any person showing herself or himself to their satisfaction to be entitled to take out representation to the deceased (otherwise than as a creditor)—to the end that the residue may be applied by the person to whom it is so paid in a due course of administration; and the same shall be so applied accordingly (for which application the Admiralty may require such security as they think fit):
- (2.) Or else the Admiralty shall, if they think fit, pay to the persons (if any) beneficially interested in the residue their respective shares thereof:
- (3.) And in cases where the foregoing provisions

of the present section do not apply, and the amount of the residue appears to the Admiralty insufficient to cover the expense of representation, the Admiralty shall dispose of the residue in manner prescribed by order in council.

9. In the case of a seaman or marine, the Admiralty shall not pay the residue or any part thereof to any nominee of the representative of the deceased or of a person entitled to take out representation to the deceased, whether such nominee be appointed by power of attorney or otherwise, unless in special circumstances it appears to the Admiralty safe and proper to make such payment to any such nominee.

10. Notwithstanding anything in this Act, the Admiralty shall not in any case dispose of the residue or any part thereof otherwise than by paying the same to the representative of the deceased until after the expiration of three months from the receipt by the Admiralty of notice of the death, unless in special circumstances it appears to the Admiralty safe and proper to dispose of the residue or any part thereof at an earlier time.

11. In the case of a seaman or marine, where representation is not taken out, the Admiralty shall before disposing of the residue or any part thereof satisfy out of the residue (as far as the same will extend) any debt of the deceased of which they have notice, subject to the following conditions:

First.—That the debt accrued due within three years before the death:

Second.—That payment of it is claimed within two years after the death:

Third.—That the claimant proves the debt to the satisfaction of the Admiralty:

Fourth.—That six months have elapsed from the receipt by the Admiralty of notice of the death, and no person has shown herself or himself to the satisfaction of the Admiralty to be entitled to take out representation to the deceased.

In any such case any person claiming to be a creditor of the deceased shall not be entitled to obtain payment of his debt out of any money being under this Act in the hands of the Admiralty by any means or proceeding whatever except by means of a claim lodged with the Admiralty and proceedings thereon under and according to this Act.

12. Nothing in this Act shall prejudicially affect the claim of any creditor in respect of a debt incurred before the commencement of this Act.

13. The provisions of this Act relative to the residue, in the case of a deceased officer, seaman, or marine, shall extend and apply, *mutatis mutandis*, to unsold effects and money (if any) in charge of the Admiralty.

14. Medals and decorations belonging to an officer, seaman, or marine dying on service shall not be considered as comprised in the personal estate of the deceased with reference to the claims of creditors, or for any of the purposes of administration under this Act or otherwise; and, notwithstanding anything in this or any other Act, the same shall be held and disposed of according to regulations prescribed by order in council.

15. Where the residue does not exceed one hun-

dred pounds and is administered and disposed of under this Act without representation being taken out, it shall not be liable to the payment of any duty; and if in any case the Admiralty under this Act require security by bond for the application of a residue in due course of administration, the bond shall be exempt from stamp duty where an ordinary administration bond relative to the same residue would be so exempt; but this provision shall not affect any exemption from duty existing independently hereof.

16. Every payment or application of money, and every sale or other disposition of property, made by the Admiralty in pursuance of this Act, or of any order in council for carrying this Act into effect, shall be good and valid as against all persons whomsoever; and the Admiralty shall be by virtue of this Act absolutely discharged from all liability in respect of the money or other property so paid, applied, or disposed of.

17. Her Majesty in council may from time to time make such orders in council as may seem meet for the better execution of any of the purposes of this Act.

18. Every order in council under this Act shall be published in the *London Gazette*, and shall be laid before both Houses of Parliament within thirty days after the making thereof, if Parliament is then sitting, and if not then within thirty days after the next meeting of Parliament.

19. This Act shall commence on such day, not later than the first day of *January*, one thousand eight hundred and sixty-six, as her Majesty in council thinks fit to direct.

Any order in council for the better execution of any of the purposes of this Act may nevertheless be made before that day, but not so as to commence before it.

#### CAP. CXII.

An Act to repeal Enactments relating to Powers of the Commissioners of the Admiralty, and to various Matters under the Control of the Admiralty.

[5th July, 1865.]

#### CAP. OXIII.

An Act to authorize the Payment of Retiring Pensions to Colonial Governors. [5th July, 1865.]

1. *Definition of "colony."*
2. *Full rate of pension as herein stated.*
3. *Reduced rate.*
4. *When full rate may be granted.*
5. *When reduced rate may be granted.*
6. *Permanent civil service not to be counted under this or any other Act.*
7. *Deductions from pensions on account of half pay, &c.*
8. *Advancement to higher rates of pension.*
9. *Person receiving pension bound to accept employment till of age of sixty; not to relinquish it till sixty-five.*
10. *As to pension of person also employed in civil service.*
11. *What to be deemed employment in civil service.*

12. *Secretary of state to determine when an officer is an administration of government.*

13. *Statement of persons to be laid before Parliament.*

‘WHEREAS it is expedient that retiring pensions should be granted in certain cases to officers who have administered the government of her Majesty’s colonial possessions:’ Be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. In this Act the term “colony” includes any plantation, island, or other possession within her Majesty’s dominions, exclusive of the United Kingdom of *Great Britain* and *Ireland*, and of the islands being immediate dependencies thereof, and exclusive of *India* as defined by the Act of Parliament of 1858 “for the better government of *India*.”

2. The full rate of pension herein-after referred to shall be as follows, that is to say:

In the case of officers who shall for at least four years have administered the government of any colony or colonies in which the salary of the governor is not less than five thousand pounds, one thousand pounds:

In the case of officers who shall for at least four years have administered the government of any colony or colonies in which the salary of the governor is not less than two thousand five hundred pounds, seven hundred and fifty pounds:

In the case of officers who shall for at least four years have administered the government of any colony or colonies in which the salary of the governor is not less than one thousand two hundred pounds, five hundred pounds.

In other cases, two hundred and fifty pounds.

3. The reduced rate of pension herein-after referred to shall in all cases be two thirds of the full rate.

4. One of her Majesty’s principal secretaries of state may, by writing under his hand, grant the full rate of pension to any person who, being of the age of sixty, shall have administered the government of any colony or colonies, for periods amounting in the whole to eighteen years, or who, being of the age aforesaid, shall have administered such government or governments for periods amounting in the whole to ten years, and shall have been employed in the whole either in such administration or in the permanent civil service of her Majesty, for periods amounting in the whole to twenty-five years, or to any person who, having administered such government or governments, for periods amounting in the whole to fifteen years, shall have established, to the satisfaction of such secretary of state, that he is incapable, from infirmity of mind or body contracted while administering his government, of discharging the duties of any office in the public service, and that such infirmity is likely to be permanent.

5. Such secretary of state may, by such writing as aforesaid, grant the reduced rate of pension to any person being of the age of sixty, who, after having attained the age of forty, shall have administered the government of any colony or colonies, for periods

amounting in the whole to twelve years, or to any person being of the age of sixty, who, after having attained the age of forty, shall have administered such government or governments for periods amounting in the whole to eight years, and shall have been employed in the whole, either in such administration or in the permanent civil service of her Majesty, for periods amounting in the whole to twenty years, or to any person who, having administered such government or governments for periods amounting in the whole to ten years, shall have established to the satisfaction of such secretary of state that he is incapable, from infirmity of mind or body contracted while administering his government, of discharging the duties of any office in the public service, and that such infirmity is likely to be permanent.

6. No person whose claim to a pension under the provisions of this Act is founded in part upon his employment in the permanent civil service of her Majesty shall be entitled to claim a superannuation allowance, in respect of the same employment, under the provisions of any other Act of Parliament.

7. In case any person to whom a pension shall have been granted under the provisions of this Act shall be or become entitled to any half pay, salary, or other emolument from any public revenue raised, or in respect of any public services performed within her Majesty's dominions, his pension shall be reduced by half the amount of such half pay, salary, or emolument.

8. In case any person to whom a pension shall have been granted under the provisions of this Act shall, by reason of his re-employment become eligible for any higher rate of pension than that already granted him, one of her Majesty's principal secretaries of state may, by such writing as aforesaid, grant to him such higher rate of pension.

9. In case any person having administered the government of any colony and not being of the full age of sixty, shall be called upon by her Majesty to administer the government of any colony not being of a lower class than that on which his rate of pension has been, or in case of his retirement on reaching the age of sixty would be calculated, and not being incapable from infirmity of mind or body of administering such government, shall refuse to administer the same; or if any such person, not being of the full age of sixty-five, shall relinquish such government without the permission of her Majesty, or shall neglect or decline to execute the duties thereof satisfactorily, the said secretary of state may by writing under his hand declare that such person has forfeited all claims to any pension under this Act, and such claim shall thereupon be forfeited accordingly.

10. In case any person shall have administered the government of any colony or colonies, and shall likewise have been employed in the permanent civil service of her Majesty, but shall not have become entitled to any pension under the preceding clauses of this Act, the number of years passed in the government of such colony or colonies shall, for the purpose of computing any superannuation allowance to be granted to such person under the Superannuation Act, 1859, be taken to have been passed in the permanent civil service of her Majesty, and at the rate of

salary last received by such person in respect of his employment in such permanent civil service.

11. Any person claiming a pension shall, for the purposes of this Act, be taken to have been employed in the permanent civil service of her Majesty while holding any office which at the time of his claiming such pension would entitle the holder thereof to superannuation allowance under the Superannuation Act, 1859.

12. One of her Majesty's principal secretaries of state may, with the consent of the Lords Commissioners of the Treasury, from time to time determine under what conditions and to what extent any officer shall be deemed for the purposes of this Act to have been administering the government of any colony while administering the same provisionally, or while absent from his government with permission of her Majesty; and for the purposes of this Act the commission issued under the great seal of the territory of *New South Wales* for the government of the district of *Port Philip* shall be taken to have constituted that district a colony.

13. All pensions granted under this Act shall be paid out of such monies as Parliament may provide for that purpose, and a statement of all such pensions shall be laid annually before Parliament.

#### CAP. CXIV.

An Act for confirming, with Amendments, certain Provisional Orders made by the Board of Trade under The General Pier and Harbour Act, 1861, relating to *Eastbourne, Clevedon, Heme Bay, Llandrillo, and Pensarn*. [5th July, 1865.]

#### CAP. CXV.

An Act to amend The Naval Discipline Act, 1864. [5th July 1865.]

1. *Amendment of Act of 1864 as to minimum term of penal servitude.*
2. *Short title.*

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same as follows:

1. With respect to any sentences of penal servitude passed after the passing of this Act under The Naval Discipline Act, 1864, paragraph (4.) of section forty-nine of that Act shall have effect as if the words "not less than five years" were substituted therein for the words "not less than three years."

2. This Act may be cited as The Naval Discipline Act Amendment Act, 1865.

#### CAP. CXVI.

An Act to explain the Foreign Jurisdiction Act. [5th July 1865.]

1. *Meaning of "British colony" in 6 & 7 Vict. c. 94.*
2. *Short title.*

BE it declared and enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in

this present Parliament assembled, and by the authority of the same, as follows:

1. In the Foreign Jurisdiction Act (that is to say, the Act of the session of the sixth and seventh years of her Majesty's reign, chapter ninety-four, "to remove doubts as to the "exercise of power and jurisdiction by her Majesty within divers countries and places out of her Majesty's dominions, and to render the same more effectual,") the term "*British colony*" includes and shall be construed to include any of her Majesty's possessions out of the United Kingdom.

2. This Act may be cited as The Foreign Jurisdiction Act Amendment Act, 1865.

#### CAP. CXVII.

An Act to regulate the Appointment of a Vicar or incumbent to the Vicarage of the Parish Church of *Rochdale* in the County of *Lancaster* and in the Diocese of *Manchester*. [5th July, 1865.]

#### CAP. CXVIII.

An Act to continue and amend the Peace Preservation (*Ireland*) Act, 1856. [5th July, 1865.]

- Sec. 1. *Printed copies of every proclamation, &c. to be issued under last-mentioned Act to be posted, &c.*
2. *Production of Dublin Gazette containing publication of any proclamation to be conclusive evidence of facts, &c.*
3. *Sect. 1 of 23 & 24 Vict. c. 138, repealed.*
4. *Copy of proclamation to be laid before Parliament.*
5. *19 & 20 Vict. c. 36, as amended by this Act continued.*

‘WHEREAS by an Act passed in the twenty-fifth and twenty-sixth years of her Majesty, chapter twenty-four, the "Peace Preservation (*Ireland*) Act, 1856," as the same is amended by the Act passed in the twenty-third and twenty-fourth years of her Majesty, chapter one hundred and thirty-eight, was continued in force until the first day of *July* one thousand eight hundred and sixty-four, and until the end of the then next session of Parliament: and whereas it is expedient that the said "Peace Preservation (*Ireland*) Act, 1856," should be further amended and continued for a limited time:’ be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The printed copies of every proclamation, abstract, and notice to be issued under the provisions of the said last-mentioned Act shall be posted on or near to the doors of all places of public worship and of every police station and barrack within the district named in such proclamation by some one or more of the constables or sub-constables of the constabulary force; and as soon as may be after any constable or sub-constable shall have posted any of such printed copies within such district, or any part thereof, he shall verify such posting by a solemn declaration annexed to such printed copy, to be made before a jus-

tice of the peace in the form or to the effect specified in the Schedule to this Act annexed; and such constable or sub-constable shall deposit such printed copy and declaration annexed thereto with the clerk of the peace for the county or county of a city within which such district or any part thereof is situate; and the said clerk of the peace shall sign and date the same, and shall preserve the same amongst the records of the said county or county of a city; and the same, when produced from the custody of such clerk of the peace, shall be conclusive evidence that the said proclamation, abstract, and notice was duly posted within the district or part of the district in said declaration mentioned.

2. The production of a printed copy of the *Dublin Gazette*, purporting to be printed and published by the Queen's authority, containing the publication of any proclamation, warrant, order, or notice under the said recited Act or this Act, shall be conclusive evidence of all such facts and circumstances as were or shall be necessary to authorise the issuing of any such proclamation, warrant, order, or notice; and every such proclamation, warrant, order, or notice shall be deemed and taken in all such courts respectively, to all intents and purposes whatsoever, to have been issued in conformity with the said recited Act and this Act.

3. From and after the passing of this Act the first section of the Act passed in the session of Parliament held in the twenty-third and twenty-fourth years of the reign of her present Majesty, chapter one hundred and thirty-eight, shall be and the same is hereby repealed.

4. A copy of every proclamation issued under the authority of this Act shall be laid before each house of Parliament within fourteen days of the date of the same, if Parliament be then assembled, and if not then within fourteen days of the next subsequent meeting of Parliament.

5. The "Peace Preservation (*Ireland*) Act, 1856," as the same is amended in this Act, shall be and continue in force until the first day of *July* one thousand eight hundred and sixty-six, and until the end of the then next session of Parliament.

#### SCHEDULE.

##### FORM OF SOLEMN DECLARATION.

I *A.B.* (constable or sub-constable) do solemnly and sincerely declare, that on the            day of            and [*here insert the dates*], I posted on or near to the doors of all places of public worship and of every police station and barrack within that part of the district named or referred to in the within (proclamation or notice), known and called by the name of [*here insert the name of the barony, half-barony, townland, &c.*], true copies of the annexed (proclamation or notice and abstract); and I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of an Act passed in the sixth year of the reign of his Majesty King *William* the Fourth, chapter sixty-two, for the abolition of unnecessary oaths.

(Signed) *A.B.*

Made and subscribed before me this            day of            , in the year 186            .

(Signed) *C.D.*, Justice of the Peace.



## CAP. OXIX.

An Act for continuing various expiring Acts.

[5th July, 1865.]

Sec. 1. *Short title.*2. *Continuance of Acts in Schedule.*

‘WHEREAS the several Acts mentioned in the first column of the Schedule hereto are wholly, or as to certain provisions thereof, limited to expire at the times specified in respect of such Acts in the fourth column of the said schedule: and whereas it is expedient to continue such Acts, in so far as they are temporary in their duration, for the times mentioned

in respect of such Acts respectively in the fifth column of the said Schedule:’ be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as the “Expiring Laws Continuance Act. 1865.”

2. The Acts mentioned in column one of the said Schedule, and the Acts, if any, amending the same, shall, in so far as such Acts or any provisions thereof are temporary in their duration, be continued until the times respectively specified in respect of such Acts in the fifth column of the said Schedule.

## SCHEDULE.

1. Original Acts.	2. Amending Acts.	3. How far temporary.	4. Time of Expiration of temporary Provisions.	5. Continued until
3 & 4 Vict. c. 89. Poor-rates, Stock in Trade, Ex- emption.	- - -	Whole Act -	1st October, 1865, and end of then next Session. (26 & 27 Vict. c. 95.)	1st October, 1866, and end of then next Session.
4 & 5 Vict. c. 59. Application of Highway Rates to Turnpike Roads.	- - -	Whole Act -	1st October, 1865, and end of then next Ses- sion. (23 & 24 Vict. c. 67).	1st October, 1870, and end of then next Session.
10 Vict. c. 82. Landed Property Improvement (Ireland).	18 & 14 Vict. c. 31.	As to Powers of Com- missioners.	1st January, 1865, and end of then next Ses- sion. 26 & 27 Vict. c. 95.)	1st January, 1866, and end of then next Session.
10 & 11 Vict. c. 90. Poor Laws (Ire- land).	14 & 15 Vict. c. 68.	As to Appointment of Commissioners, &c.	23rd July, 1865, and end of then next Session. (27 & 28 Vict. c. 84.)	23rd July, 1866, and end of then next Session.
10 & 11 Vict. c. 98. Ecclesiastical Ju- risdiction.	- - -	As to Provisions con- tinued by 21 & 22 Vict. c. 50.	1st August, 1865, and end of then next Session. (27 & 28 Vict. c. 84.)	1st August, 1867, and end of then next Session.
11 & 12 Vict. c. 82. County Cess (Ire- land).	20 & 21 Vict. c. 7.	Whole Act -	1st August, 1865, and end of then next Session. (27 & 28 Vict. c. 84.)	1st August, 1866, and end of then next Session.
11 & 12 Vict. c. 107. Sheep and Cattle diseased.	16 & 17 Vict. c. 62	Whole Act -	1st August, 1865, and end of then next Session. (27 & 28 Vict. c. 84.)	1st August, 1866, and end of then next Session.
14 & 15 Vict. c. 104. Episcopal and Capitular Es- tates Manage- ment.	17 & 18 Vict. c. 116. 22 & 23 Vict. c. 46. 23 & 24 Vict. c. 124.	Whole Act -	1st January, 1865, and end of then next Session. (27 & 28 Vict. c. 84.)	1st January, 1866, and end of then next Session.
17 & 18 Vict. c. 117. Incumbered Es- tates (West Indies).	21 & 22 Vict. c. 96. 25 & 26 Vict. c. 45. 27 & 28 Vict. c. 108.	As to Appointment of Commissioners.	2nd August, 1865 - (27 & 28 Vict. c. 84.)	2nd August, 1867, and end of then next Session.
24 & 25 Vict. c. 109. Salmon Fishery (England) Act.	- - -	As to Appointment of Inspectors, s. 31,	1st October, 1865 - (27 & 28 Vict. c. 84.)	1st October, 1866, and end of then next Session.
25 & 26 Vict. c. 97. Salmon Fisheries (Scotland) Act.	26 & 27 Vict. c. 50. 27 & 28 Vict. c. 118.	As to Powers of Com- missioners, &c.	1st January, 1866 -	1st January, 1867.
26 & 27 Vict. c. 114. Salmon Fisheries (Ireland).	- - -	As to duration of Of- fice of the Special Commissioners for Irish Fisheries, and all powers, rights, and privileges per- taining thereto.	28th July, 1865, and end of then next Session.	28th July, 1866, and end of then next Session.
27 & 28 Vict. c. 92. Public Schools.	- - -	Whole Act. -	1st August, 1865 -	1st August, 1866.

## CAP. CXX.

An Act to amend the Acts relating to the Preservation of *Harwich Harbour*.

[5th July, 1865.]

## CAP. CXXI.

An Act to amend "The Salmon Fishery Act, 1861."

[5th July, 1865.]

## CAP. CXXII.

An Act to amend the Law as to the Subscriptions and Declarations to be made and Oaths to be taken by the Clergy of the Established Church of *England and Ireland*.

[5th July, 1865.]

Sec. 1. *Declaration of assent.*

2. *The declaration against simony.*
3. *Stipendiary curate's declaration.*
4. *Subscription and oaths on ordination.*
5. *Subscription and oaths on institution to benefice or licence to a perpetual curacy, &c.*
6. *Declaration on taking stipendiary curacy.*
7. *Declaration after institution or collation.*
8. *Declaration after licence to stipendiary curacy.*
9. *No other declaration or oaths than those required by Act to be enforced.*
10. *Declaration of assent to be substituted in case of other ecclesiastical appointments.*
11. *When oaths not to be administered.*
12. *Oath of canonical obedience not affected.*
13. *Extent of Act.*
14. *Short title.*
15. *As to repeal of Acts in Schedule.*

'WHEREAS it is expedient that the subscriptions, declarations, and oaths required to be made and taken by the clergy of the United Church of *England and Ireland* should be altered and simplified: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The following declaration is herein-after referred to as "the declaration of assent."

'I *A.B.* do solemnly make the following declaration:

'I assent to the Thirty-nine Articles of Religion, and to the Book of Common Prayer and of the ordering of bishops, priests, and deacons. I believe the doctrine of the United Church of *England and Ireland*, as therein set forth, to be agreeable to the word of God; and in public prayer and administration of the Sacraments I will use the form in the said book prescribed, and none other, except so far as shall be ordered by lawful authority.'

2. The following declaration is herein-after referred to as the declaration against simony:

'I *A.B.* solemnly declare, that I have not made, by myself or by any other person on my behalf, any payment, contract, or promise of any kind whatso-

ever which to the best of my knowledge or belief is simoniacal, touching or concerning the obtaining the preferment of \_\_\_\_\_ nor will I any time hereafter perform or satisfy, in whole or in part, any such kind of payment, contract, or promise made by any other without my knowledge or consent.'

3. The following declaration is herein-after referred to as "the stipendiary curate's declaration:—"

'I *A.B.* incumbent of \_\_\_\_\_ in the county of \_\_\_\_\_ bona fide undertake to pay to *C.D.* of \_\_\_\_\_ in the county of \_\_\_\_\_ the annual sum of \_\_\_\_\_ pounds as a stipend for his services as curate, and I, *C.D.* bona fide intend to receive the whole of the said stipend.

'And each of us, the said *A.B.* and *C.D.* declare that no abatement is to be made out of the said stipend in respect of rent or consideration for the use of the glebe house; and that I *A.B.* undertake to pay the same, and I *C.D.* intend to receive the same, without any deduction or abatement whatsoever.'

4. Every person about to be ordained priest or deacon shall, before ordination, in the presence of the archbishop or bishop by whom he is about to be ordained, at such time as he may appoint, make and subscribe the declaration of assent, and take and subscribe the oath of allegiance and supremacy according to the form set forth in the Act of the session of the twenty-first and twenty-second years of the reign of her present Majesty, chapter forty-eight.

5. Every person about to be instituted or collated to any benefice, or to be licensed to any perpetual curacy, lectureship, or preachship, shall, before institution or collation is made or licence granted make and subscribe the declaration of assent, and the declaration against simony, and take the said oath of allegiance and supremacy, in the presence of the archbishop or bishop by whom he is to be instituted, collated, or licensed, or the commissary of such archbishop or bishop.

6. Every person about to be licensed to a stipendiary curacy shall, before obtaining such licence, present to the archbishop or bishop by whom the licence is to be granted, the stipendiary curate's declaration, signed by himself and by the incumbent of the benefice to which he is about to be licensed.

7. Every person instituted or collated to any benefice with cure of souls, or licensed to a perpetual curacy, shall, on the first Lord's Day on which he officiates in the church of such benefice or perpetual curacy, or on such other Lord's day as the ordinary may appoint and allow, publicly and openly, in the presence of the congregation there assembled, read the Thirty-nine Articles of Religion, and immediately after reading the same make the said declaration of assent, adding, after the words "Articles of Religion," in the said declaration, the words "which I have now read before you."

If any person instituted, collated, or licensed as aforesaid wilfully fails to comply with the provisions of this section, he shall absolutely forfeit his benefice or perpetual curacy, but no title to present by lapse shall accrue by any such forfeiture until the ordinary has given six months' notice thereof to the patron.

8. Every person licensed to a stipendiary curacy shall, in the presence of the archbishop or bishop by

whom he was licensed, or of the commissary of such archbishop or bishop, (unless, having been ordained on the same day, he has already made and subscribed the same,) make and subscribe the declaration of assent, and on the first Lord's Day on which he officiates in the church or in one of the churches in which he is licensed to serve publicly and openly make the declaration of assent in the presence of the congregation there assembled, and at the time of Divine Service.

If any person licensed to a stipendiary curacy wilfully fails to comply with the provisions of this section his licence shall be void.

9. Subject as herein-after mentioned, no person shall on or as a consequence of ordination, or on or as a consequence of being licensed to any stipendiary curacy, or on or as a consequence of being presented, instituted, collated, elected, or licensed to any benefice with cure of souls perpetual curacy, lectureship, or preachingship, be required to make any subscription or declaration, or take any oath other than such subscriptions, declarations, and oath, as are required by this Act.

10. On all occasions other than those herein-before provided for, on which any declaration or subscription with respect to the Thirty-nine Articles of the Book of Common Prayer or the Liturgy is required to be made by any person in holy orders appointed to any ecclesiastical dignity, benefice, or office, the making and subscribing the declaration of assent shall be substituted for the making any such declaration or subscription as afore-said; and on all occasions other than those herein-before provided, on which any oath against simony is required to be taken, the making and subscribing the declaration against simony shall be substituted for the taking such oath.

11. No oath shall be administered during the service for the ordering of deacons, or during the service for the ordering of priests, or during the service for the consecration of archbishops and bishops.

12. Nothing in this Act contained shall extend to or affect the oath of canonical obedience to the bishop, or the oath of due obedience to the archbishop taken by bishops on consecration.

13. That this Act do extend to the islands of *Guernsey*, *Jersey*, *Alderney*, and *Sark*, and to the *Isle of Man*.

14. This Act may be cited for all purposes as "The Clerical Subscription Act, 1865."

15. The enactments described in the Schedule hereto, and all enactments amending, confirming, or continuing the same, and all other enactments inconsistent with this Act, are hereby repealed.

#### SCHEDULE.\*

28 Hen. 8, c. 15 (Irish).—[The whole of sections nine and ten.]

1 Eliz. c. 1.—An Act to restore to the Crown the ancient Jurisdiction over the Estate Ecclesiastical and Spiritual, and abolishing all foreign Powers repugnant to the same.—[Sections nineteen, twenty, twenty-one, twenty-two, and twenty-three, so far as they

relate to any oath to be taken by a person who is ordained or licensed to a stipendiary curacy, or presented, instituted, collated, elected, or licensed to any benefice, perpetual curacy, lectureship, or preachingship.]

2 Eliz. c. 1 (Irish).—An Act restoring to the Crown the ancient Jurisdiction over the Estate Ecclesiastical and Spiritual, and abolishing all foreign Power repugnant to the same.—[Sections seven, eight, and nine, so far as they relate to any oath to be taken by a person who is ordained or licensed to a stipendiary curacy, or presented, instituted, collated, elected, or licensed to any benefice, perpetual curacy, lectureship, or preachingship.]

13 Eliz. c. 12.—An Act for the Ministers of the Church to be of sound Religion.—[The whole of section three, except the words following: "No person shall hereafter be admitted to any benefice with cure, except he then be of the age of three-and-twenty years at the least, and a deacon." And so much of section five as provides that no one shall be admitted to the order of deacon or ministry unless he shall first subscribe to the said Articles.]

13 & 14 Chas. 2, c. 4.—An Act for the Uniformity of Public Prayers and Administration of Sacraments and other Rites and Ceremonies, and for establishing the Form of making, ordaining, and consecrating Bishops, Priests, and Deacons in the Church of England.—[The whole of sections six, eight, and eleven, and section nineteen, except the words following: "No person shall be or be received as a lecturer, or permitted, suffered, or allowed to preach as a lecturer, or to preach or read any sermon or lecture in any church, chapel, or other place of public worship within this realm of England, or the dominion of Wales and town of Berwick-upon-Tweed, unless he be first approved and thereunto licensed by the archbishop of the province or bishop of the diocese, or (in case the see be void) by the guardian of the spiritualities under his seal."]

17 & 18 Chas. 2, c. 6 (Irish).—[The whole of sections three, five, and six, and sections eighteen, except the words following: "That no person shall be or be received as a lecturer, or permitted, suffered, or allowed to preach as a lecturer, or to preach or read any sermon or lecture in any church, chapel, or other place of public worship within this realm of Ireland, unless he be first approved and thereunto licensed by the archbishop of the province or bishop of the diocese, or (in case the see be void), by the guardian of the spiritualities under his seal."]

1 Wm. & Mary, c. 8.—An Act for the abrogating the Oath of Supremacy and Allegiance and appointing other Oaths.—[The whole Act so far as relates to any oath to be taken by any person who is ordained or is licensed to a stipendiary curacy, or presented, instituted, collated, elected, or licensed to any benefice, perpetual curacy, lectureship, or preachingship.]

3 Will. & Mary, cap. 2.—An Act for the abrogating the Oath of Supremacy in Ireland, and appointing other oaths.—[So much of section four as relates to persons admitted to any ecclesiastical office or employment.]

1 Geo. 1, st. 2, c. 13.—An Act for the further Security of His Majesty's Person and Government,

\* The portions printed in brackets show the extent of repeal.

and the Succession of the Crown in the Heirs of the late Princess Sophia, being Protestants, and for extinguishing the Hopes of the pretended Prince of Wales and his open and secret abettors.—[Sections two and seven, so far as they relate to any oath to be taken by any person who is ordained or is licensed to a stipendiary curacy, or presented, instituted, collated, elected, or licensed to any benefice, perpetual curacy, lectureship, or preachship.]

23 G. 2, c. 28.—[The whole Act.]

1 & 2 Vict. c. 106.—[Part of section eighty-one, beginning with the words "and in every case in which application shall be made" to the end of the section.]

### CAP. CXXIII.

An Act to apply a Sum out of the Consolidated Fund and the Surplus of Ways and Means to the Service of the Year ending Thirty-first March One thousand eight hundred and sixty-six, and to appropriate the Supplies granted in this Session of Parliament. [6th July, 1865.]

### CAP. CXXIV.

An Act for consolidating certain Enactments relating to the Admiralty. [6th July, 1865.]

- Sec. 1. *Provisions of 27 & 28 Vict. c. 57, to apply to this Act.*
2. *Style of commissioners of admiralty in suits. As to costs.*
3. *Prerogatives of the Crown in suits preserved, &c.*
4. *Saving for proceeding by information, &c.*
5. *Superintendents of dockyards to be justices for certain purposes.*
6. *Punishment for uttering false petitions, certificate, &c.*
7. *Parts of 24 & 25 Vict. c. 98, incorporated.*
8. *Punishment for personation of seamen, &c.*
9. *Saving for punishment under other Acts, &c.*
10. *Commencement of Act.*
11. *As to publication of orders in council.*
12. *Short title.*

BE it enacted by the Queen's most excellent Majesty by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The provisions of the admiralty lands and works Act, 1864, respecting the user of lands and respecting powers of management and leasing, and other rights and powers relative to lands, and respecting recovery of possession and sale of lands, and respecting actions and suits by and against the admiralty relative to lands, shall apply in relation to all lands for the time being vested in or purchased by the commissioners of the admiralty.

2. Except as otherwise expressly provided, the commissioners of the admiralty for the time being may be styled, in any action, suit, or other proceeding at law or in equity, "The commissioners for executing the office of lord high admiral of the United Kingdom,"

without more; and any action, suit, or proceeding shall not be affected by any change among the commissioners of the admiralty; and in any action, suit, or proceeding the commissioners of the admiralty shall be liable and entitled to pay or receive costs according to the ordinary law and practice relative to costs.

3. Nothing in this Act, or in the Admiralty Lands and Works Act, 1864, shall take away or abridge in any action or suit, the legal rights, privileges, and prerogatives of her Majesty, her heirs and successors, but in all actions and suits instituted by or against the commissioners of the admiralty, and in all proceedings and matters connected therewith, the commissioners of the admiralty may exercise and enjoy all such rights, privileges, and prerogatives as are for the time being exercised and enjoyed in any action or suit in any court of law or equity by her Majesty, her heirs or successors, as if the Crown were actually a party to such action or suit.

4. Notwithstanding anything in this Act, or in the Admiralty Lands and Works Act, 1864, it shall be lawful for her Majesty, her heirs and successors, to proceed by information in the Court of Exchequer, or by any other crown process, legal or equitable, in any case in which it would have been competent for her Majesty, her heirs or successors, so to proceed if no provisions respecting procedure had been inserted in this Act, or in the Admiralty Lands and Works Act, 1864.

5. The superintendents of her Majesty's dockyards shall be in all places justices of the peace in respect of all offences specified in this Act, and of all matters relating to her Majesty's naval service, and the stores, provisions, and accounts thereof.

6. If any person, in order to sustain any claim to any pay, wages, allotment, prize money, bounty money, grant, or other allowance in the nature thereof, half pay, pension, or allowance from the Compassionate Fund of the Navy, or other money payable by the admiralty, or to any effects or money in charge of the admiralty,—or in order to procure any person to be admitted a pensioner as the widow of an officer of the navy,—does any of the following things, namely,—offers or utters to any person in the service of the Crown or of the admiralty any false affidavit, knowing the same to be false, or makes or subscribes or offers or utters as aforesaid any false written petition, application, statement, answer, certificate or voucher, or other false writing, knowing the same to be false,—every such person shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, or on summary conviction before a justice, sheriff, or magistrate shall be liable to be imprisoned for any term not exceeding six months, with or without hard labour.

7. The following sections of the Act of the session of the twenty-fourth and twenty-fifth years of her Majesty's reign (chapter ninety-eight), "to consolidate and amend the statute law of England and Ireland relating to indictable offences by forgery," shall

be incorporated with this Act, and shall be read as if they were here re-enacted, namely,—sections forty to forty-two and fifty to fifty-three (all inclusive); and for this purpose the expression “this Act” used in the said incorporated sections shall be construed to include the present Act, and expressions therein used relating to forgery or forged writings shall be construed to apply to any act being a misdemeanor under the last foregoing provisions of this Act, and to writings made, subscribed, offered, or uttered in contravention of that provision.

8. If any person in order to receive any pay, wages, allotment, prize money, bounty money, grant, or other allowance in the nature thereof, half pay, pension, or allowance from the compassionate fund of the navy, payable or supposed to be payable by the admiralty, or any other money so payable or supposed to be payable, or any effects of money in charge or supposed to be in charge of the admiralty, falsely and deceitfully personates any person entitled or supposed to be entitled to receive the same, every such person shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, or on summary conviction before a justice, sheriff, or magistrate, shall be liable to be imprisoned for any term not exceeding six months, with or without hard labour.

9. Nothing in this Act shall prevent any person from being proceeded against and punished under any other Act or at common law in respect of an offence (if any) punishable as well under this Act as under any other Act or at common law.

10. This Act shall commence on such day, not later than the first day of *January* one thousand eight hundred and sixty-six, as her Majesty in council thinks fit to direct.

11. Every order in council under this Act shall be published in the *London Gazette*, and shall be laid before both houses of Parliament within thirty days after the making thereof, if Parliament is then sitting, and if not then within thirty days after the next meeting of Parliament.

12. This Act may be cited as the Admiralty Powers, &c. Act, 1865.

#### CAP. CXXV.

#### An Act for the Regulation of Dockyard Ports.

[6th July, 1865.]

##### Sec. 1. *Short title.*

##### 2. *Interpretation of terms.*

##### 3. *Power to define limits.*

##### 4. *Appointment of Queen's harbour masters.*

##### 5. *Port regulations to be made by orders in council.*

##### 6. *Penalties in such orders.*

##### 7. *Orders in council to be made as to lights, prevention of collision, &c. with concurrence of Board of Trade. 25 & 26 Vic. c. 63.*

##### 8. *As to the printing and sale of orders.*

##### 9. *Publication of orders.*

##### 10. *Effect of order.*

##### 11. *Power for Queen's harbour master to un-moor vessels, &c.*

##### 12. *Power to search, &c.*

##### 13. *Power to remove wreck, &c.*

##### 14. *Power to remove unserviceable vessels.*

##### 15. *Recovery of expenses of removal of wreck, &c.*

##### 16. *Recovery of expenses by owner from master, &c.*

##### 17. *Summary proceedings for penalties, &c.*

##### 18. *Application of penalties.*

##### 19. *Penalties, &c. may be raised by sale of vessel.*

##### 20. *Service of summons.*

##### 21. *Local jurisdiction.*

##### 22. *Jurisdiction of justice of the peace.*

##### 23. *Saving for right of property, &c.*

##### 24. *Limitation of actions, &c.*

##### 25. *Commencement of Act.*

##### 26. *Orders in council to be laid before Houses of Parliament.*

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as The Dockyard Ports Regulation Act, 1865.

2. In this Act—

The term “Dockyard port” means any port, harbour, haven, roadstead, sound, channel, creek, bay, or navigable river of the United Kingdom in, on, or near to which her Majesty now or at any time hereafter has any dock, dockyard, steam factory yard, victualling yard, arsenal, wharf, or mooring:

The term “vessel” includes ship, boat, lighter, and craft of every kind, however propelled:

The term “master” applied to a vessel means the person having the command or charge of the vessel for the time being:

The term “justice” and the term “magistrate” respectively mean a justice of the peace and a magistrate acting for the place where the matter requiring the cognizance of a justice or magistrate arises:

The term “sheriff” means the sheriff depute of the county or ward of a county in *Scotland*, and the steward depute of the stewartry in *Scotland* in which the matter submitted to the cognizance of the sheriff arises, and includes the substitute of a sheriff or steward depute:

The term “the Admiralty” means the Lord High Admiral of the United Kingdom or the Commissioners for executing the office of Lord High Admiral.

3. It shall be lawful for her Majesty in council, from time to time, by order in council, to define the limits of a dockyard port for the purposes of this Act.

4. The Admiralty may from time to time appoint for each dockyard port a fit person to superintend the execution of this Act, and otherwise to protect the port, to be called the Queen's harbour master for the respective port.

5. In relation to any dockyard port it shall be lawful for her Majesty in council, from time to time, by order in council, to make regulations for all or any of the following purposes, namely:

To prohibit the mooring or anchoring of vessels so as to obstruct navigation into, in or out of the port:

To appropriate any space as a mooring place or anchoring ground for the exclusive use of her Majesty's vessels, but not so as to authorize any user of such space in such manner as to obstruct navigation into, in, or out of the port:

To prohibit or restrict the having of gunpowder and the having or discharging of shotted or loaded guns on board any vessel in any specified part of the port, and to regulate the loading and unloading of gunpowder in the port:

To restrict the use of fire and light, and the having of tar, oil, or other combustible substances on board any vessel, in any specified part of the port:

To prohibit the navigating of steam vessels at a greater than a specified speed in any specified part of the port:

To require the presence of at least one person at all hours of the day and night on board every vessel above a specified size moored, anchored, or placed in any specified part of the port:

To prohibit or regulate the breaming of vessels in any specified part of the port:

And for such other purposes as from time to time seem necessary with a view to the proper protection of her Majesty's vessels, dockyards, or property, or to the requirements of her Majesty's naval service.

6. Any such order in council may impose such reasonable penalties as seem fit, not exceeding for any offence ten pounds; but any provision imposing a penalty shall be so framed that part only of the penalty may be ordered to be paid.

7. In relation to any dockyard port it shall be lawful for her Majesty in council, from time to time, by order in council, on the joint recommendation of the Admiralty and the Board of Trade, to make rules concerning the lights or signals to be carried or used, and the steps for avoiding collision to be taken by her Majesty's vessels and other vessels navigating the waters of the port and of the approaches thereto; and such rules shall, with respect to her Majesty's vessels and other vessels navigating those waters, have the same effect as if they had been regulations originally contained in table (C.) in the schedule to the Merchant Shipping Act Amendment Act, 1862, or were regulations duly substituted for the same, and as if such original or substituted regulations applied to her Majesty's vessels as well as to other vessels.

8. The Admiralty shall cause printed copies of every order in council under this Act relative to any dockyard port to be provided, and to be sold at a reasonable price, to be fixed by the Admiralty, to all persons desirous of buying the same.

9. Every order in council under this Act shall be published in the *London Gazette*, and shall be made to take effect not sooner than the expiration of thirty days from such publication; and a copy of the *Lon-*

*don Gazette* containing any such order shall be conclusive evidence of the due making and publication of such order; and every such order shall be judicially noticed without being specially pleaded.

10. Every order in council under this Act shall be binding on all persons, and shall be sufficient to justify all persons acting thereunder.

11. If the master of any vessel within a dockyard port does not moor, anchor, place, unmoor, or remove the same according to directions given by the Queen's harbour master in conformity with any order in council under this Act, or if there is no person on board of any such vessel to attend to such directions, the Queen's harbour master may cause the vessel to be moored, anchored, placed, unmoored, or removed in conformity with the order in council, and for that purpose may cast off, loose, or unshackle, and (if need be) sever any chain or rope of the vessel, first putting on board a sufficient number of persons for the protection of the vessel in case there is not a sufficient number of persons on board to protect the same; and all expenses attending the exercise of the powers of the present section shall be paid by the master of the vessel.

12. The Queen's harbour master, or any person having authority in writing from the Admiralty in this behalf, may, with proper assistants, enter into any vessel in a dockyard port, and there search for gunpowder, shotted or loaded guns, fire, or light, or combustible substances had or suspected to be had on board in contravention of any order in council under this Act, and may extinguish any such fire or light; and if any person wilfully obstructs the Queen's harbour master or other person in the execution of the authority conferred by this section he shall for each offence be liable to a penalty not exceeding ten pounds.

13. The Queen's harbour master may remove any wreck or other thing being an obstruction to the dockyard port or to the approaches thereto, and any floating timber that impedes the navigation thereof.

14. Any vessel laid by or neglected as unfit for sea service shall not be permitted to lie within any part of a dockyard port specified in this behalf in any order in council under this Act; and the Queen's harbour master may cause every such vessel to be removed from the part of the port so specified, and to be laid on some part of the strand or sea shore, or in some other place where the same may without injury to any person be placed.

15. The expenses incurred by the Queen's harbour master in the removal of any such wreck or other thing or timber, or in the removal or placing of any such vessel, shall be repaid by the owner thereof; and the Queen's harbour master may detain, and in cases of non-payment of the expenses on demand, may sell the wreck or other thing, timber, or vessel, and out of the proceeds of the sale pay those expenses and the expenses of the sale, rendering the surplus (if any) to the owner on demand; and any deficiency may be recovered from the owner.

16. If the owner of any vessel or thing is in any case compelled to pay any penalty, expenses, sum of money, or costs, by reason of any act or omission of the master of a vessel or other person, he shall be entitled to recover the amount paid by him, with costs,

from the person who actually committed the offence or did the wrongful act in respect whereof the owner was compelled to make such payment.

17. Penalties, expenses, and sums of money made recoverable by this Act, or by any order in council under it, may be recovered by summary proceedings in *England* or in *Ireland* before a justice, and in *Scotland* before a sheriff, justice, or magistrate.

18. Penalties, expenses, and sums of money recovered as aforesaid, except when recovered by an owner from a master or other person, shall be paid into the receipt of her Majesty's exchequer in such manner as the Commissioners of her Majesty's Treasury from time to time direct, and shall be carried to and form part of the consolidated fund of the United Kingdom.

19. Where any justice, sheriff, or magistrate, by virtue of this Act or any order in council under it, makes an order directing payment of any penalty, expenses, or sum of money by the master or owner of a vessel, and payment is not duly made, the justice, sheriff, or magistrate who made the order, or any other justice, sheriff, or magistrate having the same jurisdiction, may (in addition to any power which he may have for the purpose of compelling payment) direct the amount unpaid to be levied by distress or pawning and sale of the vessel, her tackle, furniture, and apparel, or of any part thereof.

20. Any summons or other document in any proceeding on this Act or any order in council under it may (in addition to any other mode of service) be served by being left for the person to be served on board any vessel to which he belongs with the person being or appearing to be in command or charge of the vessel.

21. For the purpose of giving jurisdiction, every offence against this Act or any order in council under it shall be deemed to have been committed, and every cause of complaint shall be deemed to have arisen, either in the place in which the same actually was committed or arose, or in any place in which the offender or person complained against happens to be.

22. Where any district within which any justice, sheriff, or magistrate has jurisdiction for any purpose under this or any other Act, or at common law, abuts on the shore of the sea or other navigable water, every such justice, sheriff, or magistrate shall for the purposes of this Act have jurisdiction over any vessel being or passing near the shore, and over every person on board thereof or belonging thereto, as if such vessel or person was within the ordinary limits of the jurisdiction of the justice, sheriff, or magistrate.

23. Nothing in this Act shall prejudice, take away, abridge, or alter any right of property, privilege, or jurisdiction, or any powers of conservancy, held, possessed, enjoyed, or exercised by any body or person in, to, upon, or over any part of a dockyard port, or of the shores and banks thereof.

24. Any action or proceeding shall not lie against

any Queen's harbour master or other person acting under the authority or in the execution or intended execution or in pursuance of this Act, or of any order in council under it, for any alleged irregularity or trespass or other Act or thing done or omitted by him, unless notice in writing (specifying the cause of the action or proceeding) is given by the intending plaintiff or prosecutor to the intended defendant one month at least before the commencement of the action or proceeding, nor unless the action or proceeding is commenced within six months next after the act or thing complained of is done or omitted, or, in case of a continuation of damage, within six months next after the doing of such damage has ceased.

In any such action the defendant may plead generally that the act or thing complained of was done or omitted by him when acting under the authority or in the execution or intended execution or in pursuance of this Act, or of any such order in council (specifying it), and may give all special matter in evidence; and the plaintiff shall not succeed if tender of sufficient amends is made by the defendant before the commencement of the action; and in case no tender is made the defendant may, by leave of the court in which the action is brought, at any time pay into court such sum of money as he thinks fit, whereupon such proceeding and order shall be had: and made in and by the court as may be had and made on the payment of money into court in an ordinary action; and if the plaintiff does not succeed in the action the defendant shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about the action as may be taxed and allowed by the proper officer, subject to review; and though a verdict is given for the plaintiff in the action he shall not have costs against the defendant unless the judge before whom the trial is had certifies his approval of the action.

25. This Act shall commence on such day, not later than the first day of *January* one thousand eight hundred and sixty-six, as her Majesty in council thinks fit to direct; save that any order in council may be made before that day, so as it be not made to take effect before that day.

26. Every order in council under this Act shall be laid before both houses of Parliament within thirty days after the making thereof if Parliament is then sitting, and if not then within thirty days after the next meeting of Parliament.

#### CAP. CXXXVI.

An Act to consolidate and amend the Law relating to Prisons. [6th July, 1865.]

#### CAP. CXXXVII.

An Act to amend the Law relating to small Penalties. [6th July, 1865.]



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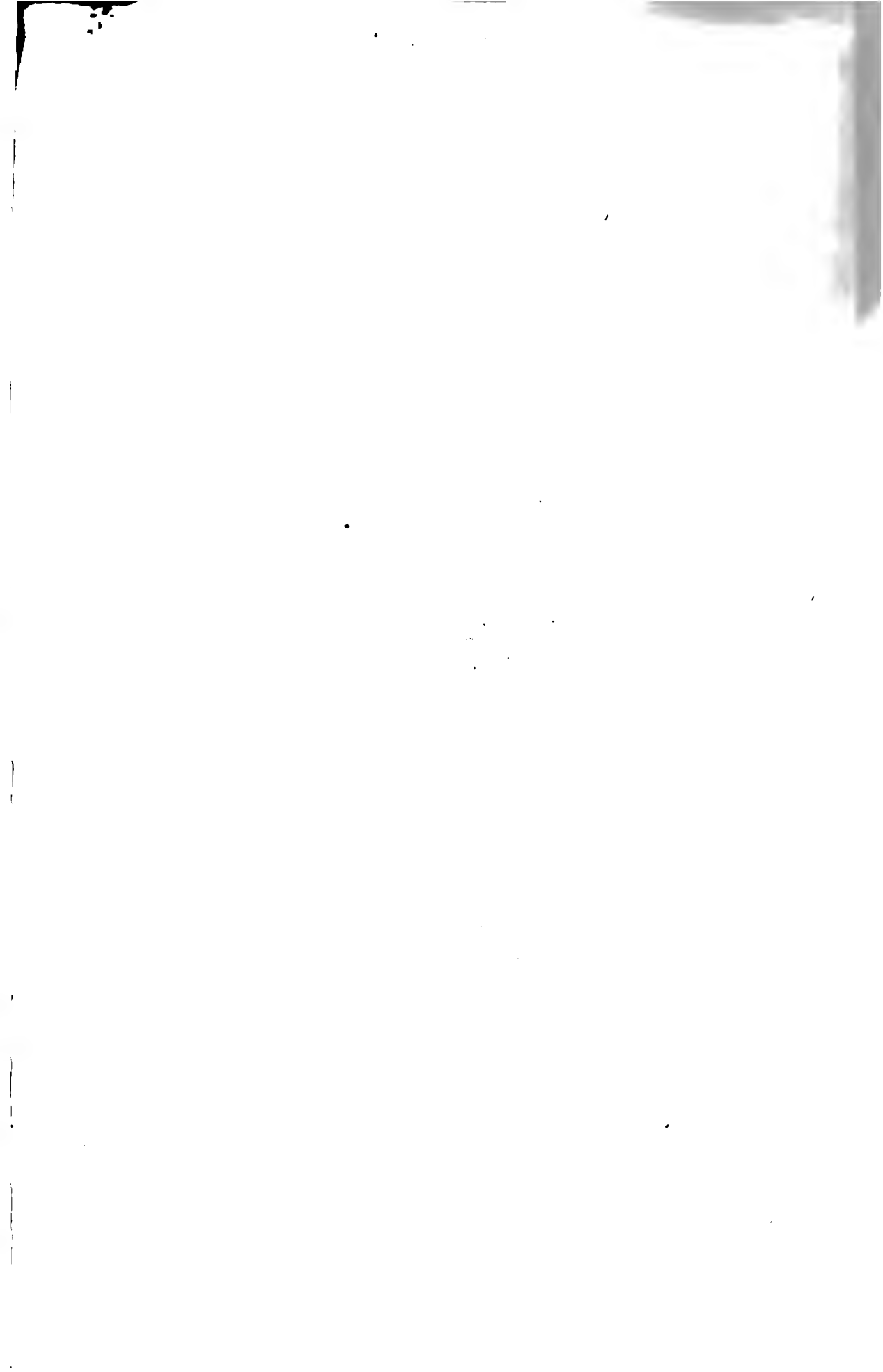
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